(1) both the transferor and transferee were residents of Canada for the purposes of the *ITA* at the time of transfer;

(2) the transferee does not elect for the transfer to occur on a fully taxable basis; and

(3) in the case of the life interest trusts described in (b), (c), and (d) above, certain tests are met relating to the entitlement to income and access to capital.

Normally when capital property is transferred to a spouse, common-law partner, or a trust set up primarily for such a person, any income or loss from property (as opposed to business), capital gain or capital loss realized by the transferee will be attributed to the transferor while they are a resident of Canada.

See the following sections in this manual for further discussion of spousal trusts, common-law partner trusts, alter ego trusts, and joint spousal or common-law partner trusts:

- "Spousal/Common-Law Partner Rollovers as a Tax Deferral Technique" in this chapter, and
- "Spousal or Common-Law Partner Trust" and "Alter Ego and Joint Spousal or Common-Law Partner", both in chapter 6.

IV. TAX DEFERRAL TECHNIQUES IN SUCCESSION PLANNING [§1.13]

Although tax deferral techniques generally do not avoid tax, a lengthy deferral can be as valuable as an actual tax saving. Further, an absolute tax savings may arise if tax rates drop over time or income is deferred until a year where the taxpayer has little or no income. There are many applicable strategies to delay tax liabilities.

A. SPOUSAL/COMMON-LAW PARTNER ROLLOVERS AS A TAX DEFERRAL TECHNIQUE [§1.14]

The spousal/common-law partner rollovers are the most common tax deferral mechanism used in estate planning. These rollovers provide a significant incentive to transfer property to a spouse or common-law partner either during one's lifetime or at death so that the tax arising on death is deferred until the death of the surviving spouse or common-law partner.

Section 70 of the *ITA* provides for the rollover of capital property, resource property, and land inventory to a spouse, common-law partner, spousal trust, or common-law partner trust as a consequence of a taxpayer's death, while s. 73(1) provides for a rollover for an *inter vivos* transfer of only capital property to such persons or trusts. Separate rollovers permit an RRSP or an RRIF to be transferred to a surviving spouse or common-law partner (but not to a trust) on a tax-free basis (see also chapter 4 (Registered Investment Accounts in Estate Planning)). When property is acquired under a rollover, the transferee acquires the property at the transferor's cost for tax purposes, so that the gain would be recognized if the property retains its value and the transferee disposed of the property or still owned the property on death.

The requirements of the rollover in s. 70 for property that is transferred on a taxpayer's death on a rollover basis to a spouse, common-law partner, or spousal trust are:

(1) the property is capital property, resource property, or land inventory of a taxpayer;

(2) the taxpayer was resident in Canada immediately before their death;

(3) the property is transferred as a result of the taxpayer's death, and for the benefit of their spouse or common-law partner;

(4) the spouse or common-law partner is a resident of Canada or the trust for the spouse or common-law partner is resident in Canada (in which case the spouse/beneficiary does not need to be a resident of Canada), subject to treaty relief;

(5) if transferred to a trust, the trust is created by the taxpayer's will; and

(6) the property vests indefeasibly in the spouse, common-law partner, spousal trust, or common-law partner trust within 36 months after the death of the taxpayer or within such other time as the CRA agrees to in response to a written request made within the initial 36-month period by the taxpayer's legal representative. (Obtaining an extension from the CRA to the 36-month period should always be considered if an estate is subject to wills variation litigation and the beneficiaries include a surviving spouse or common-law partner.)

To qualify as a spousal trust or common-law partner trust, the spouse or common-law partner, under the terms of the trust, must be *entitled* to receive all of the income, as defined for trust law purposes and not for purposes of the *ITA*, of the trust that arises before the spouse's or common-law partner's death (see chapter 6 (Inter Vivos Trust Planning)). Further, under the terms of the trust, no person other than the spouse or common-law partner may, before the spouse's death or common-law partner's death, receive or otherwise obtain the use of any of the income or capital of the trust (although payments to another person for the exclusive benefit of the spouse may be permissible). See Canada Revenue Agency, Income Tax Folio S6-F4-C1, "Testamentary Spouse or Common-law Partner Trusts" for further detail on these requirements.

The CRA has argued that the spousal trust or common-law partner trust rollover is not available where other persons are entitled to receive or otherwise obtain the use of trust capital under the general power provisions commonly found in wills and *inter vivos* trusts. This might arise where the trust holds a life insurance policy and the policy premiums must be paid from the trust property (see CRA Document No. 2018-0761511C6 F, "Rollover to spousal trust on death", dated October 5, 2018) or where the terms of the trust allow the trustee to make donations to charities before the death of the spouse (see CRA Document No. 2022-0942141C6 "Rollover under 70(6) and gifts to charities", dated October 7, 2022). General power provisions should be subject to a notwithstanding clause that provides that the general powers cannot be exercised in a fashion that would be inconsistent with a spousal trust or common-law partner trust qualifying as such under the *ITA*. See "Spouse Is Designated Beneficiary" in chapter 4.

As mentioned, s. 73 provides for a similar rollover in respect of *inter vivos* contributions of capital property to spousal and common-law partner trusts, self-benefit trusts described in s. 73(1.02)(b)(ii), joint spousal and common-law partner trusts, and alter ego trusts. These latter two types of trusts are often used as an alternate vehicle for a will. See also chapter 6 (Inter Vivos Trust Planning) for a discussion of the use of trusts in estate planning.

The rollover provision with respect to the transfer of property from a deceased taxpayer to a spouse, common-law partner, or a trust for such person is extremely important in succession planning in that tax can be deferred until the death of the last of the two spouses. Concerns about transferring capital property, resource property, and land inventories to a surviving spouse who may not be capable of prudently managing the property can be dealt with by transferring the property to a spousal or common-law partner trust rather than directly to the spouse. This is not the case in respect of an RRSP or RRIF, as the rollover is only available if the asset passes directly to the spouse or common-law partner.

Consider the circumstance where a capital gain on property transferred from one spouse or common-law partner to another could qualify for the LCGD in s. 110.6(2) in respect of QFFP and s. 110.6(2.1) in respect of QSBCS. The maximum amount of the QFFP deduction is $1 million and the maximum amount for the QSBCS deduction, indexed to inflation after 2014, is $1,016,836 for 2024 (see comments about the proposed increase to the QFFP deduction and QSBCS deduction to $1.25 million in "Lifetime Capital Gain Deductions" in this chapter). If the deceased had significant non-capital loss or net capital loss carry-forwards, or donation tax credits, then the deceased's estate should elect under s. 70(6.2) for the spousal rollover provisions in s. 70(6) and (6.1) not to apply to such property. This permits the transfer to occur on a fully taxable basis (the estate cannot elect an amount between the fair market value and the adjusted cost base of the property), on a property-by-property basis, and without subjecting the estate to tax, so that the transferee can receive the property at an increased cost for tax purposes.

B. FARM AND FISHING PROPERTY ROLLOVERS AS A TAX DEFERRAL TECHNIQUE [§1.15]

Section 70 of the *ITA* provides for the rollover of certain farm property and fishing property to a child resident in Canada on the death of a parent (and vice versa), while s. 73 provides for a rollover in respect of certain *inter vivos* transfers of farm property and fishing property. "Child" for the purposes of the farm and fishing rollovers includes grandchildren, great grandchildren, and persons under 19 who are wholly dependent on a taxpayer for support and of whom the taxpayer has custody. Because the deferral on the death of the parent is pursuant to s. 70, it is not available where the property is held in a life interest trust at the time of the parent's death.

The realization of a gain can be deferred in connection with land, depreciable property, and, in the case of *inter vivos* transfers only, goodwill (for example, milk and egg quotas, and fishing licences) used principally (more than 50%) in the business of farming or fishing in which a family member was actively engaged on a regular and continuous basis, "shares of the capital stock of a family farm or fishing