Canada

1. Types of tax

While there are no estate taxes in Canada, there is a deemed disposition of all capital property owned by an individual at the time of death. In general, this disposition is deemed to take place at the fair market value immediately prior to death and will usually result in the recognition of some amount of gain or loss, which will be included in computing income in the year of death. In all cases, the estate or the beneficiaries, as the case may be, will acquire the property at a cost equal to the deceased's proceeds from the deemed disposition. Additionally, the fair market value of any registered retirement savings plan (RRSP) or registered retirement income fund (RRIF) would be fully taxable in the year of death unless it is bequeathed to the individual's spouse or a dependent minor child.

Because the deemed disposition of capital property can result in significant tax liabilities, the Canadian Tax Act provides relief in some circumstances. For example, there are exceptions for transfers to spouses and certain transfers of farm or fishing property to children. These are discussed below.

1.1 Inheritance tax

There are no inheritance taxes in Canada.

1.2 Gift and endowment tax

Neither Canada nor its provinces have a separate gift or endowment tax regime. However, under the Canadian Tax Act, a disposition at fair market value will arise when property is gifted to any person, trust, foundation or charity, depending on whether that person deals at arms' length with the donor. In the case of Canadian residents, the deemed disposition rules apply to any property that is gifted. For non-residents, the rules will apply to gifts of taxable Canadian property, as defined in the next section. There are exceptions for transfers during their lifetimes to qualified spouse trusts, as discussed below, and special trusts created by an individual who is more than 65 years old for the benefit of themselves (an alter ego trust), or themselves and their spouse (a joint partner trust).

1.3 Real estate transfer tax

Several provinces levy a tax on the transfer of real property, referred to as either a land transfer tax or real property transfer tax. For tax purposes, real property generally includes land, buildings or structures on land and any rights or interests in land. As a general rule, the tax applies to the property's fair market value, which is normally based on the value of the consideration or sale price. Tax is paid when a person registers a transfer of land at a provincial land title office.

Provinces levying the tax generally exempt certain transactions from the tax. Some of the more commonly exempted transactions include:

- Transfers where the value of the land does not exceed a minimum threshold
- Transfers for nominal consideration
- Transfers between family members
- Transfers of farmland

In addition, many provinces provide an exemption for first-time home buyers.

The table below summarizes the land transfer tax rates by province and territory.

Province or territory	Tax or duty	Statute
Alberta	No land transfer tax; however, registration fees may apply.	N/A
British Columbia	Total of: ▸ 1% of the first C$200,000 of the taxable transaction's fair market value (FMV) ▸ 2% of the remaining taxable transaction's FMV Property Transfer Tax Act	Property Transfer Tax Act
Manitoba	Total of: ▸ 0.5% of the excess of the land's FMV over C$30,000 ▸ 0.5% of the excess of the land's FMV over C$90,000 ▸ 0.5% of the excess of the land's FMV over C$150,000 ▸ 0.5% of the excess of the land's FMV over C$200,000	Part III (Land Transfer Tax) of The Tax Administration and Miscellaneous Taxes Act
New Brunswick	0.25% of the greater of: ▸ Consideration for the transfer ▸ Real property's assessed value	Real Property Transfer Tax Act
Newfoundland and Labrador	No land transfer tax; however, registration fees may apply.	N/A
Northwest Territories	No land transfer tax; however, registration fees may apply.	N/A
Nova Scotia	Determined by each municipality and applied to the sale price of every property that is transferred by deed.	Part V (Deed Transfers) of the Municipal Government Act
Nunavut	Maximum being 1.5% of the value of the property transferred.	N/A
Ontario	Total of: ▸ 0.5% of the value of the conveyance's consideration up to and including C$55,000 ▸ 1% of the value of the conveyance's consideration exceeding C$55,000 up to and including C$250,000 ▸ 1.5% of the value of the conveyance's consideration exceeding C$250,000 ▸ 2.0% of the value of the conveyance's consideration exceeding C$400,000 (only where conveyance of land contains at least one and not more than two single family residences)	Land Transfer Tax Act

Province or territory	Tax or duty	Statute
Prince Edward Island	1% of the greater of: ‣ Consideration for the transfer ‣ Real property's assessed value No land transfer tax is applied where neither the greater of the consideration or assessed value exceeds C$30,000.	Real Property Transfer Tax Act

Quebec	Total of:
	‣ 0.5% of the basis of imposition up to and including C$50,000
	‣ 1% of the basis of imposition exceeding C$50,000 up to and including C$250,000
	‣ 1.5% of the value of the basis of imposition exceeding C$250,000
	‣ The basis of imposition being the greater of:
	  ‣ Consideration furnished for the transfer
	  ‣ Consideration stipulated for the transfer
	  ‣ The immovable's market value at the time of the transfer
		An Act Respecting Duties on Transfers of Immovables

Saskatchewan	No land transfer tax; however, registration fees may apply.	N/A
Yukon	No land transfer tax; however, registration fees may apply.	N/A

1.4 Transfer duty

The only transfer taxes in Canada are on real estate as noted above.

1.5 Net wealth tax

Canada does not have a net wealth tax.

2. Who is liable?

The taxation of individuals in Canada is determined by residence. The deemed disposition at death applies to the worldwide assets of all Canadian residents at the time of death. Non-residents may also be liable for tax at the time of death if they own taxable Canadian property.

2.1 Residency

Canadian residents

The Canadian courts have developed various principles to determine whether a person is a Canadian resident. The following considerations are used for determination:

- The amount of time spent by a person in Canada.
- The motives or reasons for a person being present in or absent from Canada during the year.
- Whether the person maintains a dwelling in Canada.
- The person's origin and background.
- The person's general mode or routine of life.
- Other connections that the person has with Canada, such as ownership of property, membership in clubs and presence of relatives.

A person may be a resident of more than one country during the same period of time. Where an individual is considered to be a resident of Canada and also a resident of a treaty country, the applicable treaty will normally determine the country of residence under the "tie-breaker" rules.

In addition to the judicially developed tests, the Canadian Tax Act has provided statutory tests that may deem a person to be a Canadian resident. In the case of an individual, the key rule is that a person is deemed to be a resident for any tax year in which he or she spends 183 or more days in Canada.

Non-residents who hold taxable Canadian property

The Canadian Tax Act establishes procedures for collecting tax from non-residents on the disposition of taxable Canadian property as defined in the Canadian Tax Act. In 2010, the definition of taxable Canadian property was amended to move closer to the international norm.

In general, the new definition will limit the taxation of capital gains realized by non-residents to direct and indirect interests in Canadian real estate, Canadian resource properties or timber resource properties (the specified assets). It should be noted that while the rules will be very similar to the rules in the United States, there is a significant difference, such that any corporation, even if it is non-resident, that holds more than 50% of the specified assets at any time during the prior 60 months will be considered taxable Canadian property.

A non-resident must obtain a certificate of compliance and furnish acceptable security (normally 25% of the expected gain on account of any potential Canadian income tax liability arising on the disposition of a taxable Canadian property). These rules do not apply to a deemed disposition on death. However, the executor acting on behalf of a non-resident decedent must file an income tax return for the year of death and pay any tax that may be necessary on the deemed disposition. The executor is still required to report the deemed or actual disposition of the property in the deceased's terminal return and pay any tax thereon.

2.2 Domicile

Canada only taxes individuals based on residency and does not consider the domicile of taxpayers for the calculation of tax.

3. Rates

Canadian maximum personal marginal income tax rates — 2011[1]

	Ordinary income[2] %	Eligible dividends[3] %	Ordinary dividends[3] %	Capital gains %
Alberta	39.00	17.72	27.71	19.50
British Columbia	43.70	23.91	33.71	21.85
Manitoba	46.40	26.74	39.15	23.20
New Brunswick	43.30	20.96	30.83	21.65
Newfoundland and Labrador	42.30	20.96	29.96	21.15
Northwest Territories	43.05	21.31	29.65	21.53
Nova Scotia	50.00	34.85	36.21	25.00
Nunavut	40.50	25.72	28.96	20.25
Ontario	46.41	28.19	32.57	23.20
Prince Edward Island	47.37	27.33	41.17	23.69
Quebec	48.22	31.85	36.35	24.11
Saskatchewan	44.00	23.36	32.08	22.00
Yukon	42.40	17.72	30.40	21.20

[1] The rates shown are the 2011 maximum combined federal and provincial marginal tax rates, including surtaxes where applicable, based on known rates as of 15 July 2011.

[2] Ordinary income includes such items as salary, interest, business income and income from other sources, but excludes Canadian dividends and capital gains.

[3] The rates apply to the actual amount of taxable dividends received in the year. Eligible dividends are those paid by public corporations and private companies out of earnings that have been taxed at the general corporate tax rate (the dividend must be designated by the payor corporation as an eligible dividend).

The combined basic federal tax plus a 48% non-resident surtax is set out below. These rates are applicable to non-residents on Canadian-sourced employment or business income. Capital gains on taxable Canadian property are taxed at 50% of these rates.

	Rate	Bracket	
Non-residents	22.20%	C$0	No surtax
	32.56%	C$41,545	
	38.48%	C$83,089	
	42.92%	C$128,801	

4. Exemptions and reliefs

Transfers to a spouse or qualifying spouse trust

In certain family situations, taxation resulting from the deemed disposition at death can be deferred either totally or partially. If the property is transferred to the Canadian resident spouse of the testator or to a qualifying spouse trust, there is total deferral. For purposes of the Canadian Tax Act and many other statutes, a spouse includes a common law partner of either the opposite or same sex. The spouse or spouse trust, as the case may be, acquires the property at the deceased's cost, and any gain is deferred until the spouse or spouse trust disposes of it. Any income from the property or any gain upon its ultimate disposition will be taxed in the hands of the transferee. In order for a trust to be considered a qualifying spouse trust, and be eligible for the deferral of capital gains tax (CGT), the following criteria must be met:

1. The deceased transferor must have been a resident in Canada at the time of death.
2. The trust must be a resident in Canada when the property vests in the trust (spouse could be non-resident).
3. The trust must be created in the deceased's will.
4. The terms of the trust must provide that the spouse of the deceased is exclusively entitled to all of the income generated by the property in the trust during the spouse's lifetime.
5. The terms of the trust must provide that no one other than the spouse is entitled to either income or capital of the trust while the spouse beneficiary is alive.

Capital gains exemption

Where the deceased owns shares of a qualifying small business corporation (QSBC) or qualified farm or fishing property, CGT will be minimized if the deceased's C$750,000 lifetime capital gains exemption can be claimed on the terminal return. This will depend on whether all or a portion of this exemption remains unclaimed at death and whether the shares or farm or fishing property qualify for the exemption. Where shares of a QSBC or farm or fishing property are left to a surviving spouse, the personal representative may choose to elect out of the automatic rollover to trigger a portion of the capital gain that can be sheltered by the deceased's available exemption.

Note that the application of this exemption is fairly limited in scope:

- It is not available to non-residents.
- The definition of a QSBC is very narrow: the corporation must be a Canadian-controlled private corporation and must meet certain tests with respect to the use of its assets in Canada.

Utilizing capital losses

In most cases, net capital losses can be used only to offset net capital gains. However, the Canadian Tax Act includes a relieving provision whereby net capital losses incurred on a deemed disposition at death can be applied to reduce income from any source in the year of death or the preceding year. This provision applies to any net capital losses carried forward from previous years (to the extent that they exceed amounts previously claimed as capital gains exemption by the deceased) and net capital gains realized in the year of death.

In addition to a capital gain or loss, the disposition of depreciable property on the death of the testator may give rise to recapture of depreciation or terminal losses. For each item of depreciable property, the testator is deemed on death to receive proceeds equal to fair market value. When the deemed proceeds exceed the undepreciated capital cost of the property, there will generally be a recapture of depreciation. This recapture must be included as part of the income of the testator in his or her terminal year's return. On the other hand, when the undepreciated capital cost of the property exceeds the deemed proceeds, a terminal loss will occur. In this case, the terminal loss can be deducted from income in the terminal year's return.

Transfer of farm and fishing property to children or grandchildren

If the property to be transferred during the lifetime or under the will is a farm or fishing property, an interest in a farm or fishing partnership or shares in a farm or fishing corporation, there can be a complete deferral of tax liability if the property is being transferred to the children or the grandchildren of the deceased and certain conditions regarding the use of the farm or fishing property are met. As the personal representative can elect to transfer the property to a child at any value between cost and fair value, it will also be possible to elect to realize sufficient gain to utilize the remaining capital gains exemption so that the child will have a higher cost for their future disposition.

5. Filing procedure and dates for payment of tax

Canada taxes income earned on the calendar year basis. The personal representative will be responsible for filing one or more of the following returns:

- Prior year return: if an individual dies between 1 January and the usual filing date for the preceding year, he or she will often not have filed his or her tax return for the preceding year. In this situation, the filing deadline for the preceding year is the later of six months after the date of death, or the normal due date of the return (30 April or, if the individual had business income, 15 June).
- Terminal return — year of death: the return for the year of death, also referred to as the terminal return, will be due on 30 April of the subsequent year or, if the deceased had business income, 15 June of the subsequent year. However, if the death occurs between 1 November and 31 December of the current year, the deceased taxpayer's representative has until the later of the normal filing date or six months after the date of death to file the current year's return.
- Elective return — rights or things: in the event that the deceased had any "rights or things" at death, these may be included in a separate tax return with a separate set of graduated tax rates. Rights or things generally mean amounts of income that were not paid at the time of death and that, had the person not died, would have been included in the person's income for the year in which they were paid. Examples include such items as matured but unclipped bond coupons, dividends declared but unpaid and unpaid compensation. This special return is due the later of one year from the date of death or 90 days after the mailing date of the notice of assessment of the final return.
- Elective return — testamentary trust beneficiary: if the deceased is an income beneficiary of a testamentary trust, the representative may elect to file a separate return for the period between the end of the trust's fiscal year and the date of the taxpayer's death. The filing deadline is the same as the one applicable to the final return.

In terms of planning, there are two basic reasons for filing as many tax returns as possible. The first relates to the fact that the income tax rates are progressive and income starts at zero in each return. If multiple returns are not filed, there may be amounts taxed at higher rates than would have been the case if multiple returns had been filed.

The second advantage of filing multiple returns is that some personal tax credits can be deducted in each return. This could reduce the deceased taxpayer's estate tax total liability.

Date for payment of tax

Generally, tax is due when the relevant returns are required to be filed. However, where the deceased individual is deemed to have disposed of capital property, resource property, land inventory or was entitled to a right or thing at death, the executor can elect to defer payment of a portion of the tax arising on such deemed dispositions or rights or things. Provided that acceptable security is posted with the Canada Revenue Agency (CRA), the tax may be paid in as many as 10 equal annual installments, with the first payment due on the balance-due date for the return. Each subsequent payment is due on the anniversary of the balance-due date. Interest, calculated using the prescribed rate in effect plus 4%, will apply to the outstanding amount, commencing at the balance-due date until the full amount of the tax is paid. The accrued interest must also be paid at the due date for each installment.

6. Valuation

The CRA has not altered its official policy with respect to valuation issues since the issuance of IC 89-3 Policy Statement of Business Equity Valuations in 1989, which defines fair market value as:

"The highest price, expressed in terms of money or money's worth, obtainable in an open market between knowledgeable, informed and prudent parties acting at arm's length, neither party being under any compulsion to transact."

7. Trusts

From an estate planning point of view, trusts are often used as a means of making lifetime gifts to enable the donor to place constraints on the donee. Property will normally be gifted at a time when it does not attract a tax liability, and any growth in value of assets held by the trust is outside of the donor's estate.

For example, *inter vivos* trusts are commonly used to hold participating shares of a holding company established as part of an estate freezing plan so that the growth in the value of the business or investments transferred to the company will accrue to the next generation. The transferor may be one of the trustees, and consequently, will be in a position to influence if and when distributions from the trust will be made.

The Canadian Tax Act deems trusts to dispose of capital properties at fair market value at certain specified times. In most cases, a trust will be deemed to dispose of its capital properties on the 21st anniversary of the date on which the trust was originally settled.

Generally, in situations where the beneficiaries of a trust are residents of Canada, planning can be implemented that results in a deferral of CGT that would otherwise be payable by the trust as a result of the application of the 21-year rule. That planning often involves transferring the assets of the trust to its beneficiaries at the adjusted cost base amounts of the assets. The beneficiaries then pay CGT when they ultimately dispose of the assets that they have acquired from the trust.

Capital properties cannot be distributed by a trust to beneficiaries on a tax-deferred basis if the beneficiaries are non-residents of Canada.

8. Grants

If an individual has paid into the Canada Pension Plan during their lifetime, their estate may file a claim to recover up to C$2,500 of the cost of the funeral. This "death benefit" is taxable to the recipient, not reported on the final tax return of the decedent.

9. Life insurance

The receipt of life insurance proceeds is not taxable in Canada, but could be subject to probate if the estate is named the beneficiary of the insurance policy.

If a private company is the beneficiary of a life insurance policy, the insurance proceeds (net of the adjusted cost base of the policy if the company is the owner of the policy) is added to the company's capital dividend account and a tax-free capital dividend can be paid to any Canadian resident shareholder. A capital dividend paid to a non-resident would be subject to the non-resident withholding tax applicable for taxable dividends.

10. Civil law on succession

Most of the Canadian legal system has its foundation in the British common law system, but Quebec still has a civil law system for issues of private law.

10.1 Estate planning

Estate planning in Canada can include implementing an estate freeze either by gifting assets directly to the next generation (resulting in a deemed disposition) or by transferring the assets to a holding company on a tax-deferred basis by taking back fixed value preferred shares and having the next generation subscribe for the future growth shares either directly or through a discretionary family trust for their benefit (see discussion above). An estate freeze using a family trust can also have the benefit of allowing the family access to multiple capital gains exemptions if the trust holds and disposes of shares of a QSBC and the trustees allocate the gain to the beneficiaries so they can utilize their capital gains exemption.

10.2 Succession

This is not applicable to individuals in Canada.

10.3 Forced heirship

See comments below with respect to matrimonial regimes, as Canada does not have compulsory succession rules or forced heirship other than the statutory rules for intestacy.

10.4 Matrimonial regimes and civil partnerships

Matrimonial regimes in Canada are governed by provincial law. Among Canadian provinces, there exists a broad spectrum of rights of dependents upon death. In some provinces, the rights of a surviving spouse or other dependents are so secure as to call the laws "forced heirship" laws. For example, Ontario's Family Law Act provides that a surviving spouse is absolutely entitled to one-half of the difference between the net family property of the deceased spouse and the net family property of the surviving spouse, if the former is greater. Spouses are able to contract out of these statutory rights to an equalization or division of family assets if they wish to do so.

There are other classes of people, besides spouses, who may make a claim that they should receive a greater share of the deceased's estate than was left to them in the will. Most Canadian provinces have legislation that allows dependants to claim the support and maintenance that the testator or testatrix was under a duty to provide for them, and failed to provide for them in the will. In general, this legislation gives the courts discretion to determine whether the individual is a dependent, whether adequate provision for support was made and on what terms and how much he or she should receive from the estate.

10.5 Intestacy

A will is a legal document that regulates an individual's estate after death. Canadian provinces will normally accept the formal validity of a will drawn under the laws of the deceased's place of residence at the time of making the will or at death. Whether the deceased had the personal legal capacity to make the dispositions in the will is generally governed by the law of the deceased's residence.

If there is no valid will at death, then the deceased's estate passes under predetermined rules known as intestate succession.

The intestacy rules are different depending on in which province or territory the person was resident at his or her death. Generally, the laws of intestacy for the Province of Ontario state that if the deceased had a spouse and no children, the spouse is entitled to receive the entire estate. The following table summarizes the intestacy rules for the Province of Ontario. Other provinces have similar, but not identical rules.

Survivor	Distribution
If a spouse	All to the spouse
If a spouse and one child	Preferential share (C$200,000) to the spouse, remainder split equally between the spouse and the child
If a spouse and two or more children	Preferential share to spouse plus one-third of remainder, two-thirds divided between children
If no spouse and one or more children alive	Children share equally: if one child is deceased but has children, those children get their parents' share equally (representation)
If no spouse and no children, but grandchildren	Grandchildren share equally regardless; no representation
If none of above and a parent is alive	Parents share equally, or if only one parent, parent gets estate absolutely
If none of above, and at least one surviving brother or sister	Brothers and sisters share equally with representation
If none of above and at least one niece or nephew	Nieces and nephews equally with no representation
If none of above	Next of kin of equal degree of consanguinity to the intestate equally without representation, degrees of kindred shall be computed by counting upward from the deceased to the nearest common ancestor and then downward to the relative, and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree
If none of above	Her Majesty the Queen (escheat to the Crown)

10.6 Probate tax

Generally, all of the Canadian provinces levy some form of probate taxes based on the gross value of the estate. These taxes are generally payable by the estate of a decedent immediately upon issuance of an estate certificate (or letters of probate). These documents generally authenticate for third parties the appointment of the personal representatives of an estate.

In Ontario, the tax is levied at the rate of 0.005% on the first C$50,000 of value and at the rate of 0.015% on any value in excess of C$50,000. The following table shows the maximum rates applicable in the various provinces and territories:

Alberta	Over C$250,000–C$400
British Columbia	C$50,000 and over – C$14 per C$1,000
Manitoba	Over C$10,000–C$7 per C$1,000
New Brunswick	Over C$20,000–C$5 per C$1,000
Newfoundland	Over C$1,000–C$5 per C$1,000
Nova Scotia	Over C$100,000–C$15.53 per C$1,000
Ontario	Over C$50,000–C$15 per C$1,000
Prince Edward Island	Over C$100,000–C$4 per C$1,000
Quebec	No probate
Saskatchewan	C$7 per C$1,000
Northwest Territories	Over C$250,000–C$400
Nunavut	Over C$250,000–C$400
Yukon	Over C$25,000–C$140

11. Estate tax treaties

Canada does not have any tax treaties dealing only with the taxation of estates. However, many provisions of its treaties will have an impact on estate planning. For example, most of Canada's international tax treaties prevent Canada from taxing gains on any property other than immovable property or property associated with a permanent establishment in Canada. For these purposes, immovable property is typically defined as real property or an interest therein, although particular tax treaties may provide expanded definitions. In addition, most tax treaties allow a country to tax gains on the disposition of an indirect interest in immovable property located in its jurisdiction. For example, under most treaties, the shares of a company or an interest in a partnership, trust or estate whose value is derived principally from immovable property will be exposed to tax in the jurisdiction in which that property is located. For these purposes, an entity is considered to derive its value principally from immovable property if that property represents more than 50% of the total fair market value of the enterprise.

While Canada has no estate tax and no separate estate tax treaty with the United States, the Canada-US income tax treaty includes provisions for the application of the US estate tax to estates of Canadian citizens who are not US residents at death.

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Additional reading materials

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