

Case Study: Real Estate and Alter Ego Trusts

Alter ego trust (AET) planning is common in Canada, and when implemented in relation to real estate, presents significant issues in every province. The following hypothetical situation exemplifies these difficulties across Canada and in foreign jurisdictions, such as Hong Kong.

Each of the contributors to this hypothetical case study examined the holdings of Richard Wong in several Canadian provinces and in Hong Kong. They commented on the issues arising from the facts set out below, the efficacy of Richard's planning, its implementation during Richard's lifetime, and the nuances specific to the various jurisdictions. A fascinating and complex set of consequences emerged.

Facts

Richard was born in Hong Kong. In the 1960s, he moved to Winnipeg, Manitoba to pursue his university studies. After obtaining his engineering degree, he remained in Canada and started working in Winnipeg. He was subsequently transferred by his company, Engineco, to Saskatchewan, Alberta, Ontario, Quebec, Nova Scotia, and finally British Columbia.

Richard retired from his position as senior vice-president of Engineco in 2000 and settled in Victoria, British Columbia. In 2010, when he was 70 years old, Richard consulted a British Columbia lawyer, Amy Law, to set up an AET. Richard had never been married. His AET provided that on his death the trust assets were to be distributed equally to his nephew, who is a

Canadian citizen residing in Canada, and his niece, who resides in Hong Kong and has no Canadian immigration status. Richard was named as the initial trustee; his trusted accountant and friend, Michael Friend, who resides in Victoria, was named as the successor trustee.

When the AET was set up, Richard owned the following assets:

- his residence, a house in Victoria, British Columbia;
- a house in Winnipeg, Manitoba;
- a house in Waterloo, Ontario;
- a house in Calgary, Alberta;
- an apartment in Regina, Saskatchewan;
- a cottage in Halifax, Nova Scotia;
- an apartment in Montreal, Quebec;
- vacant farmland in Hong Kong, which Richard inherited from his father in 1990; and
- bank accounts and investment accounts with a major bank.

Amy assisted Richard in transferring the bank and investment accounts, the British Columbia residence, the Winnipeg property, the Ontario property, the Alberta property, the Saskatchewan property, the Nova Scotia property, and the Quebec property to the AET. She transferred both the legal and the beneficial interest of the British Columbia residence to the AET; registered title was transferred to "Richard Wong, in trust," as was permitted by the Land Title Office with the provision of the trust deed to the registrar.

Amy prepared deeds of gift to transfer the beneficial interest in the

remaining real properties in other provinces to the AET without changing the registered title. She also prepared bare trust agreements to confirm that Richard held legal title to the properties in bare trust for the AET. She advised Richard that she did not practice law in the other provinces and would need to consult with lawyers in those provinces to determine whether any further steps were necessary. Richard was concerned about the expense and failed to instruct Amy to pursue the issues. Amy also suggested that when Richard was in Hong Kong, he should prepare a Hong Kong will to deal with his property there.

Richard died in December 2020 without having made a will in Canada or in Hong Kong. Michael, as successor trustee of the AET, consulted Amy for advice in dealing with Richard's estate and the AET. Amy determined that none of Richard's assets in British Columbia required probate. Richard's nephew and niece told Michael that they had no interest in acting as trustee of the AET or as administrator of Richard's estate.

Nova Scotia Perspective

SARAH M. ALMON

Stewart McKelvey

Associate Member, STEP Atlantic

Although Nova Scotia law permits the registration of real property in the name of a trustee, no steps were taken to transfer legal title to the cottage to Richard in his capacity as trustee of the alter ego trust (AET). Because the transfer into the AET was not perfected at the time of Richard's death, Richard remained on title as the sole owner of the cottage, a situation that automatically triggers probate in Nova Scotia. Proof of a personal representative's authority in the form of a grant of administration is required by the Nova Scotia Land Registry before the personal representative is permitted to deal with real property.

The personal representative may apply for a grant of administration. Alternatively, if letters of administration have already been obtained in British Columbia or another jurisdiction, the personal representative can apply for an extraprovincial grant of administration (hereafter, a grant). Section 32 of the *Probate Act* sets out the order of priority for applicants. Since Richard had no spouse, children, or other heirs entitled to inherit under

the *Intestate Succession Act* residing in Nova Scotia, the applicant would rank behind the public trustee of Nova Scotia, and those with a higher priority would need to renounce.

Assuming that a grant of administration or its equivalent has already been obtained in another jurisdiction, the application for a grant in Nova Scotia is filed by the potential personal representative in the district in which the cottage is located, and requires the following:

- two court-certified copies of the original grant under the seal of the court that granted it;
- one certificate under the seal of the original court, stating that the original grant is still in effect;
- one copy of Richard's proof of death;
- the security required under the *Probate Act* (in the amount of 1.5 times the value of the Nova Scotia estate assets);
- the payment of the probate taxes required under the *Probate Act*; and
- the prescribed form under the *Registry Act* or the *Land Registration Act*, which is dependent on the migration status of the cottage.

Probate tax must be paid when an application for a grant is filed in Nova Scotia, and is calculated as shown in the accompanying table.

Estate Value	Tax
Estates not exceeding \$10,000	\$85.60
Estates exceeding \$10,000 but not exceeding \$25,000	\$215.20
Estates exceeding \$25,000 but not exceeding \$50,000	\$358.15
Estates exceeding \$50,000 but not exceeding \$100,000	\$1,002.65
Estates exceeding \$100,000	\$1,002.65 plus \$16.95 for each additional \$1,000 or portion thereof in excess of \$100,000

In this case, the beneficial ownership of the cottage was previously transferred to the AET, leaving Richard with bare legal title at the time of his death. The personal representative would therefore report a nominal value of \$1 for probate tax purposes, which would result in the lowest amount of probate tax being paid.

Proof of a personal representative's authority in the form of a grant of administration is required by the Nova Scotia Land Registry before the personal representative is permitted to deal with real property.

Once a grant is issued by the Probate Court, a court-certified copy of the grant is sent by the court directly to the Nova Scotia Land Registry for recording in order to transfer registration of the cottage into the name of the personal representative; no deed transfer taxes are payable. After the grant is recorded against the cottage, the personal representative transfers the cottage to the successor trustee of the AET in the course of administering the estate under the *Probate Act*; therefore, the cottage is ultimately distributed to Richard's niece and nephew under the terms of the trust.

Had Richard perfected the transfer of the cottage into the AET during his lifetime, a better result could

have been obtained for his heirs. The cottage could have been transferred from Richard to himself as trustee of the AET without attracting deed transfer tax (because a gift for nominal consideration qualifies for an exemption). In this case, Richard's personal representative would not have been automatically required to obtain a grant in Nova Scotia in order to deal with the cottage after Richard's death.

ronn
ronn
ronn
ronn
ronn

