

**TAB 14**

**S.116 Filing Obligations in Respect of Capital  
Distributions to Non-Resident Beneficiaries of  
Canadian Resident Trusts/Estates**

**Mary Anne Bueschkens**  
*Heenan Blaikie LLP*

**The Six-Minute Estates Lawyer 2009**



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**“S.116 FILING OBLIGATIONS IN RESPECT OF CAPITAL  
DISTRIBUTIONS TO NON-RESIDENT BENEFICIARIES  
OF CANADIAN RESIDENT TRUSTS/ESTATES”**

**Mary Anne Bueschkens**  
Heenan Blaikie LLP  
Toronto, Ontario

## **S.116 FILING OBLIGATIONS IN RESPECT OF CAPITAL DISTRIBUTIONS TO NON-RESIDENT BENEFICIARIES OF CANADIAN RESIDENT TRUSTS/ESTATES**

### **Summary**

A non-resident of Canada who disposes of “taxable Canadian property” is required to include in computing income pursuant to subsection 116(1) of the *Income Tax Act* (all statutory references are to the *Income Tax Act*) taxable capital gains arising from disposition of said property, except where such property is a “treaty-protected property”.

As a mechanism of ensuring this tax liability is paid, the non-resident is required pursuant to subsection 116(5) to seek a certificate (the “116 Certificate”) from the Minister in respect of the disposition. If no 116 Certificate is received, subsection 116(5) requires the purchaser to remit to the Government on behalf of the vendor an amount equal to 25% of the cost of the property acquired. If a certificate is received, a liability still may exist but it will equal 25% of the amount by which the cost to the purchaser of the property exceeds the “certificate limit”.<sup>1</sup> These obligations arise even if the non-resident is not liable for Canadian income tax either because there is no gain or because the gain is exempt from Canadian income tax under Canada’s treaty system.

If the taxable Canadian property is an “excluded property”, and in the case of an excluded property that is a “treaty-exempt property” certain other conditions are met, the purchaser will not be required under subsection 116(5) to withhold or remit any amount.

The obligation to comply with subsection 116(5) is relevant to executors and trustees of either an *inter vivos* trust or a testamentary trust because the definition of taxable Canadian property in subsection 248(1) includes a capital interest in a trust (other than a unit trust). The definition of disposition in subsection 248(1) provides that a transfer of property that is part of a taxpayer’s capital interest in a trust made after 1999 constitutes a disposition of such capital interest. Thus, a non-resident who receives a capital distribution from a trust, even if that distribution is simply a cash distribution, will be considered to have disposed of taxable Canadian property and correspondingly, the

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<sup>1</sup> The certificate limit is defined as the estimated proceeds of sale and as discussed below.

estate or trust seen as “acquiring” part of that interest. While we could debate whether there is any “deemed acquisition” on the part of the estate or trust in this scenario, it is clearly the CRA’s position.

The purchaser must acquire taxable Canadian property from the non-resident person for subsection 116(5) to apply. The Canada Revenue Agency (“CRA”) has taken the position that for the purposes of applying section 116, a trust is considered to be the purchaser of the capital interest,

“Our view is that the trust making a distribution of capital to the non-resident beneficiary is considered to be the purchaser for the purposes of subsection 116(5) of the *Income Tax Act* with the result that the trust would be liable under section 116(5) to pay the amount described...”<sup>2</sup>

Irrespective of whether or not one agrees with the interpretation by CRA, subsection 159(2) provides that trustees of a trust which makes a distribution to a beneficiary without receiving a clearance certificate from the taxation authorities become liable to pay any income tax owing by the trust. For this reason, therefore, if a liability under subsection 116(5) may be exigible, it is strongly recommended that executors and trustees protect themselves by ensuring that either the appropriate 116 Certificate is received or it pays the required tax to the Government.<sup>3</sup>

It should be noted that a similar procedure must be followed in the province of Quebec if the property also is taxable Quebec property.

### **The 116 Certificate Process-Vendor Notification**

The receipt of property from a trust by a beneficiary in respect of its capital interest of a beneficiary constitutes a disposition of a portion of, or all of, the capital interest in a trust. Prior to the receipt of the distribution, subsection 116(1) allows the non-resident to send a notice to the CRA setting out:<sup>4</sup>

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<sup>2</sup> CRA Windows 2005-0149961E5.

<sup>3</sup> Section 1094 of the *Taxation Act* (Quebec) defines taxable Quebec property. The procedures are found in subsections 1097 and 1099.

<sup>4</sup> Form T2062

- (a) the name and address of the person to whom the property is to be disposed (in this instance the trust),
- (b) a description of the property;
- (c) the estimated amount of proceeds of disposition, and
- (d) the amount of the adjusted cost base to the non-resident at the time the notice is sent.

If the notice has not been sent in advance of the disposition, then the beneficiaries must provide similar information within ten days of the dispositions.<sup>5</sup> CRA has the ability to impose a penalty on the non-resident if the application is not filed within this 10 day period. The penalty is \$25 a day for each date late filed with a \$100 minimum and \$2,500 maximum penalty.

Following the sending of the notice, the Minister is obliged to issue the 116 Certificate fixing the “certificate limit” which is defined as the estimated proceeds of disposition set out in the notice.<sup>6</sup> The certificate is to be issued once either:

- (a) tax has been paid equal to 25% of the difference between the estimated proceeds of disposition and adjusted cost base; or
- (b) security acceptable to the Minister has been received. What this means in practice is that CRA is satisfied that the non-resident person is able to claim that the disposition of the property is exempt from income tax in Canada because of the applicable income tax convention between the country of residence of the non-resident and Canada.

If tax has been withheld, the non-resident can file an income tax return with Canada and claim a refund of any such tax that exceeds the actual liability.

### **Withholding Requirement of the Purchaser-the General Rule**

Subsection 116(5) requires the purchaser who has acquired taxable Canadian property remit the required amount, namely 25% of the amount by which the cost of the

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<sup>5</sup> Subsection 116(3)

<sup>6</sup> Subsection 116(2)

property to the purchaser exceeds the certificate limit [if the vendor has obtained the 116 Certificate] within thirty days of the end of the month following the acquisition of property. If the payment is not made within such timeframe, in addition to this withholding obligation, the purchaser faces an additional liability of between 3% and 10% of the withholding obligation, the percentage based on the number of days that the amount is remitted after the due date. However, the penalty increases to 20% of the withholding obligation if the failure was made knowingly or under circumstances amounting to gross negligence.<sup>7</sup> In addition, interest computed at the prescribed rate also is payable in respect of the withholding obligation and the penalty.<sup>8</sup>

If the trustees of a trust, for example, make a capital distribution of \$400,000 cash, the trustees fail to obtain a 116 Certificate, they are required to withhold \$100,000 even if the beneficiary is not liable for Canadian income tax. If they do not make such withholding, they become liable to pay \$100,000 in respect of the subsection 116(5) withholding obligation plus a penalty (assume 10%) of \$10,000.

If the purchaser {or here the trustees} have not withheld and are obliged to pay the 25%, they technically are able to demand recovery from the vendor of this amount (or here the capital beneficiary) since the payment has been made on behalf of the beneficiary. In theory, recovery could be made from any remaining capital: however, the trustees may be precluded from encroaching on capital even if there is sufficient remaining capital in the trust.

One of the practical problems that have arisen with respect to obtaining a 116 Certificate is the delay between the submission of a request by the non-resident for a 116 Certificate and the response to that request by CRA. Invariably, even where the non-resident is entitled to claim protection under a treaty with regard to any gain arising from the disposition of taxable Canadian property, CRA is not always able to provide the 116 Certificate prior to the time that the purchaser is obliged to remit the payment. Administratively, CRA generally is willing to issue a letter to the purchaser allowing the purchaser to retain the funds and not remit them on the due date pending the issuance of

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<sup>7</sup> Subsection 227(9)

<sup>8</sup> Subsection 227(9.2)

the 116 Certificate. Provided this letter is received prior to the due date of the payment, interest and penalties will not arise. Once the 116 Certificate is received, then the purchaser's obligations to pay any amount required by subsection 116(5) must be complied with.

The disposition of a capital interest in a trust by a non-resident person usually does not result in a capital gain and, therefore, a tax liability. Nevertheless, the obligation under subsection 116(5) remains.

### **The Concept of Treaty-Exempt Property**

A non-resident person who resides in a country with an income tax convention with Canada generally is exempt from taxation in Canada with respect to the disposition of taxable Canadian property. That exemption, in most cases, does not extend to taxable Canadian property whose underlying value is based on real property situated in Canada. To simplify the 116 Certificate process, the *Income Tax Act* was amended in 2008 to expand the definition of excluded property to include a property that is a "treaty-exempt property" at the time of its disposition.

Where the excluded property is a treaty-exempt property, subsection 116(5) now provides in respect of dispositions occurring after 2008 that a purchaser is not obliged to withhold under this provision if subsection 116(5.01) applies to the acquisition of this property. Subsection 116(5.01) refers to a "treaty-protected property" which definition ultimately depends on the definition of "treaty-exempt property".

The definition of treaty-exempt property in subsection 116(6.1) requires that at the time of disposition,

- (a) it is a treaty-protected property of the non-resident person, and
- (b) if the purchaser and non-resident person are related at the time, the purchaser provides a notice as required under subsection 116(5.02) in respect of the disposition.

The definition of a treaty-protected property is found in subsection 248(1) and means a property any income or gain from the disposition of which by the taxpayer would be exempt from tax under Part I because of a tax treaty with another country.

The obligation and liability of a purchaser of taxable Canadian property that is a treaty-exempt property from a non-resident to adhere to the obligations of subsection 116(5) will not arise if subsection 116(5.01) applies. This subsection requires the following three conditions be met:

- (1) after reasonable inquiry, the purchaser must conclude that the vendor is, under a tax treaty that Canada has with a particular country, resident in that particular country;
- (2) Canada's tax treaty with that particular country must exempt the vendor from Canadian Part I taxation of any income or gain from the disposition of that property, assuming that the vendor was indeed resident in that particular country under that tax treaty; and
- (3) the purchaser must provide notice containing specified information to the CRA of its acquisition of the property within 30 days after the date of the acquisition.

Subsection 116(5.01) provides a reasonable inquiry safe harbour for condition 1, but not for condition 2. A purchaser may be incorrect about the vendor's country of residence, but if the purchaser made reasonable inquiry as to the vendor's treaty residence, the purchaser may still be able to rely on subsection 116(5.01) as a basis for not remitting any money to the Receiver General.

#### **Determination of residence**

The purchaser, after reasonable enquiry, must conclude that the individual is resident in a country with an income tax convention with Canada. Unfortunately, Information Circular 72-17R5<sup>9</sup> does not provide any practical guidance with respect to the use of those words for the purposes of subsection 116(5). Furthermore, the explanatory notes to the legislation introducing the concept of treaty-exempt property<sup>10</sup> do not set out any steps that need to be taken to ensure that a reasonable enquiry has been made

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<sup>9</sup> Information Circular IC 72-17R5, *Procedure Concerning the Disposition of Taxable Canadian Property by Non-Residents of Canada – Section 116*, March 15, 2005, paragraph 50

<sup>10</sup> Explanatory Notes relating to the *Income Tax Act*, the *Excise Tax Act*, the *Excise Tax Act, 2001*, the *Customs Tariff*, the *Excise Tax Act* and other Acts, April 2008



CRA issued Form T2062C which is to be used to provide the notice requirement set out in subsection 116(5.02). The form contains what is referred to as an “optional area”. In it, the vendor is required to provide a tax identification number. CRA suggests that it will “generally accept that the purchaser has made reasonable inquiry if [the optional part of the form] is completed by the vendor or an equivalent statement is made by the vendor]”.

While CRA pronouncement is helpful, query whether the purchaser should seek the vendor’s last income tax return as evidence that the vendor is resident in a particular country? In certain cases, the purchaser may be aware of the actual residence of the vendor and may be prepared to accept that knowledge is sufficient to fall within the concept of reasonable enquiry, for example, where the vendor and purchaser are related to each other.

### **Treaty-Protected Property**

The second condition relates to the property being treaty-protected property. Subsection 116(5.01) does not provide that the determination of whether or not a property would be a treaty-protected property can be determined after reasonable enquiry. In fact, the explanatory notes make it clear that it is:

“not a matter of reasonable enquiry by the purchaser but rather of the actual effect of the treaty.”

The purchaser must conclude that the property is a treaty-protected property with regard to the income tax convention of the country of whom the non-resident is considered resident. By way of example, assume the purchaser reasonably concludes that the vendor is resident in the United Kingdom and determines that the property is a treaty protected property under the Canada-United Kingdom Tax Convention. If the vendor in fact turns out to be resident in a country other than the United Kingdom, the purchaser will have satisfied this second condition because the basis of determining whether there is a treaty-protected property is looking to the tax treaty of the country where the vendor is considered resident after reasonable inquiry.

If a purchaser cannot conclude that the property is a treaty-protected property, the obligation of the purchaser under subsection 116(5) either to seek a 116 Certificate and/or to withhold from the purchase price and remit to CRA continues.

As an example of the difficulty that purchaser may face, consider article XIII of the *Canada-U.S. Income Tax Convention* which deals with taxation of gains ensuing from the alienation of property. Article XIII(4) provides that gains from the alienation of property are taxable only in the country in which the vendor is resident except in specific circumstances. One such case is a gain resulting from the disposition of “real property situated in the other contracting state”. This phrase is defined in Article XIII(3)(b) and provides that real property situated in Canada includes an interest in a trust, the value of which is derived principally from real property situated in Canada. Real property includes the right to explore for or exploit mineral deposits and other natural resources and rights to amounts computed by reference to the value of production of that property.

Take a second example. An individual who has been a resident of Canada may be liable for taxation with respect to the disposition of taxable Canadian property if, as in the case of the *Canada-U.S. Income Tax Convention*, that individual was resident in Canada at any time during the ten years preceding the disposition of property, and was resident in Canada for 120 months cumulative during any of the period of twenty consecutive years preceding the disposition. A purchaser will be required to know the non resident’s residential history to conclude whether a treaty-protected property exists.

Another issue that may arise in determining whether or not there is a treaty-protected property relates to whether or not the non-resident is subject to any limitation of benefit provisions under the a particular tax treaty. If a limitation of benefits provision does exist and is applicable to the non-resident, the property in question would not be considered treaty-protected property since the definition of treaty-protected property requires that the property be exempt from tax because of a tax treaty.

#### **Notice Provision**

The purchaser must comply with the notice provision within 30 days of the acquisition of the property. Prescribed form T2062C has been published and is to be used

to comply with the notice requirement. T2062C requires that the following information be provided as set out in subsection 116(5.02)

- (a) the date of acquisition;
- (b) the name and address of the non-resident vendor;
- (c) a sufficient description of the property;
- (d) the amount paid or payable in respect of the property; and
- (e) the name of the country with which Canada has concluded a tax treaty under which the property is a treaty-protected property for the purpose of either subsection 116(5.01) or (6.1).

The new form T2062C also provides an optional area for the vendor to certify its agreement with the information provided in the remainder of the form. Contained in the completion instructions on the form, the CRA states that it will “generally accept that the purchaser has made reasonable inquiry if this optional part of the form is completed by the vendor or an equivalent declaration is obtained by the vendor” This type of formal approval mechanism should arguably assist purchasers seeking to ensure that they have met the reasonable inquiry standard on the question of treaty residence

#### **Filing of an Income Tax Return by the Purchaser**

The non-resident who disposes of taxable Canadian property and is exempt from Canadian income tax because of an income tax convention nevertheless was required to file an income tax return as required under subsection 150(1). The taxpayer would claim that the gain was not subject to income tax in Canada by virtue of subparagraph 110(1)(f)(i) which allows a taxpayer to deduct in computing taxable income an amount exempt from income tax in Canada because of a provision contained in the tax convention or agreement with another country that has force in Canada.

Paragraph 150(1)(a) now provides that a corporation that disposes of taxable Canadian property which is an “excluded disposition” is not required to file an income tax return. Similarly, an individual will not be required to file an income tax return for

the same reason.<sup>11</sup> An excluded disposition requires as one of its conditions that the property be an excluded property as defined in subsection 116(6).

One issue that might arise with respect to the decision not to file the return is that, should CRA subsequently challenge the claim that the property is a treaty-exempt property, CRA will not be prevented from assessing the transaction at any time. The general rule is that an assessment cannot be issued if it is beyond the “normal reassessment period”.<sup>12</sup> The definition of “normal reassessment period” in subsection 152(3.1) provides that the time period starts with the issuance of an original notice of assessment. If no income tax return is filed, then no notice of assessment can be issued and the normal reassessment period does not start. Technically, the ability of CRA to assess the gain never will be statute-barred. Since notification of the disposition is provided to CRA in any event, a taxpayer might consider filing an income tax return in any event to start the normal reassessment period and limit CRA’s ability to review the transaction.

### **Conclusion**

The addition of the concept of treaty-exempt property to the definition of excluded property likely may provide purchasers (i.e. Canadian resident Estates or Trusts) who may be arguably related to a vendor (the non-resident capital beneficiary) the ability to acquire the property without the need to seek a 116 Certificate. In other words, the Canadian resident trustee may not need to seek a 116 Certificate in cases where they are, for example, distributing cash to a beneficiary of the estate or trust who is a non-resident. However, because of the certainty that a purchaser must determine with regard to whether the property is a treaty protected property, the 116 Certificate process still may be the requirement that a purchaser will insist be met in order to satisfy its obligations.

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<sup>11</sup> Subsection 150(1.1) and the definition of excluded disposition in subsection 150(5)

<sup>12</sup> Subsection 152(4)



**REQUEST BY A NON-RESIDENT OF CANADA FOR A CERTIFICATE OF COMPLIANCE RELATED TO THE  
DISPOSITION OF CANADIAN RESOURCE OR TIMBER RESOURCE PROPERTY, CANADIAN REAL PROPERTY  
(OTHER THAN CAPITAL PROPERTY), OR DEPRECIABLE TAXABLE CANADIAN PROPERTY**

**INSTRUCTIONS**

All legislative references are to the Canadian *Income Tax Act*.

**When and How to file the Form**

Use this form if you are a non-resident of Canada to give notice of the proposed disposition of, or the completed disposition of, Canadian resource property, Canadian real property (other than capital property), Canadian timber resource property, or depreciable taxable Canadian property. A disposition of property includes any interest or option for such property, whether or not the property exists.

Use Form T2062 for the proposed or completed disposition of other taxable Canadian property, including the gain on the disposition of depreciable property. If both forms T2062A and T2062 are required for a disposition, the forms must be filed together.

If you are reporting a proposed or completed disposition of Canadian resource property, you must also complete Form T2062A, Schedule 1, *Disposition of Canadian Resource Property by Non-Residents*.

File a separate T2062A for each disposition or proposed disposition. However, if you are disposing of, or proposing to dispose of, several properties to the same purchaser at the same time, only one T2062A is required for all the properties. A separate T2062A must be filed by each person indicating an interest in a joint tenancy, tenancy in common, or co-ownership.

We issue a certificate of compliance after tax is paid or security acceptable to the Minister is submitted for the disposition. Final settlement of the tax liability is made when you file your Canadian income tax return. **You have to file an income tax return to report the disposition of the property listed on this form.**

**Completing the Form**

Send this notification along with all supporting documents (see attached list) to the tax services office for the area where the property is located. An incomplete notification will delay the issuance of a Certificate of Compliance.

**Country of residence** – Indicate the country where you normally, customarily, or routinely live.

**Identification number** – Enter the appropriate identification number. This will ensure that security or payment made for tax is credited to the correct account. Identification numbers must be used when filing your Canadian income tax return and on all correspondence with us.

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|--------------------------------------|--|
| <b>Social insurance number (SIN)</b> | – applies if an individual was formerly a resident or a deemed resident of Canada. Identification numbers must be used.        |
| <b>Individual Tax Number (ITN)</b>   | – is a number assigned to a non-resident individual who filed a Canadian income tax return in previous years.                  |
| <b>Subsidiary ledger number</b>      | – is a number assigned to a non-resident individual who has made a remittance but does not have a Canadian tax account number. |
| <b>Business number (BN)</b>          | – is a registration number for businesses such as corporations, partnerships, and sole proprietorships.                        |
| <b>Trust account number</b>          | – is a number assigned to a trust that filed a Canadian income tax return in previous years.                                   |

If you do not have a SIN or ITN, please complete Form T1261, *Application for a Canada Revenue Agency Individual Tax Number (ITN) for Non-Residents*, available on the Internet at [www.cra.gc.ca](http://www.cra.gc.ca). Include the completed form with your T2062.

**Applying for a BN**

Complete Form RC1, *Request for a Business Number (BN)*. Form RC1 and our pamphlet called *The Business Number and Your Canada Revenue Agency Accounts* are available on the Internet at: [www.cra.gc.ca](http://www.cra.gc.ca)  
Send the completed Form RC1 with a copy of the certificate of incorporation to the tax services office where you filed the Form T2062A.

**Details of property** – If a disposition includes more than one property, attach a piece of paper providing the details for each property. All amounts must be in Canadian dollars.

**Property jurisdiction** – include the municipality/city, province/territory, and postal code for the street address requested below in "Description of property".

**Description of property** – Include the following details:

Depreciable property, real property (other than capital property) and timber resource property – street address, plan number, lot number, registration number, serial number, and use of property (rental, lease, or business); a written description and the applicable class of asset according to Schedule II of the *Income Tax Regulations*.

Resource property – well or mine location, legal description, and street address.

**Proceeds of disposition or capital cost**

For dispositions of depreciable property, use whichever is less: the proceeds of disposition or capital cost. For dispositions of timber resource property and real property (other than capital property), use the proceeds of disposition.

**Undepreciated capital cost or cost amount**

For dispositions of depreciable property and timber resource property, use the undepreciated capital cost. For dispositions of real property (other than capital property), use the cost amount.

**Exemption**

If you are claiming an exemption from tax, such as under a tax convention, enter the exempt portion in column (4). Attach a note detailing the calculation of the exempt amount.

**Note:** You cannot claim outlays and expenses related to the disposition of property, including real estate commissions, brokerage fees, and legal and notary fees, when you file this form. However, you can claim these amounts when you file your Canadian income tax return.

**More information**

You can get information about residency status in Canada from Interpretation Bulletin IT-221, *Determination of an Individual's Residence Status*, or by contacting the International Tax Services Office at 613-952-3741 (calls from within the Ottawa area), 1-800-267-5177 (calls from other areas in Canada and the United States), or collect at 613-952-3741 (calls from outside Canada and the United States), or visit our Web site at: [www.cra.gc.ca](http://www.cra.gc.ca).

You can also get information from:

- |                           |        |  |
|---------------------------|--------|--|
| Information Circular      | 72-17  | – <i>Procedures Concerning the Disposition of Taxable Canadian Property by Non-Residents of Canada – Section 116</i> |
| Interpretation bulletins: | IT 171 | – <i>Non-Resident Individuals – Computation of Taxable Income Earned in Canada and Non-Refundable Tax Credits</i>    |
|                           | IT 176 | – <i>Taxable Canadian Property – Interests in and Options on Real Property and Shares</i>                            |
|                           | IT 419 | – <i>Meaning of Arm's Length</i>   |

## Supporting Document List

When you send us your completed Form T2062A, you must attach supporting documents so we can process your request. To help you, we have provided the following reference list. You can tick (✓) the boxes that apply to you.

### Transactions

#### Sale of depreciable property

If you sell depreciable property, include copies of:

- ☐ the sales agreement (actual disposition);
- ☐ the capital cost allowance (CCA) schedules for all years;
- ☐ documentation to support the cost amount and capital cost;
- ☐ a completed Form T2062, *Request by a Non-Resident of Canada for a Certificate of Compliance Related to the Disposition of Taxable Canadian Property*; and
- ☐ the offer to purchase (proposed disposition).

#### Rental Property

If you sell rental property, also include:

- ☐ documents to support the allocation of the proceeds between land and building;
- ☐ documents to support subsection 21(1) and (3) elections regarding capitalization of interest; and
- ☐ copies of Canadian income tax returns and notices of assessment for the last three years.

#### Leases

If you grant an interest in property, or dispose of an interest in property, include copies of:

- ☐ the right-of-way agreement;
- ☐ the surface lease agreement; or
- ☐ the leasehold interest agreement.

#### Vendor takes back mortgage

If the vendor takes back the mortgage include:

- ☐ a copy of the mortgage agreement.

#### Mortgage foreclosures and power of sale

If the transaction is a result of a mortgage foreclosure or power of sale, include copies of:

- ☐ the power of sale or court order; and
- ☐ the mortgage agreement.

#### Sale of Canadian resource property

If you sell Canadian resource property, include copies of:

- ☐ the petroleum and natural gas lease;
- ☐ the offer to purchase and conveyance agreement;
- ☐ Form T2062A, Schedule 1;
- ☐ documents to support pool balances;
- ☐ the sales agreement (actual disposition); and
- ☐ the purchase agreement (when property was acquired).

#### Sale of Canadian timber resource property

If you sell timber resource property, include copies of:

- ☐ CCA schedules for all years;
- ☐ documents to support any revenue received (e.g., logging contract, payments from sawmills);
- ☐ your Canadian income tax returns for the last three years;
- ☐ the offer to purchase (proposed disposition);
- ☐ the sales agreement (actual disposition);
- ☐ the purchase agreement (when property was acquired); and
- ☐ a calculation of the ACB.

#### Sale of partnership property

If you sell partnership property, include copies of:

- ☐ the sales agreement (actual disposition);
- ☐ the listing of partners;
- ☐ the partnership agreement; and
- ☐ the offer to purchase (proposed disposition).

#### Partnership interest

If the property is a partnership interest, include:

- ☐ a calculation of the ACB;
- ☐ a copy of the partnership capital account balance; and
- ☐ the purchase agreement (if interest was originally acquired from another partnership).

#### Partnership residual interest

If the property is a partnership residual interest, include:

- ☐ a calculation of the ACB.

#### Partnership continuing income right

If the property is a continuing income right, include:

- ☐ a calculation of the ACB; and
- ☐ documents to support the partner's share of income.

#### Claims for exemptions under tax conventions

If you are claiming an exemption under a tax convention, you have to give us proof of residence.

**Individuals** should include:

- ☐ copies of their most recent income tax returns from the treaty country; and
- ☐ a letter from the tax authority in the treaty country confirming their residency status.

**Corporations** should include:

- ☐ a copy of their charter;
- ☐ copies of their most recent income tax returns from the treaty country;
- ☐ a letter from the tax authority in the treaty country confirming their residency status.

**Trusts and estates** should include:

- ☐ a copy of the trust agreement, indenture, or will; and
- ☐ copies of the most recent income tax returns from the treaty country; or
- ☐ a letter from the tax authority in the treaty country confirming the trust's residency status.

### Fresh start rule

If you are claiming an exemption under the *Canada-US Tax Convention*, Article XIII paragraph 9 (Fresh Start Rule), include:

- ☐ proof that you were a continuous resident of the United States from September 26, 1980, to the date of sale;
- ☐ the value of the property on December 31, 1971 (for property acquired before January 1, 1972); and
- ☐ a calculation of the exempt portion of the gain accrued to December 31, 1984; or
- ☐ an appraisal report for the fair market value of the property on December 31, 1984.

### Non-arm's length transactions

If the transaction is between non-arm's length parties, include:

- ☐ an appraisal report determining the fair-market value of the property at the time of disposition; or
- ☐ a letter of opinion from an appraiser or agent.

### Gift of property

If the transaction is a gift of property, include:

- ☐ a copy of the transfer deed.

### Section 85 elections (rollovers)

If a section 85 election is made on the transaction, include a copy of:

- ☐ Form T2057, *Election on Disposition of Property by a Taxpayer to a Taxable Canadian Corporation*; or
- ☐ Form T2058, *Election on Disposition of Property by a Partnership to a Taxable Canadian Corporation*; and
- ☐ all supporting documents including valuations, appraisals, and calculations showing how the agreed amounts were determined.

### Corporate reorganization

If the transaction is a result of a corporate reorganization, include:

- ☐ copies of documents explaining the reorganization;
- ☐ a list of steps involved in the reorganization; and
- ☐ a corporate organization chart.

### Deemed dividends – section 212.1 or subsection 84(3)

If a section 212.1 or subsection 84(3) deemed dividend results from the transaction, include the calculation of the:

- ☐ deemed dividend or paid-up capital reduction; and
- ☐ tax paid-up capital.

### Trusts and estates

If the vendor is a trust or estate, include the following information as well as documents related to the transaction:

- ☐ name and address of the trustee, executor, administrator, or other representative of the trust or estate;
- ☐ proof of residency of the trustee, executor, administrator, or other representative of the trust or estate;
- ☐ the trust or estate's country of residence; and
- ☐ disclosure that a trust is a party to the transaction.

### Charities and non-profit organizations

If the vendor is a charity or non-profit organization, include the following information as well as specific documents related to the transaction:

- ☐ proof that the organization is registered as a charity for tax purposes in the country of residence.

### Joint tenancy, tenancy in common, or co-ownership

If the vendor is a member of a joint tenancy, tenancy in common, or co-ownership, include the following information as well as specific documents related to the transaction:

- ☐ a list of names and addresses of all members; and
- ☐ the percentage of ownership of each member.

### Elections

If you previously made an election on the property, include a copy of the election form such as:

- ☐ Form T664 or T664 (Seniors), *Election to Report a Capital Gain on Property Owned at the end of February 22, 1994*; or
- ☐ Form T2061A, *Election by an Emigrant to Report Deemed Dispositions of Taxable Canadian Property and Any Resulting Capital Gain or Loss*.
- ☐ Electing under subsection 45(2), deems the change in use from personal to income producing not to have occurred.\*
- ☐ Electing under subsection 45(3), deems the change in use from income producing to personal not to have occurred.\*
- \* If there was a change in use and no election was made provide the fair market value of the property at the time the change occurred.

### Payment of tax or security

If you are making a payment of tax, include:

- ☐ the trust cheque, certified cheque, bank draft, or money order;
- ☐ the bank guarantee; or
- ☐ evidence that security has been given.

For CRA use only

Account or subsidiary  
ledger number

Amount of payment

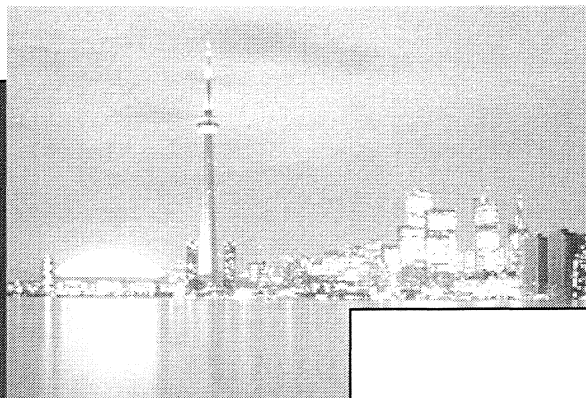




**REQUEST BY A NON-RESIDENT OF CANADA FOR A CERTIFICATE OF COMPLIANCE RELATED TO THE DISPOSITION OF CANADIAN RESOURCE OR TIMBER RESOURCE PROPERTY, CANADIAN REAL PROPERTY (OTHER THAN CAPITAL PROPERTY), OR DEPRECIABLE TAXABLE CANADIAN PROPERTY**

**Note:** The information you provide on this form is collected under the authority of the *Income Tax Act* (ITA) and is protected by the provisions of the *Privacy Act*. It is used to process requests for certificates of compliance under section 116 of the ITA and is retained in information bank number CRA-PPU 111.

Tick (✓) the box that applies to you					<input type="checkbox"/> Proposed disposition					<input type="checkbox"/> Completed disposition									
<b>Vendor (non-resident)</b>																			
<input type="checkbox"/> Corporation					<input type="checkbox"/> Trust					<input type="checkbox"/> Partnership					<input type="checkbox"/> Individual				
Business number (BN)					Trust account number					Social insurance, temporary tax, or subsidiary ledger number									
Last name (print)					First name and initial (print)					Date of birth YYYY MM DD					Date of departure from Canada YYYY MM DD				
Present address										Telephone									
Country of residence (see the instructions on page 1)										Fax									
Representative name (By completing this information, you authorize the person named to act as your representative in matters concerning this request).										Telephone									
Representative address										Fax									
1. Is the disposition subject to an election under section 85 (transfer of property to a company)? <span style="float:right"><input type="checkbox"/> Yes <input type="checkbox"/> No</span>																			
2. Do you hold or plan on holding a mortgage as a result of the disposition? <span style="float:right"><input type="checkbox"/> Yes <input type="checkbox"/> No</span>																			
3. Have you received any income, including rent, royalties, or lease payments, from the property? If <b>yes</b> , complete the following: <span style="float:right"><input type="checkbox"/> Yes <input type="checkbox"/> No</span>																			
<input type="checkbox"/> Non-resident tax was withheld. Give name and address of person who withheld the tax. ▶					From: YYYY MM DD To: YYYY MM DD														
<input type="checkbox"/> Non-resident tax was not withheld. State the period when income was received from the property (attach income statements that show the amount of gross income). ▶																			
If <b>no</b> , state the use of the property during the period of ownership. ▶																			
4. If you have outstanding balances for taxes, including income or excise taxes, custom duties, or the goods and services tax/harmonized sales tax (GST/HST), give the identification or account number(s) for the outstanding balances. ▶																			
5. State the last tax year for which you filed a Canadian income tax return, if applicable. ▶																			
6. Is the disposition of property a non-arm's length transaction or a gift inter-vivos? <span style="float:right"><input type="checkbox"/> Yes <input type="checkbox"/> No</span> If <b>yes</b> , and the disposition is at less than fair market value, enter the fair market value at the time of the disposition in column (1) below.																			
<b>Purchaser</b>																			
Last name					First name and initial (print)					Telephone									
Present address										Fax									
Representative name										Telephone									
Representative address										Fax									
<b>Details of property (see the instructions on page 1 for more information)</b>																			
<input type="checkbox"/> Depreciable property					<input type="checkbox"/> Real property (other than capital property)					<input type="checkbox"/> Canadian resource property					<input type="checkbox"/> Timber resource property				
Date or proposed date of disposition ▶					YYYY MM DD					Vendor's acquisition date ▶					YYYY MM DD				
Property jurisdiction ▶					Municipality/city					Province/territory					Postal code				
Description of property																			
(1) Proceeds of disposition or capital cost			(2) Undepreciated capital cost or cost amount			(3) Income or (loss) Column(1) less column (2)			(4) Exemptions			(5) Net income or (loss) Column (3) less column (4)							
\$			\$			\$			\$			\$							
<b>Payment of tax. Enter Part 1 federal tax on net income.</b> ▶																			
(For resource property, enter the amount from line (H) of Form T2062A, Schedule 1.) \$																			
<b>Certification</b>																			
I, _____, certify that the information given on this form is, to the best of my knowledge, correct and complete.																			
Name																			
_____																			
Date					(Authorized person's signature)					(Position or office)									



**Heenan Blaikie**

**S.116 Filing Obligations in Respect of Capital  
Distributions to Non-Resident Beneficiaries of  
Canadian Resident Trusts/Estates**

**Mary Anne Bueschkens  
Heenan Blaikie LLP, Toronto**

**The Six Minute Estates Lawyer 2009  
The Law Society of Upper Canada  
April 6, 2009  
Donald Lamont Learning Centre, Toronto**

## The Section 116 Process

- **CRA requires non-resident vendors who dispose of “taxable Canadian property” to notify CRA of disposition no later than 10 days after the disposition**
  
- **Taxable Canadian property includes**
  - Real property situated in Canada
  - Capital property used in carrying on business in Canada
  - Shares of a private corporation resident in Canada
  - *Capital interests in personal trusts resident in Canada*

## **The Section 116 Process (cont'd)**

- **Transfer by trust of property to a capital beneficiary triggers trustee obligation (CRA Windows 2005-0149961E5)**
- **Definition of “disposition” in s. 248(1) includes a transfer of property that is part of a taxpayer’s capital interest in a trust made after 1999**
- **Therefore non-resident beneficiary who receives capital distribution from a trust (even cash distribution) is considered to have disposed of TCP**
- **CRA also takes position that the Canadian resident trust “acquires” part of that interest**

## **CRA Windows 2005-0149961E5**

- **“Our view is that the trust making a distribution of capital to the non-resident beneficiary is considered to be the purchaser for the purposes of subsection 116(5) of the *Income Tax Act* with the result that the trust would be liable under section 116(5) to pay the amount described ...”**

## **The Section 116 Process (cont'd)**

- **Purchaser liable for withholding 25% of gross proceeds payable to non-resident and to remit to CRA by 30 days**
- **Penalties and interest if it fails regardless of whether there is a tax liability**
- **Withholding can be eliminated or reduced if non-resident vendor gets certificate of compliance (s.116 certificate)**

## **Concept of “Treaty-Exempt Property”**

- **Non-resident persons who reside in a country with an income tax convention with Canada are generally exempt from taxation with respect to dispositions of taxable Canadian property**
- **The exemption normally does not extend to taxable Canadian property whose underlying value is based on real property situated in Canada**
- **To simplify the 116 certificate process, the Income Tax Act was amended in 2008 to expand definition of excluded property to include “treaty-exempt property)**

## **Treaty-Exempt Property s.116 (6.1)**

- **Definition of treaty exempt property requires that at time of disposition:**
  - (a) it is “treaty-protected property” of the non-resident person; and
  - (b) if the purchaser and non-resident person are related at the time, the purchaser provides a notice as required under subsection 116 (5.02) in respect of disposition
- **Definition of treaty-protected property in s. 248 (1) means a property any income or gain from the disposition of which by the taxpayer would be exempt from Part I tax because of treaty**



## **Treaty-Exempt Property (cont'd)**

- **Where excluded property is a treaty-exempt property, s.116(5) provides that for dispositions after 2008, a purchaser is NOT obligated to withhold under 116(5) if s.116(5.01) applies to the acquisition of property**
- **S.116(5.01) refers to a “treaty-protected property” which definition ultimately depends on definition of “treaty-exempt property”**

## **Excluded Property The Treaty-Exempt Property**

- **Three requirements:**
  1. **Purchaser concludes after reasonable enquiry that vendor resides in country that has tax treaty with Canada**
    - no definition of ‘reasonable enquiry’
    - Form T2062C suggests mechanism that “generally” will meet test
  2. **Property is a “treaty protected property” of vendor based on treaty referred to in 1.**

**Treaty protected property (“TPP”) is property (from which) the income or gain would be exempt from Canadian tax because of treaty with another country**

**Excluded Property**  
**The Treaty-Exempt Property (cont'd)**

- 3. Purchaser must send notice to CRA within 30 days of acquisition with:**
- (a) date of acquisition**
  - (b) name and address of non-resident vendor**
  - (c) sufficient description of property**
  - (d) amount paid or payable**
  - (e) name of treaty country**

# **Benefit of New Definition**

## **1. Related parties – likely**

**Should know whether treaty exemption applies**

## **2. Unrelated Parties**

**Onus on purchaser re determination of residence – whether a treaty protected property**