WINDING UP THE FAMILY: SOME TAX IMPLICATIONS

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I. INTRODUCTION

The last decade in Canada has witnessed substantial reform in both family and tax law. While one may not expect perfect synchronization, there exist startling disharmonies which lead at times to genuine hardships. The objects of this paper are to examine the interaction of family and tax law insofar as it relates to property matters, to identify problems and to suggest solutions.[1]

The Income Tax Act[2] and The Family Law Reform Act, 1978[3] will provide the focus of this study. Their objects are necessarily different. The latter declares itself to "provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership . . . ".[4] In contrast, speaking of the American Income Tax Act, Learned Hand, J. said:

> In my own case the words of such an Act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception — couched in abstract terms that offer no handle to seize hold of — leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time. I know that these monsters are the result of fabulous industry and ingenuity, plugging up this hole and casting out that net, against all possible evasion. . . .[5]

Much of this "fabulous industry and ingenuity" has been expended countering equally ingenious tax avoidance schemes built around the family relationship. So long as husband and wife are content to live together, the Income Tax Act functions as equitably as tax legislation can. When they separate, however, distortions appear.

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[1] For a general study of the tax implications of separation and divorce, *see* Suzuki, *Income Tax Consequences of Separation and Divorce*, 2 CAN. J. FAM. L. 33 (1979).

[2] Income Tax Act, S.C. 1970-71-72, c. 63 *as amended* [hereinafter cited as ITA].

[3] The Family Law Reform Act, 1978, S.O. 1978, c. 2 [hereinafter cited as FLRA].

[4] FLRA, *preamble*.

[5] Quoted in MATERIALS ON CANADIAN INCOME TAX 395 (3d ed. W. Grover & F. Iacobucci 1976).

II. CONSENSUAL PROPERTY TRANSFER OR SETTLEMENT

To begin with the simplest model, consensual transfers are frequently part of separation agreements. Always in the case of spouses[6] and frequently in the case of "common-law" and ex-spouses[7] the parties will be considered to be dealing at non-arm's length.[8] Unless an exception is provided, ITA section 69 will apply: the non-arm's length transferor will be deemed to have received proceeds of disposition equal to fair market value and the transferee to have acquired the property at that value. An immediate capital gain may be triggered in the hands of the transferor, based on deemed, not actual, proceeds of disposition. As well, in the case of depreciable property, a possible recapture of previously allowed capital cost allowance may arise. The practical aspect of deemed dispositions is that the taxpayer is fixed with an immediate tax liability yet does not receive actual proceeds of disposition from which to defray the tax cost.

A. *Rollover Provisions*

The key exception to section 69 here is the rollover provision of section 73, which will apply if the transferee is a spouse, former spouse, spousal trust or an individual receiving pursuant to certain provincial legislation.[9] Both transferee and transferor must be resident in Canada at the time. The effect is that the transferee steps into the shoes of the transferor for purposes of adjusted cost base or undepreciated capital cost. Thus no capital gain, loss or recapture occurs. When the transferee eventually disposes of the property, tax will be calculated as if the transferee had held the property from the date of initial acquisition by the transferor.[10]

B. *Attribution Rules*

Section 73 of course could be a powerful instrument of income-splitting. With respect to spouses,[11] section 74 forecloses this possibility by providing that the income, taxable capital gains or allowable capital losses from the property are attributed to the transferor. Such attribution ceases to operate upon the death of the transferor, his giving up Canadian

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[6] ITA, s. 251(1) (*a*).

[7] ITA, s. 251(1) (*b*).

[8] *See* "The Concept of Arm's Length" p. 694 *infra*.

[9] This description is general — the section should be perused in every case.

[10] *See* Zinn, *Particular Problems in Capital Dispositions*, in ESSAYS ON CANADIAN TAXATION 437, at 471-74 (B. Hansen, V. Krishna & J. Rendall eds. 1978); M. CULLITY & R. FORBES, TAXATION AND ESTATE PLANNING 301 (1978).

[11] ITA, s. 75 provides for attribution of income from property transfered to minors.

residence,[12] or upon decree absolute of divorce.[13] One must also note that the attribution rules continue to apply to property substituted for the originally transferred property, but not to income derived from re-investment of the income. In other words, the rules apply to the tree, the fruit of the tree, even substituted trees, but not to the seedlings.

Counsel must be aware that the substituted property rule can be a "sleeper". Let us assume Mr. *A* transfers the principal residence, valued at $100,000, to his estranged wife. At this point it would seem there could be no tax consequences. However Mrs. *A* needs income as well as accommodation — she sells the house and buys a triplex with the proceeds. Mr. *A* will now become liable for tax on that income, as well as a proportion[14] of capital gains upon a disposition of the building. In view of this, counsel for the transferor should insist that the transferee covenant to limit such substitution or indemnify the transferor for any tax liability.[15]

Where the transferor does have income or taxable capital gains attributed to him, he will need full financial disclosure with respect to the asset so as to calculate expenses, including the capital cost allowance. Thus, an essential term of the transfer agreement is that the transferee allow full access to records for tax purposes.[16]

Both transferor and transferee should be aware of section 160 which makes them jointly and severally liable for tax on any *income* attributable under section 74 or section 75. Further, section 160(1) (*d*) makes the transferee liable for *any* tax arrears of the transferor to the extent of the value of the transferred property. The transferee is well advised to insist upon a covenant that the transferor is not in arrears in his taxes.

C. *Property Owned Before 1972*

For the purposes of this paper, it is sufficient to say that property owned continuously from a time prior to 1972 receives special capital gains treatment under the Income Tax Application Rules.[17] Very

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[12] Residence for tax purposes is a term of art. *See* MATERIALS ON CANADIAN INCOME TAX 93-105 (4th ed. W. Grover & F. Iacobucci 1980).

[13] *See also* Notice of Ways and Means Motion to Amend the Income Tax Act, s. 31(*b*), introduced in the 32d Parl., 1st Sess., in CAN. HOUSE OF COMMONS, VOTES AND PROCEEDINGS No. 6 (21 Apr. 1980) [hereinafter cited as Ways and Means Motion to Amend the ITA]: attribution rules shall cease to apply where there is a separation pursuant to a judicial order or a written separation agreement. This change has been incorporated into Draft Amendments to the Income Tax Act, Proposed legislation related to the Notice of Ways and Means Tabled in the House of Commons On April 21, 1980 [hereinafter cited as Draft Amendments to the ITA]; *see* s. 36(3).

[14] To determine the proportion, *see Transfer of Property to a Spouse*, INTERPRETATION BULLETIN IT-258, para. 9 (20 Oct. 1975).

[15] *See* Turley, *Divorce and Taxes — Texas Style*, 48 TEX. L. REV. 721, at 761-62 (1970).

[16] *Id.*

[17] A tax-free zone is applied: *see* Income Tax Application Rules, 1971, S.C.

generally stated, pre-1972 capital gains and losses are respectively neither taxed nor allowed.[18]

These ITAR transition rules are delayed in their implementation until disposition by the transferee, when the transfer was a rollover under section 73 (for the purpose of ITAR 20(1)) or where it was at non-arm's length (for the purposes of ITAR 26(3)).[19]

D. *Part Dispositions*

One spouse may transfer to the other part of a particular asset. The operative provision in such a case is section 43, which provides that the adjusted cost base to the transferor of the part transfered is "such portion of the adjusted cost base to [the transferor] at that time of the whole property as may reasonably be regarded as attributable to that part". This provision puts the prudent transferor and transferee on notice that they should make an accurate valuation at the time of transfer, because an inaccurate valuation could pose problems after the transfer. While valuation is rendered unnecessary by the operation of section 74 attribution, it should be made in anticipation of section 74 ceasing to operate.

E. *Settlement of Trusts*

For a variety of reasons, one spouse may wish to settle a trust for the benefit of the other and for the children.[20] It is trite to observe that the taxation of trusts is highly complex. The non-specialist should seek counsel, learn the law in the area, or both. An advance tax ruling may also be in order, although many practitioners are averse to seeking advice from the "other side" in what is a sharply adversary situation.

For our purposes, it is sufficient to note that a trust created by a taxpayer under which a spouse is entitled to all of the income that arises before the spouse's death, and under which no other person may, before the spouse's death, obtain any of the income or capital, will qualify for a section 73 rollover. It is essential to note that if a single element is omitted, the trust will not qualify. Instead, section 69 will apply, creating immediate tax consequences for the transferor.

1970-71-72, c. 63, ss. 20(1), 26(3) [hereinafter cited as ITAR]. For useful explanations of these provisions, *see Capital Property Owned on 31 December, 1971 — Depreciable Property*, INTERPRETATION BULLETIN IT-217 (26 May 1975) and *Capital Property Owned on 31 December, 1971 — Fair Market Value*, INTERPRETATION BULLETIN IT-139R (23 Apr. 1974).

[18] *See* MATERIALS ON CANADIAN INCOME TAX, *supra* note 12, at 488-99.

[19] *See* ITAR, ss. 20(1.1), 26 (5). Note s. 29 of Ways and Means Motion to Amend the ITA which will allow the taxpayer to elect to transfer capital property to a spouse or former spouse at deemed proceeds equal to fair market value rather than the adjusted cost base. This is now found in Draft Amendments to the ITA, s 35(1).

[20] *See generally* Zinn, *supra* note 10; M. CULLITY & R. FORBES, *supra* note 10

Further, it should be noted that section 74 attribution applies simply to "a trust". The anomaly could arise that by making a transfer to a non-qualifying trust, the transferor would not only suffer immediate tax consequences, but would continue to have income and, eventually, later accrued capital gains attributed to him.

F. *Tax Planning and Consensual Transfers*

Basic to tax planning is the notion that losses should be shifted to the hands of the high marginal rate taxpayer whereas gains should be realized in the hands of the lower rate taxpayer. To the extent that separated spouses allow themselves to co-operate to their mutual financial advantage, this form of tax planning is available to them.

To accomplish this, section 73 is used by the spouses to roll assets over to one another so that those assets with accrued gains are in the hands of the lower rate spouse, while those with accrued losses are in the hands of the higher rate spouse. Dispositions must now wait until the decree absolute of divorce is obtained. The divorce terminates the operation of section 74 so that the transferees are free to make dispositions without attribution occurring. Sheppard[21] explains the device with excellent examples, although he seems to ignore that section 73 and section 74 are two-way streets: there is no reason to limit these sections to transfers from high to low income spouses.[22]

Almost invariably, one spouse will benefit more than the other from this device and compensation should be made so that the tax benefits are equally shared.

G. *Classification of Property for Tax Purposes*

To complete this basic understanding of interspousal property transfers, the various types of property contemplated by the Income Tax Act will be investigated and their application to interspousal transfers considered.

1. *Non-Depreciable Property*

All property not included as either depreciable property or eligible capital property is non-depreciable property. To the extent that none of the transition rules discussed above apply, the disposition of a non-depreciable capital property triggers a capital gain or loss. The formula in simple terms is[23]

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[21] Sheppard, *Taxation of the Family Divided: Divorce — Canadian Style*, in CANADIAN TAX FOUNDATION, REPORT OF THE TWENTY-SIXTH TAX CONFERENCE 316, at 334-35 (1974).

[22] *See* proposed changes to these attribution rules, Ways and Means Motion to Amend the ITA, s. 31. This is now found in Draft Amendments to the ITA, s. 36.

[23] ITA, s. 40(1).

$$\text{taxable capital gain (or allowable capital loss)} = \frac{\text{proceeds of disposition} - (\text{adjusted cost base} + \text{expenses} + \text{reserve})}{2}$$

Suppose a certain parcel of land was purchased in 1972 for $20,000, including legal fees and other incidental costs. The adjusted cost base of the land is $20,000. In 1977, the land is sold for $35,000. Expenses of disposition are $3,000. Now, ignoring reserve,[24] there will be a taxable capital gain of:

$$\frac{\$35{,}000 - (\$20{,}000 + \$3{,}000)}{2} = \$6{,}000$$

2. *The Principal Residence*

Section 54(*g*) broadly defines the principal residence.[25] While typically the principal residence might be a freehold interest in a house, it could as well be a leasehold interest, a condominium, a houseboat, even a tent and the land upon which it is pitched. If more than one acre is involved, the taxpayer must justify the excess. Further, it must be "ordinarily inhabited"[26] by the taxpayer, his spouse or former spouse, or certain dependent children or grandchildren. Should the principal residence change in character to that of income property, the taxpayer may nevertheless elect to designate that property as the principal residence for up to four years. Finally, each taxpayer may have only one principal residence at any time. Husband and wife may designate one each, *i.e.* the city home and the cottage.

The importance of the designation is that, in general, capital gains on the principal residence are not taxable.[27] Galligan J., in the recent case of *Silverstein v. Silverstein*,[28] recognized this distinction in his division of assets between the spouses.

A spouse who, as part of a separation agreement, allows the other to remain in the matrimonial home which the first spouse owns, charging the other spouse rent, may benefit only the Minister of National Revenue. To the extent that he does not elect, or that the election period has run, taxable capital gains are accruing which may largely negative the value of his rental income.

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[24] *See* MATERIALS ON CANADIAN INCOME TAX, *supra* note 12, at 485-86

[25] *See Principal Residence*, INTERPRETATION BULLETIN IT-120R (6 Dec 1976).

[26] *Id.*, para. 7.

[27] ITA, s. 40(2) (*b*) provides a formula by which the capital gain on the disposition of a principal residence is to be determined. If the taxpayer has used the property as a principal residence for the entire period after the acquisition date ("the later of Dec. 31, 1971 and the day on which he last acquired or reacquired it"), the capital gain will be nil.

[28] 20 O.R. (2d) 185, 1 R.F.L. (2d) 239, 87 D.L.R. (3d) 116 (H C 1978)

3. *Personal Use Property*

Generally speaking, section 54(*f*) defines personal use property as property owned by the taxpayer for the personal use and enjoyment of himself or a relative, or, where the taxpayer is a trust, by a beneficiary under the trust. The definition also includes certain debts and options.

Since to allow credit for losses on personal use property would be to subsidize the taxpayer's living expenses, the ITA deems the losses on such property to be nil.[29] However, any capital gain on personal use property is taxable.

To reduce the need for the taxpayer to record the purchase and sale of every bicycle and typewriter, a $1,000 rule applies: both the adjusted cost base and the proceeds of disposition are deemed to be the greater of the actual amount or $1,000.[30] A chair actually bought for $55 and sold for $10 is deemed to have an adjusted cost base of $1,000 and proceeds of disposition of $1,000; thus the gain (or loss) is nil. Most personal use property falls under this rule. The remainder will develop either non-recognized losses, or gains which must be declared.

4. *Listed Personal Property*

In a word, these are the investment collectables — certain artwork, jewellery, rare folios, manuscripts or rare books, stamps or coins.[31] The taxpayer is assessed on net gains (*i.e.* gains on listed personal property minus losses on listed personal property).[32] Net losses on listed personal property may not be applied against any other gains or income. There are provisions for loss carry-back and carry-forward.[33]

Listed personal property, in that it is a subsection of capital property, falls within the operation of section 73. Further, any gain or loss that results from the disposition of listed personal property by the transferee is attributed to the transferor.[34]

5. *Depreciable Property*

Depreciable property is simply that in respect of which a capital cost allowance is permitted.[35] Such capital cost allowance is permitted in respect of property used to derive income.[36] By definition, then,

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[29] ITA, s. 40(2) (*g*) (iii). This of course means losses cannot be set off against gains.

[30] ITA, s. 46(1).

[31] ITA, s. 54 (*e*).

[32] ITA, s. 41.

[33] ITA, s. 41(2) (*b*): forward five, back one.

[34] ITA, s. 74(2) (*c*).

[35] ITA, s. 13(21) (*b*).

[36] ITA, s. 20(1) (*a*).

depreciable property is property held for income-producing purposes.[37]

Depreciable property is unique in that the capital cost allowance is not taken on individual items, but under a system of pooling or classes. This is the reason for special treatment under section 73: a mechanism is provided to break the particular property free from its class for purposes of the transfer.[38]

Two caveats must be registered at this point. First, because this is income producing property and the income will be attributed by section 74, nowhere is it more important to provide for the transferor's right of access to financial records. As well, since the income is deemed to be that of the transferor, it is only reasonable that he should reserve the right to specify the amount (if any) of capital cost allowance to be claimed each year for the asset.[39]

Secondly, a problem arises with respect to double taxation.[40] Section 73(2) provides that when the deemed capital cost of the depreciable property to the transferee, as determined under section 73(1)(*c*), is less than the capital cost to the transferor, for the purposes of sections 13 and 20, the transferee's capital cost is deemed to be equal to the capital cost of the transferor. The end result of this provision is to increase any recapture. The problem arises with capital gains; the lower capital cost is used thereby increasing any capital gain or decreasing any capital loss. The taxpayer should argue against such an occurrence on the basis of policy, citing section 4(4), the general rule against double inclusions and deductions. Administrative policy appears to be in favour of allowing the taxpayer to compute the capital gain or loss on the basis of the higher capital cost (*i.e.* that of the transferor). To avoid any doubt, section 74(2) should be removed from the Income Tax Act.

6. *Eligible Capital Property*[41]

These properties include goodwill, some franchises and other intangibles. While not the normal object of interspousal transfers, they exist and the family lawyer should be aware that the tax treatment is quite distinct from that of other capital properties.[42]

III. Transfers Arising Through Equitable Doctrines

Despite the enactment of FLRA, the equitable doctrines of resulting and constructive trust[43] still prove useful in Ontario. In the recent case of

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[37] There are specific exclusions such as land and inventory, *see* Income Tax Regulations, C.R.C., c. 945, s. 1102.

[38] ITA, s. 73(1) (*e*).

[39] ITA, s. 20(1) (*a*): the taxpayer is free to deduct any amount to the maximum permitted by regulation.

[40] *See* Zinn, *supra* note 10, at 472: examples are given.

[41] ITA, s. 54 (*d*).

[42] *See* Materials on Canadian Income Tax, *supra* note 12, at 403-16.

[43] *See* D. Waters, Law of Trusts in Canada 277-364 (1974)

Becker v. Pettkus, the Ontario Court of Appeal awarded a "common-law" wife a one-half interest in a bee-keeping operation, as well as in the matrimonial home;[44] she could not have obtained the same result under FLRA.[45]

It is not the purpose of this paper to discuss the equitable doctrines as such; rather it is to consider the tax implications of their operation. Key to this consideration is the interpretation of section 73(1.1):[46]

> where, by the operation of prescribed provisions of the law of a province or by virtue of a decree, order or judgment of a competent tribunal made in accordance with such provisions, a person referred to in subsection (1) . . .
> (*c*) has vested in him property. . . .

It is apparent that this part of section 73 is intended to accommodate FLRA and its counterparts in other provinces, but until 3 April 1980, no regulation defined the meaning of "prescribed provisions of the law of a province". It was therefore open to argue that the expression imported the entire law of the province. Specifically, it could be said that the doctrines of resulting and constructive trust were imported into the section and that a rollover would occur upon court declaration of such a trust. However, on 3 April 1980, by amendment to the Income Tax Regulations, "prescribed provisions of the law of a province" was defined so as to eliminate any such interpretation of section 73.[47]

Thus, if section 73 does not apply, the transfer, in that it is at non-arm's length,[48] will fall under the general provisions of section 69. As a result, the disposition and acquisition will be deemed to be at fair market value. On the face of it, the tax consequences for the disposition could be severe.

Assume an individual in 1972 took certain non-depreciable property in his own name at a cost of $20,000. In 1979, when it has a fair market value of $100,000, a court declares a trust for one-half in favor of another person. If section 69 operates, he is deemed to have disposed of the

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[44] 20 O.R. (2d) 105, 5 R.F.L. (2d) 344, 87 D.L.R. (3d) 101 (C.A. 1978), *aff'd* (not yet reported, S.C.C., 18 Dec. 1980). *See also* Ahone (Smith) v. Ahone, 20 R.F.L. 290, 56 D.L.R. (3d) 454 (B.C.S.C. 1975), and the cases in J. PAYNE, M. BÉGIN & F. STEEL, CANADA: CASES AND MATERIALS ON DIVORCE 35: 111-14 (1978).

[45] *See* "Property in Lieu of Support Payments", p. 693 *infra*.

[46] This section was added to the ITA by An Act to amend the statute law relating to income tax and to authorize payments related to provincial sales tax reductions, S.C. 1977-78, c. 32, s. 15(1).

[47] S.O.R./80-245 (114 Can. Gazette, Pt. II, 1250):

> 6500 (2) For the purpose of the subsection 73(1.1) of the Act, "prescribed provision of the law of a province" means
> . . .
> (*d*) sections 4, 6, 7 and 8 and paragraph 19(1) (*c*) of the Family Law Reform Act, 1978, S.O. 1978, c. 2, of the Province of Ontario
> . . . .

This regulation is effective in respect of the period commencing 31 Mar. 1978.

[48] *See* "The Concept of Arm's Length", p. 694 *infra*.

one-half for proceeds of $50,000. Thus, a capital gain of $40,000 is generated ($50,000 − $10,000), $20,000 of which is taxable.

If the individual has a 1979 taxable income from other sources of $15,000, the effect will be devastating: his tax payable will increase from just over $4,000 to approximately $12,500. From a taxable income of $15,000, the taxpayer will be hard pressed to pay such a tax bill.[49] He may be forced to liquidate his remaining half. The upshot is that the acquiring party is left with property worth $50,000, while the respondent retains, at most, a *net* value of $41,500 (*i.e.* $50,000 − $8,500 increase in tax). In the absence of fraud or other unseemly behavior, this is an inequitable conclusion of an equitable process!

There are two arguments against such a result. The first, and preferable, is that there is no disposition and acquisition, and therefore section 69 does not operate. One cannot dispose of that which one does not own,[50] nor can one acquire that which one always had. The concept of the resulting trust (and to a large extent that of the constructive trust) is that the legal owner always held the portion in trust for the other party and the court is simply declaring what already exists.[51] Viewed from this perspective, section 69 does not apply; the parties simply apportion the adjusted cost base and go their separate tax ways.

An alternative approach is to accept the declaration as a disposition, but ask the court, in making its award, to order the successful applicant to compensate the respondent proportionately for his increased tax.[52]

One final comment should be made in this area. In the recent case of *Koshman v. Koshman*,[53] a wife obtained a declaration under Saskatchewan's Married Women's Property Act that she was entitled to an interest in the husband's nursery business. However, as a partition and sale would have disrupted the business and deprived the husband of his source of income from which to contribute future maintenance, the court ordered a lump-sum amount in satisfaction of the wife's interest.

Such a payment is probably a tax event, but how is it to be characterized and what are its results? The most straightforward approach is to view the payment as consideration for the wife's interest, *i.e.*, a purchase by the husband. This would bring into play a section 73 rollover, using the section 43 part disposition rules to establish an adjusted cost base for the non-depreciable portion of the property. In most instances such a transaction would require an accurate valuation of all components of the business. As well, all the above-mentioned arguments for an equitable sharing of tax liabilities should apply.

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[49] An income-averaging annuity contract may provide some temporary relief. *see Income-Averaging Annuity Contracts*, INFORMATION CIRCULAR IC-72-21R (17 Apr. 1978).

[50] The *nemo dat quod non habet* rule.

[51] D. WATERS, *supra* note 43.

[52] The tax is increased first by the tax on capital gains and second by the tax incurred because the extra income pushes the taxpayer up the progressive scale.

[53] 27 R.F.L. 249 (Sask. Q.B. 1977); R.S.S. 1965, c. 340, s. 22, *as amended by* S.S. 1974-75, c. 29, s. 1.

IV. TRANSFERS UNDER THE FAMILY LAW REFORM ACT, 1978

A. *Introductory Comments*

The Family Law Reform Act, 1978 brought family law in Ontario firmly into the twentieth century. Like any sweeping new legislation, though, it gives rise to countless questions of interpretation and effect, not the least of which are those related to tax.

As was indicated earlier, the Act's object is to provide for an orderly and equitable settlement upon marriage breakdown, while that of the Income Tax Act is to ensure that that which is Caesar's is rendered unto Caesar. The divergence may lead on occasion to actual hardship and unfairness; an investigation of the problem is warranted.

B. *Problems Associated with Coming into Force*

Two recent articles[54] point out that certain rights in property arise immediately upon the coming into force of FLRA. Goodwin suggests that these rights may be tantamount to part ownership; Eng is not as bold.[55] Had this in fact been the effect, 31 March 1978 would have seen a host of deemed transfers. However, since any such transfer would have been to a spouse, section 73 rollovers would have applied.

While the ownership, if any, was only in the matrimonial home, and matrimonial homes are generally the principal residence, there is enough divergence between the concepts[56] that certainly some tax consequences would have arisen. Aside from insoluble valuation problems, the political consequences would be horrendous. However, it seems that Revenue Canada is not considering 31 March 1978 as a date different from other dates for capital dispositions.

A further problem arises with respect to designation of the principal residence for capital gains purposes. While the tests for principal residence (ITA, section 54(*g*)) and those for matrimonial home (FLRA, sections 38 and 39) will coincide in most instances, this is not always the case. While a taxpayer may have only one principal residence, he may have several matrimonial homes.[57] What occurred then, on 31 March 1978 if the coming into force of FLRA automatically created some kind of ownership right?

Mrs. *B* holds sole title to the family's city home, Mr. *B* to the

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[54] Eng, *Tax Consequences of Provincial Family Law Reform Legislation*, 26 C. TAX J. 554 (1978); Goodwin, *Provincial Marital Property Laws Recently Enacted or Proposed*, in CANADIAN TAX FOUNDATION, REPORT OF THE TWENTY-NINTH CONFERENCE 215 (1977).

[55] Eng, *supra* note 54, at 559; Goodwin, *supra* note 54, at 225.

[56] For example, there may be several matrimonial homes (FLRA, s. 39(2)), but only one principal residence.

[57] FLRA, s. 39(2).

cottage. Each designates the property as principal residence.[58] If each awakens on the morning of 1 April 1978 with some property interest in the other's principal residence, each will have only one principal residence, yet a property interest in two homes. Thus for each spouse, on one or the other home, *taxable* capital gains would begin to accrue. If a home were sold, one spouse would be exempted from capital gains tax, the other would not.

While there may be room to argue that the coming into force of FLRA creates ownership rights in the matrimonial home, there are several grounds upon which it may be forcibly argued that coming into force was not a tax event. On policy grounds, a decision declaring that the mere enactment of FLRA created property rights should be rejected because of the Pandora's box of valuation problems, tracing conundrums and litigation that would be opened. As well, there is the analogy to inchoate dower — a possibility of future entitlement with certain powers of protection. Certainly inchoate dower was never subject to capital gains tax, and whatever right has been created under FLRA ought not to be subject to capital gains tax either.

C. *Court-ordered Transfers under FLRA*

It may be stated generally that division of property by the courts under FLRA is restricted to spouses in the narrow sense,[59] although there seems some possibility a common-law spouse could receive property under section 19(1) (*c*).[60] In either case, to the extent that FLRA is "prescribed provisions of the law of a province", section 73 will apply to roll the property over to the receiving spouse.

1. *Who Pays the Tax?*

The problem arises with section 74. Should attribution occur? Goodwin argues forcefully that the word "transfer" as it occurred in old section 73 and section 74 is an active verb, requiring some dealing on the part of the transferor to divest himself of the property and to vest it in the transferee.[61] However, since his writing, section 73 has been amended to include the words, "transferred to . . . an individual pursuant to a decree". One may now argue that the section deems an active transfer, but the better view is that it is the court that is effecting the transfer to the transferee — significantly, the other party is not called "transferor" but "taxpayer". However, the question is very much open and must be examined.

Assuming that section 73 casts the parties in the roles of transferor

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[58] *See Principal Residence*, INTERPRETATION BULLETIN IT-120R, para. 5 (6 Dec 1976).

[59] FLRA, s. 1 (*f*).

[60] *See* "Property in Lieu of Support Payments", p. 693 *infra*

[61] Goodwin, *supra* note 54, at 230-31 and the cases cited therein

and transferee, if the parties are not spouses, a rollover will be effected and that would be the end of the matter.[62] However, if the parties are spouses, section 74 would operate:

> Where a person has . . . transferred property either directly or indirectly by means of a trust or by any other means whatever to his spouse. . . .

So long as the parties remain spouses (*i.e.* until decree absolute), income and capital gains will be attributed to the transferor.[63] Thus, while FLRA has effected an orderly windup of a dead relationship, the Income Tax Act suspiciously views a still legally married couple as colluding to avoid tax. Such a view, while clearly unrealistic, cannot be ignored.

There are cogent reasons why attribution ought not to occur.

1. In *Silverstein v. Silverstein*, Galligan J. observed:

> It also seems to me to be equitable that if a spouse is to share in a non-family asset that such spouse should also share the burdens that go with that asset. In this case, the Midland Ave. property has no doubt appreciated in value since Valuation Day, December 31, 1971, and upon its disposition it will be subject to capital gains tax. I have found that Mrs. Silverstein is entitled to a one-half interest in that property and it seems fair to me that she should share the capital gains tax that it will attract.[64]

Galligan J. went on to order a division of recapture as well, on the facts of the case. This approach seems the only reasonable one, but it must be remembered that as well as being the only case to date dealing with the problem, it may be limited on its facts.

2. *Equity is equality*. To a large extent, the Family Law Reform Act, 1978 had its origins in equitable doctrines. The preamble speaks of an "equitable settlement". This is impossible where one spouse bears the entire tax burden.

3. It is not uncommon for the cases to speak of a division of *net proceeds*. In *Laverty v. Laverty*,[65] the spouses shared the cost of a real estate commission. In *Warbinek v. Warbinek*,[66] an allowance was made for moneys expended for additions and alterations made to the matrimonial home after separation. It would not be unreasonable to consider accrued taxable capital gains as a charge of sorts for which an allowance should be made before apportionment of proceeds. In other words, the spouses would share capital gains tax.[67]

4. Section 74 is an anti-tax-avoidance provision. It contemplates the situation where one spouse will transfer property to the other so as to reduce tax, yet still enjoy the benefit of the property. However, when the spouses separate, the opportunity to enjoy the property disappears and

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[62] Subject to the issue of double taxation: *see* note 40 *supra*.

[63] *See* proposed changes Ways and Means Motion to Amend the ITA, s. 31, and Draft Amendments to the ITA, s. 36.

[64] *Supra* note 28, at 204, 1 R.F.L. (2d) at 261, 87 D.L.R. (3d) at 135.

[65] 21 R.F.L. 189 (B.C.S.C. 1975).

[66] 25 R.F.L. 16 (B.C.S.C. 1976).

[67] *But cf.* Ciepley v. Ciepley, [1978] 2 A.C.W.S. 199 (Ont. C.A.), where the wife was awarded an *unencumbered* one-half.

the transfer loses its attractiveness. The rationale of the attribution rules disappears and their imposition would lead to distinct unfairness on one hand with no social benefit on the other.

While it is clear that the attribution rules ought not to apply, their operation seems unavoidable. To resolve this problem, Revenue Canada should take one of these steps, listed in order of preference:

(a) generally overhaul the Income Tax Act to recognize permanent separation;
(b) specifically amend section 74 to clearly exclude court-ordered transfers; or
(c) issue an Interpretation Bulletin stating that it is the Department's opinion that section 74 does not apply in such circumstances.

In the meantime counsel should in every case draw the court's attention to tax matters, asking for a *Silverstein*-type declaration tailored to suit the facts.

To summarize, then, it would seem there are two possible alternatives.

(1) The transferor is liable for all tax associated with the transferred property, capital gains, recapture and income, future as well as past. This unfair result seems to flow from a literal reading of sections 73 and 74.

(2) The transferor and transferee should share the tax as well as the benefit, then go their separate tax ways in the future. This alternative commends itself as being equitable, and it is to be hoped that it will soon receive the seal of legislative approval.

2. *Date of Transfer*

To the extent that a *Silverstein* order is made, the time of entitlement is of no consequence, but in most other instances it may be vital to pinpoint the time of transfer so as to be able to fix the adjusted cost base or undepreciated capital cost as appropriate for the purposes of a section 73 rollover.[68]

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[68] For example, Mr. Jones owns two buildings, A and B. As class 6, they are given a 10% capital cost allowance (CCA) yearly.

In 1978, Mr. and Mrs. Jones separate. At that time, A has a fair market value (FMV) of $8,000, B of $10,000 and the undepreciated capital cost (UCC) of the class is $10,000.

In 1980, Mrs. Jones obtains an order to have building B vest in her. At that time, the FMV of A is $5,000 and the FMV of B is $20,000.

If 1978 is the deemed date of transfer, the deemed proceeds of disposition as determined under s. 73(1) (*e*) equal:

$$\frac{\$10{,}000\ (\text{FMV of item})}{\$18{,}000\ (\text{FMV of class})} \times \$10{,}000\ (\text{UCC of class}) = \$5{,}555$$

Thus, the class is left with a UCC of $4,445. If 10% CCA is claimed in both 1979 and 1980, the class will have a UCC in 1980 of $3,600.

If 1980 is the deemed date of transfer, the deemed proceeds of disposition of B equal:

FLRA, section 4 indicates that entitlement with respect to family assets occurs, at the earliest, at the time of conclusive separation. There seems to be no indication of time regarding other property. Recent cases are divided, with the tendency being to identify separation, not declaration, as the time of entitlement.[69] The Income Tax Act, section 73, speaks of a transfer "pursuant to a decree, order, or judgment". Does this indicate that the transfer is deemed to occur on the date of judgment, or may we infer that by incorporating the "prescribed provisions" of FLRA, the transfer is deemed to follow entitlement, *i.e.*, the date of separation? It would be most unsatisfactory to have one date for tax purposes and another date for all others.

D. *Court Vesting Orders*

It would appear, by virtue of ITA, section 73(1.1) (*c*), that an order of the court vesting property[70] in a spouse will produce the same tax effects as an order of transfer.

E. *Trusts*

The court may order property held in trust for a spouse.[71] Whether or not a section 73 rollover would occur would depend upon the wording of the order. To be eligible for a rollover, the trust must be created *by the taxpayer*[72] and it is therefore important that the order be made such that it is the taxpayer who creates the trust. If this is not done, the section 69 deemed disposition will occur. The discussion respecting trusts under *Consensual Property Transfers*, above, is equally relevant here.

F. *Monetary Adjustments*[73]

In the recent case of *Boydell v. Boydell*,[74] a wife had developed a valuable doll collection over the years. The husband had assisted her to build up the collection. The court found that the collection was not a family asset, but that because of his contributions the husband was

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$$\frac{\$20{,}000}{\$25{,}000} \times \$8{,}100 = \$6{,}480$$

The class is left with a UCC of $1,620, nearly $2,000 less than if the transfer had been deemed to have occurred in 1978.

[69] For example, *see* Rusins v. Rusins, [1978] 3 A.C.W.S. 167 (Ont. H.C.); *Re* Ellis & Matsushita, 8 R.F.L. (2d) 193 (Ont. Div'l Ct. 1978); *cf*. Rinas v. Rinas, [1979] 1 A.C.W.S. 173 (Ont. H.C.).

[70] FLRA, s. 6.

[71] FLRA, s. 6.

[72] ITA, s. 73(1) (*c*).

[73] FLRA, ss. 6 (*f*), 8.

[74] 2 R.F.L. (2d) 121 (Ont. U. Fam. Ct. 1978).

entitled to compensation. Now, had the wife paid a driver and handyman during the time she was building the collection, such payment would have been a cost to her and would have become part of the adjusted cost base. There seems to be no good reason that the wife should not add the compensation paid to the adjusted cost base of the collection.[75]

G. *Property in Lieu of Support Payments*

As has been suggested, property may be ordered transferred under FLRA, section 19(1) (*c*) to a spouse, common-law spouse, or child, upon application for support under section 18. Clearly ITA, section 73 will apply. If the transferee is a spouse, the discussion above regarding section 74 is relevant. If the transferee is a child, section 75 will attribute income, but if the transferee is a common-law spouse there will be no attribution.

It seems that the amending of section 73 created two distortions in favor of the taxpayer. In the case of transfers to minors, section 69 used to assure that accrued capital gains were taxed at the time of transfer to the non-arm's length person. Consequently, section 75 did not concern itself with attributing capital gains — they had already been "wrung out" to the point of transfer. To the extent that a common-law spouse was a non-arm's length person, the same was true. But now that section 73 rolls the property over, and there is no attribution of capital gains, the infant or common-law spouse, if at a lower marginal tax rate than the transferor, may dispose immediately and pay less tax than the transferor would have paid. While this is hardly a form of tax planning, it nevertheless demonstrates the results that flow from an *ad hoc* approach to the harmonization of family and tax law.

H. *Order for Exclusive Possession of the Matrimonial Home*[76]

Two problems arise here, both related to the principal residence designation. Let us suppose Mr. and Mrs. *C* separate and Mrs. *C* obtains an order granting her exclusive possession of the home, notwithstanding that Mr. *C* has legal title. Mr. *C* may continue to designate the home as his principal residence.[77] However, Mr. *C* forms a new relationship and purchases a new home. He shall now have to choose which of the two he wishes to exempt from capital gains tax.

The second problem occurs if the court, in making the order for exclusive possession, also directs the spouse in possession to make

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[75] Except that Revenue Canada might argue that the wife could not have paid the husband under s. 74(3). To do so and be consistent, however, it could not then tax the compensation in the hands of the husband. It is unlikely that Revenue Canada would give up fully taxable income to save capital gains only one-half taxable.

[76] FLRA, s. 45(1) (*a*).

[77] ITA, s. 54 (*g*).

periodic payments to the other.[78] As discussed above, the receipt of income may deprive the dispossessed spouse of his ability to designate the home as a principal residence.

V. MISCELLANEOUS CONSIDERATIONS

A. *The Concept of Arm's Length*

A key concept of the anti-tax-avoidance mechanisms of the Income Tax Act is that of non-arm's length. Simply stated, the concept is that persons dealing with one another as strangers are not likely to be dealing for the primary purpose of conferring a benefit upon the other or perpetrating a sham for the benefit of one of them. Conversely, dealings between family members, partners, and certain shareholders and their corporations may not arise from the usual motives of personal gain. These cozier dealings are referred to as non-arm's length. A variety of provisions are intended to prevent non-arm's length relationships from becoming vehicles of tax avoidance. Section 69 is typical.

Unfortunately, the Act's definition does not always coincide with real life. The Income Tax Act states:

> 251(1) For the purpose of this Act
> (*a*) related persons shall be deemed not to deal with each other at arm's length; and
> (*b*) it is a question of fact whether persons not related to each other were at a particular time dealing with each other at arm's length.

The section then defines "related persons" as those connected by blood, marriage or adoption.[79] In real life, however, the comments of Dumoulin J., in *Wurtele Estate v. M.N.R.* seem more accurate:

> Unquestionably we are confronted, in this bickering separation deal, with an arm's length transaction, if ever there was one, wherein nothing was given, but everything contentiously liquidated in the bitter atmosphere of matrimonial wreckage.[80]

Unfortunately for the taxpayer spouse, the Act's deeming provisions cannot be escaped: a spouse is a spouse is a spouse, and spouses are never at arm's length. The situation of the ex-spouse or ex-common-law spouse allows some argument. The view of Revenue Canada is expressed in an Interpretation Bulletin:[81] a transfer of property to an ex-spouse occurs at fair market value. Thus, the Department believes section 69 should apply. The same would hold true with respect to parties to an annulled marriage.[82] Consistency would demand the same position with respect to

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[78] FLRA, s. 45(1) (*b*).
[79] ITA, s. 251(2) (*a*).
[80] [1963] C.T.C. 169, at 172, 63 D.T.C. 1124, at 1127 (Ex.).
[81] *Property Transfers after Divorce and Annulment*, INTERPRETATION BULLETIN IT-325, para. 1 (21 Jun. 1976).
[82] *Id.*, para. 6.

ex-common-law spouses. It would seem that as a question of fact Dumoulin J.'s assessment is far more accurate than that of the Department, whether in the case of married persons or not. Where section 251(1) (*a*) does not arbitrarily foreclose argument, the vast majority of parties winding up their relationships are anything but arm's length. The arbitrary rule of section 251(1) (*a*) should be softened by adding "unless the opposite be proved". As well, IT-325 should be revised adopting a less hard-line approach. The "question of fact" provision of section 251(1) (*b*) is quite adequate to control abuse.

B. *Corporations*

The family lawyer should be aware that the dissolution of marriage may have tax consequences for corporations.

Tax on active business income[83] is reduced by a small business deduction[84] to the extent that the company's cumulative deduction account[85] does not exceed $750,000.[86]

Attempts have been made to multiply the small business deduction by splitting a large corporation into several smaller ones, each with its own cumulative deduction account. To counter these attempts, the ITA provides that a group of associated companies must in effect pool their cumulative deduction accounts.[87] Associated companies are defined exhaustively by section 256. For example, Flipco and Flopco will be associated if *A* owns at least 10% of Flipco, *B* owns at least 10% of Flopco, and *A* and *B* are related. Thus where *A* and *B* contemplate marriage and a result of their marriage would be to make their companies associated, they should consult a tax lawyer. If the associated companies had a cumulative deduction account in excess of $750,000, they have given themselves a rather nasty wedding present. Of course, the converse may occur upon divorce: the companies may cease to be associated. Careful planning and timing is crucial; an expert must be consulted.

One must also note that section 247(2) permits the Minister to deem two or more corporations to be associated under certain circumstances. Common-law spouses would do well to bear this in mind when ordering their corporate affairs.

C. *Superficial Loss Rule*

"Wash sales" were once a popular tax-avoidance device. Property would be sold at a loss on December 31, thus generating a loss against

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[83] Active business income is a term of art defined by case law. An attempt to define it by statute died on the order paper when the 22 May 1979 federal election was called: *see* An Act to Amend the Statute Law Relating to Income Tax, to Amend the Canada Pension Plan and to Provide Other Authority for the Raising of Funds, Bill C-37, 30th Parl., 4th Sess., 1978-79, s. 38 (Commons 1st Reading, 29 Jan. 1979).

[84] ITA, s. 125(1).

[85] ITA, s. 125(6) (*b*).

[86] ITA, s. 125(2).

[87] ITA, s. 125(3).

which to cushion other income. The property was then re-acquired on January 1. To counter this device the ITA now provides:

1. any loss from a disposition of a property in any case where the same or identical property is acquired in a period from thirty days before to thirty days after the disposition, by the taxpayer, his corporation or his spouse, is a superficial loss;[88] and

2. a loss to the extent it is a superficial loss is nil;[89] and

3. the superficial loss shall be added to the adjusted cost base of the substituted property.[90]

In their normal operation, these rules totally cancel the effect of the wash sale. However, occasionally a monster is let loose. Suppose Mr. and Mrs. *D* have independent portfolios. Mrs. *D*, unknown to Mr. *D*, buys 500 Class A Goldco shares. Several days later, Mr. *D* sells his 500 Class A Goldco shares at a loss. His loss becomes nil, the amount of his superficial loss is added to the adjusted cost base of Mrs. *D*'s shares, which increase will reduce her eventual capital gain correspondingly. Such a result is of no consequence if the spouses are co-operating in their portfolio management, but to the extent they operate independently, a nightmare is created. While it is unlikely that the co-incidence of sale and purchase will ever come to the attention of the spouses, let alone the Minister, the menace is there that it will be discovered and the minister will re-assess up to four years back.[91]

The real terror lies in the potential misuse of these provisions to carry out inter-spousal guerrilla warfare, that is, by one spouse studiously dealing in the market to completely frustrate the other's portfolio management. As bizarre a proposition as this may be, it nevertheless demonstrates again the distorted results that arise from the Act's near non-recognition of marriage breakdown.

D. *Registered Retirement Savings Plans*

Another potential weapon of interspousal warfare may follow from certain attribution rules related to RRSPs. Essentially, where one spouse collapses an RRSP, any contribution made to the plan by the other spouse in that year, or either of the two preceeding years, is brought back into the income of the contributing spouse for the year of the collapse.[92]

Assume Mr. *E* contributed the maximum $5,500 to his wife's plan in each of 1977 and 1978. In 1979, Mrs. *E* discovers Mr. *E* dallying with Miss *X*, his secretary. She stalks out of the marriage with the children, dishes and residual good will. Although she does not need the money, she promptly collapses her RRSP, knowing that her husband is at the

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[88] ITA, s. 54 (*i*) (i).
[89] ITA, s. 40(2) (*g*) (i).
[90] ITA, s. 53(1) (*f*).
[91] ITA, s. 152(4).
[92] ITA, s. 146(8.3).

60% marginal tax rate. By having $11,000 attributed to Mr. *E*'s income, Mrs. *E* has nicely inflated his tax bill by $6,600. Without assessing the moral scoresheet, it is obvious that the chief beneficiary of this sweet revenge is Revenue Canada! Had Mrs. *E* waited two years to collapse the plan, at her 30% marginal rate, tax would have been only $3,300, not to speak of the benefits of tax deferral. Cooler heads and compromise would yield a tax saving of $3,300, which could be divided to their mutual benefit. To be fair, it must be remembered that if the plan is collapsed today, Mrs. *E* would obtain the entire proceeds tax-free, whereas in two years she will have to pay $3,300 tax. She should of course be compensated.

E. *Property or Spouse Outside Canada*

Canadian residents are taxable on their world income[93] to the extent that a foreign tax credit does not apply.[94] Thus, from a tax viewpoint, a transfer of property legally located[95] outside Canada is the same for most purposes as a transfer of Canadian property.

If a spouse gives up Canadian residence,[96] a variety of tax consequences will ensue. If it is the transferor, section 74 attribution will cease to apply.[97] If it is the transferee, section 74 will continue to operate.

A non-resident spouse is liable to pay a 25% tax (unless reduced by tax treaty) on every amount a resident pays, credits or is deemed to credit to him in satisfaction of interest, trust income, rents, support payments, dividends, etc.[98] The payor is required to withhold the 25% tax and remit it to the Receiver General on behalf of the non-resident.[99] If he fails to do so, he is personally liable.[100] This, of course, does not apply if section 74 operates as the income is deemed to be that of the transferor and is taxed simply as part of his overall income.[101]

Finally, when a taxpayer ceases to be resident in Canada, he is deemed to dispose of his property at fair market value immediately before he ceases to be a resident. Very simply put and subject to various exemptions, he must either pay the normal tax on capital gains and recapture created by such a disposition, or post security "acceptable to the Minister".[102] If the property is one to which section 74 attribution

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[93] ITA, s. 2(1).

[94] ITA, ss. 91(4), 126; MATERIALS ON CANADIAN INCOME TAX, *supra* note 12, at 543.

[95] Legal location may not always correspond with physical location.

[96] Citizenship is irrelevant to this discussion.

[97] *See* ITA, s. 74.

[98] ITA, s. 212.

[99] ITA, s. 215(1).

[100] ITA, s. 215(2).

[101] ITA, s. 212(12).

[102] ITA, s. 48(1).

applies, it would seem to follow that the tax would be payable by the transferor.

It is not unknown for one spouse to leave Canada upon the breakdown of the marriage. If there is any question of giving up residence,[103] the family lawyer should explain potential tax consequences.

VI. SUMMARY

A. *Statutory Changes*

1. *"Fiscal Divorce"*

Amendments to the Income Tax Act could take either of two routes — the more equitable and thorough being also the simpler. It would require a policy decision to recognize the fiscal effects of marital breakdown beyond the grudging recognition given support payments at present.[104] Probably the most effective way to implement this would be to add to section 252 a third paragraph, giving the word "spouse" a qualified meaning throughout the Act. Upon filing with the Minister a copy of a court order given under a specified provincial family law statute or other such order effectively winding up the family's assets,[105] an executed separation agreement or a sworn statement in prescribed form, the parties would no longer be deemed spouses for tax purposes. A fiscal divorce would occur — a recognition for tax purposes of what FLRA has recognized for property purposes. Section 239 provides adequate deterrence to any attempt to abuse this suggested technique.

2. *Piecemeal Change*

Failing such basic change, it is to be hoped that many of the specific amendments suggested throughout this paper might be implemented to alleviate some of the more obvious hardships mentioned. In some cases Information Bulletins setting forth the Department's policy would be useful in removing fears that arise from murky or ambiguous provisions.

3. *The Family Law Reform Act, 1978*

While not as basic or comprehensive as would be amendments to the Income Tax Act, some relief could be obtained by including a further

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[103] *See Determination of Residence For Individuals Leaving Canada*, INTERPRETATION BULLETIN IT-221 (26 May 1975) (Special Release Re IT-221, 23 Jul. 1979).

[104] ITA, ss. 56(1) (*b*), (*c*), 60 (*b*), (*c*), 60.1.

[105] Which may or may not be co-extensive with "family assets" as defined by FLRA.

paragraph in section 2 of FLRA essentially codifying an expanded *Silverstein* order: the judge would be required to assess the tax implications of property division and include it as a factor in his equitable settlement.

B. *Procedural Recommendations*

The courts, in their efforts to effect an orderly and equitable property settlement, need a detailed analysis of the accrued capital gains, losses and recapture position of all relevant property in question. The statement required by FLRA, section 5, should be accompanied by this data and should in many cases be completed in consultation with the party's accountant.

As a general rule it should be pointed out to the client that the period of time between separation and divorce is fraught with all sorts of tax problems and that period, for tax purposes at least, should be as brief as possible.

C. *Practice Comments*

It has been shown that lack of attention to tax matters can prove very costly to the parties. No matter how wealthy the parties, the assets are finite, and to the extent fair apportionment is made, tax planning benefits both parties. It would be unfortunate that the parties and their counsel become so locked in their adversary roles that they could not co-operate to their mutual benefit.

One final note: no matter how conversant the family lawyer may be with tax law, there is always one more twist, one more novel situation that would require inordinate time to conquer. For this reason it is wise to develop a working relationship with a tax specialist. However, the family lawyer must be fully aware of the basic tax implications of marital breakdown. Tax advice is part of his basic counsel. In that he is generally saving money, this aspect of the solicitor's work is noticed and appreciated by the client — a reward in itself!