

**COHEN**

**Barristers & Solicitors**

# Non-resident Sellers

Sept., 2011

# Capital Gains Tax

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- Capital Gains tax (if payable) is 50% of income tax rate – applicable to sales of Capital Assets – So about 23.6%
- Sale of Principal Residence is exempt from Capital Gains Tax for residents of Canada
- Can only have one Principal Residence at a time

# Non-Residency

- Definition of “non-resident” set forth in Section 116 of the Income Tax Act
  - “non-resident” means not resident in Canada
  - **Non-residents**
  - You're a **non-resident for tax purposes** if you:
    - normally, customarily, or routinely live in another country and aren't considered a resident of Canada; **or**
    - don't have [residential ties](#) in Canada; **and**
      - you live outside Canada throughout the tax year; **or**
      - you stay in Canada for less than 183 days in the tax year.
- At closing the Buyer’s lawyer will require Sellers to deliver a Statutory Declaration stating that the Sellers are “not non-residents” of Canada
- Sellers’ lawyer will not let the Sellers sign a false Statutory Declaration - perjury
- Applies even if Sellers are leaving the country “right after” closing

# Clearance Certificate

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- Application for CRA Clearance Certificate
    - Clearance Certificate shows that Sellers do not owe back taxes to **OR** amount that Sellers owe the Government for back taxes
    - Once the Sellers have left Canada the Government may not be able to reach their assets to satisfy back taxes
    - Can be as fast as 10 days – but in Toronto it usually takes about 12 to 16 weeks – leave time for closing
    - Cannot apply until there is an agreement to sell the property
  - Application to designate the property as Principal Residence

# 25% Holdback

- ITA requires that the Buyers lawyer shall withhold 25% of the **PURCHASE PRICE** if the Clearance Certificate is not available at Closing (not 25% of capital gain) – 50% if it is a rental property
- May be a problem if Seller needs money to buy in foreign country
- May also not be enough equity left to pay off the mortgage at closing
- If Sellers cannot deliver the Clearance Certificate within 120 days, Buyers Lawyer has to send the money to CRA

## **POA For Property**

- Very powerful document – don't give one lightly
- Allows a person to make decisions over property of another person
- Very helpful for spouse or lawyer to sign closing documents on behalf of a Seller if Seller will be out of the country prior to closing
- May be limited as to scope (i.e. applies to purchase or sale of one specific property) or time (expires on a certain date)
- Should survive any physical or mental incapacity of donor
- Usually can't be used for signing a mortgage
- Has to be registered in Land Titles/Registry System by Sellers lawyer prior to closing

# Advice for Clients

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- Seller should tell lawyer that they are leaving country early
- Leave enough time before closing to get Clearance Certificate
- Apply for Clearance Certificate right away
- Consider giving a Power of Attorney to lawyer before leaving Canada

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**416-380-7550**

41 Wynford Drive

Toronto, Ontario

M3C 1K1