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STEP Canada's 25th Annual National Conference

STEP Inside is published three times a year by the Society of Trust and Estate Practitioners (Canada), an organization of individuals from the legal, accounting, corporate trust and related professions who are involved, at a specialist level, with the planning, creation, management of and accounting for trusts and estates, executorship administration and related taxes. STEP Canada has branches in the Atlantic region, Montreal, Ottawa, Toronto, Winnipeg, Edmonton, Calgary, and Vancouver; and three chapters in London and Southwestern Ontario, the Okanagan Valley, and Saskatchewan.

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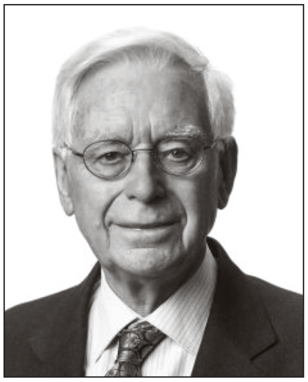

The trusts community in Canada is small, but we are blessed to have had a few towering figures in it. The esteemed Professor Donovan Waters, who died September 9, 2023, was one such figure. Renowned within Canada and internationally for his expertise in trust law, Donovan approached the topic with a vigour and intellectual curiosity that set him apart. He shared his love of trusts with anyone who was interested. He provided countless articles, lectures, and even our famed fireside chat at STEP Canada's 15th Anniversary.

Donovan's contributions to the development of trust law in Canada and to STEP cannot be overstated. He was instrumental in the establishment of STEP Global and, a few years later, of STEP Canada. His seminal text, *Waters on Trusts*, continues to be the leading authority on the subject and is consistently cited by Canada's highest courts when dealing with trust issues. Upon reviewing the first edition in 1974, eminent legal scholar Peter W. Hogg stated:

> This handsomely produced book is the first treatise on the law of trusts in Canada. Any book which filled such a deplorable gap in our literature would be entitled to a warm welcome. This book, however, is far better than we have any right to expect of a pioneer. It is original, both in its organisation and in its treatment of particular topics; it is Canadian in its scrupulous citation and discussion of Canadian cases and statutes; and it is written in an easy style which made it a pleasure to perform the reviewer's task of reading it from cover to cover. ... The labour needed to write this book must have been enormous. But I think all readers will agree that the product is of commensurate value.

In addition to explaining the law of trusts, which would have been a significant task on its own, Donovan sought to advance and improve it. He succeeded.

STEP Canada will be memorializing Donovan more formally in the near future, but on behalf of everyone on the STEP Inside Board and at STEP Canada, we send our sincere condolences to his family and friends. Donovan leaves a legacy that will survive him for generations, which is fitting for a TEP.

STEP Canada's 25th Annual National Conference

STEP Canada strives to engage our members in many ways—through *STEP Inside*, local programming, and education programs, to name a few—but our keystone event is the STEP National Conference. This year, our members and sponsors gathered in person for the first time since 2019 to celebrate the 25th anniversary of the conference on June 19-20 at the Sheraton Centre Hotel in Toronto.

Our members and sponsors accepted our conference invitation with enthusiasm. More than 1,000 people attended, with 711 of them electing to join us in person, and sponsorship opportunities sold out, with 40 organizations demonstrating their support for STEP Canada's National Conference. We had a thought-provoking keynote speech by Ajay Agarwal on the future of artificial intelligence and how it will affect our professions and lives, and we were pulled on to the dance floor by Canada's best cover band, Dwayne Gretzky, at the 25th Anniversary Celebration Event at The Carlu.

More than 90 percent of attendees who responded to our post-event survey indicated that they had a good or excellent experience at the conference. This very positive response perhaps reflected people's eagerness to reconnect with friends and fellow TEPs from across Canada and worldwide. It was also no doubt based on the superb quality of the plenary and break-out technical sessions. The pandemic may have changed many things for many people, but one thing that endured was the excellent content provided by TEPs for TEPs, and it was certainly engaging to have those speakers back in person.

In this edition of *STEP Inside*, we showcase a few of the top-rated presentations from the conference in a different format.

Chantal S. Copithorn, TEP, and Ian Pryor, TEP, take us through the main tax considerations associated with moving from Canada in "Canadian Tax Residence—Should I Stay, or Should I Go?" The key lesson for all of us who assist with departure planning is to plan ahead!

Krista Clendenning, TEP, provides a back-to-basics outline of fundamental issues in estate administration from a tax perspective, based on her talk with William Dion-Bernard, TEP, Ruth March, TEP, and Catherine Watson Coles, TEP, in "Advising the Executor: The Lawyer's Tax Checklist for Estate Administration." This article sums up the leading tax considerations that executors face, and will likely be a resource that many practitioners return to on a regular basis.

Pam Prior, TEP, and Nathalie Marchand, TEP, then take us on a deeper dive into "Tax and Trust Issues to Consider when Planning with Spousal or Life Interest Trusts," for those looking to move assets outside the administration of the estate. While it has been a few years since the major changes in life interest trusts, such trusts are becoming more common, as are the tax issues associated with them. Pam and Nathalie distill many complex issues dealing with these trusts in their excellent article.

Finally, Sanjana Bhatia, TEP, and Jennifer Eshleman, TEP, demystify the ever-evolving world of making and interpreting beneficiary designations in "Beneficiary Designations: A Dive into Uncertain Waters." While *Pecore* may have opened Pandora's box for challenges to what had previously been a straightforward planning tool, Sanjana and Jennifer do a wonderful job of itemizing the contents of the box (though we'll need some judicial and/or legislative help to pack everything back inside).

This issue of *STEP Inside* also, of course, includes our cornerstone cross-country checkup of important developments affecting our members, and concludes with a note from STEP Canada's new chair, Rachel Blumenfeld, TEP.

We would like to thank all of those who supported STEP Canada's 25th Annual National Conference, and we invite you to join us next year on June 3-4, again at the Sheraton Centre Hotel in Toronto. If you have ideas for sessions or content that you would like to see at the 2024 conference, please submit them to Janis Armstrong before November 15 at jarmstrong@step.ca.

Canadian Tax Residence—Should I Stay, or Should I Go?

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Taxpayers frequently travel for pleasure, for work, or for some combination thereof, and they may end up growing fond of a foreign country. More and more taxpayers are leaving Canada for warmer climates, business-friendly jurisdictions, and lower-tax regimes. The decision to emigrate is likely a difficult one that includes family and lifestyle factors—and that is even before the potential income tax implications are considered. Tax issues, especially in cases where a taxpayer holds material assets including private company shares and Canadian real estate, can be extremely complicated, making the decision to emigrate even more daunting.

The purpose of this article is not to provide an in-depth summary of Canadian tax residency and the factors that the Canada Revenue Agency (CRA) weighs in determining an individual's residence. Rather, it is to discuss a number of tax issues facing an emigrating individual who owns shares of a private company or Canadian real estate, and the planning that should be considered prior to departure.

Deemed Disposition

The *Income Tax Act*[1] ("the Act") provides that an emigrating taxpayer is deemed to dispose of each property they own immediately prior to departure, with certain exceptions, for proceeds equal to the fair market value (FMV) of the properties, and to reacquire them at an equivalent cost.[2] Properties that are exempted from this deemed disposition rule include directly owned Canadian real estate, registered plans, Canadian life insurance policies, and interests in certain personal trusts resident in Canada. Any accrued gains are subject to tax, which is commonly referred to as "departure tax." Depending on the nature of the assets, the taxpayer may want to obtain a formal valuation from an expert if the FMV of an asset is not easily determinable (for example, private company shares).

The taxpayer is required to file certain forms with their personal income tax return to report the deemed disposition.[3]

The deemed disposition rule does not apply to certain properties held by an individual (other than a trust) who has been resident for tax purposes in Canada for a period of less than 60 months during the 120-month period preceding the date of departure. Exempted properties include those owned at the time the individual became a Canadian resident and properties inherited while the individual was resident in Canada.[4]

If the taxpayer does not have liquid assets to fund the departure tax, the taxpayer can elect to post security to defer the payment.[5] Where the election is filed, tax is deferred until the property is actually disposed of or is deemed disposed of on death. If, by chance, the taxpayer decides to return to Canada, they can elect to unwind the departure tax and the security will be returned.[6] This can be beneficial in cases where the taxpayer is departing Canada with the expectation that they may immigrate back to Canada in the future. The process for posting security can be a lengthy one,

> ...an emigrating taxpayer is deemed to dispose of each property they own immediately prior to departure, with certain exceptions, for proceeds equal to the fair market value of the properties, and to reacquire them at an equivalent cost.

1 *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), as amended. Unless otherwise stated, statutory references in this article are to the Act.
2 See subsection 128.1(4).
3 See forms T1161 and T1243.
4 See subparagraph 128.1(4)(b)(iii).
5 See subsection 220(4.5) and form T1244.
6 See subsection 128.1(6).

and if the intention is to post security, it is recommended that discussions with the CRA start as soon as possible, because the security needs to be in place on or before the deadline for filing the taxpayer's income tax return for the year of emigration.

Private Company Shares

A deemed disposition of private company shares will result in an increase in the cost base of the shares equal to their FMV at the date of departure. However, double tax may arise on future distributions from the private company because the paid-up capital (PUC) of the shares is not increased. For example, where a taxpayer departs owning shares of a private Canadian company ("Canco") that holds an investment portfolio, the taxpayer will pay departure tax based on the FMV of the Canco shares. If no planning is implemented, Canco will incur additional tax when it sells the investments, and then withholding tax at a rate of 25 percent[7] will apply on the distribution of the after-tax proceeds or the deemed dividend arising on a redemption of the shares.[8]

Transactions should be considered prior to departure to increase the PUC of the shares to their adjusted cost base (ACB), or to liquidate corporate assets to allow for the use of corporate tax attributes (such as the capital dividend account and refundable tax balances). Depending on the nature of the assets held by the private company, such transactions could be complex. In the example above, Canco may liquidate the investments, thus triggering capital gains and creating favourable tax attributes that can be used to minimize the overall tax burden when funds are extracted from Canco. If this type of planning is implemented, however, the taxpayer will lose the ability to defer tax because they are triggering all tax in preparation of emigration. This may not always be beneficial, and the benefit of the deferral should be weighed against the triggering of the tax.

Where a private company owns illiquid assets, it may not be possible to liquidate the assets, so Canco will need to consider whether other transactions can be implemented to trigger favourable tax attributes that can be utilized before departure to mitigate the potential double tax.

Careful consideration should be given to the structuring of pre-emigration transactions. Case law has caused some uncertainty regarding the ability to implement certain surplus-stripping transactions.[9] For example, the taxpayer in *Canada v. MacDonald*,[10] who was planning to emigrate, sold his private company shares to his brother-in-law in exchange for a promissory note. The brother-in-law transferred the shares to a new company ("Newco") in exchange for a promissory note. The private company paid a dividend to Newco, which repaid the note to the brother-in-law, who used the funds to repay the note to the taxpayer. The private company was then wound up into Newco. The Tax Court of Canada found that neither the general anti-avoidance rule in section 245 nor subsection 84(2) applied on the windup. However, the Federal

Court of Appeal overturned this decision and found that subsection 84(2) applied to recharacterize the amount of the note less the PUC as a dividend, on the basis that the distribution was made in the course of a windup.

Canadian Real Estate

As mentioned above, Canadian real estate that is held directly is exempt from departure tax. However, if such property continues to be held by the non-resident after departure, it will continue to qualify as taxable Canadian property (TCP) of the taxpayer,[11] and any income or gains thereon will be subject to Canadian income tax.

If the property was the taxpayer's home prior to departure, it may qualify as the taxpayer's principal residence

7 This rate may be reduced pursuant to an income tax treaty.
8 Calculated as the redemption proceeds less the PUC of the shares pursuant to subsection 84(3).
9 That is, transactions that ultimately tax corporate surplus at capital gains rates as opposed to dividend rates.
10 *Canada v. MacDonald*, 2013 FCA 110.
11 Defined in subsection 248(1).

at the time of departure; however, the exemption cannot be claimed unless the property is disposed of. A discussion of the principal residence exemption (PRE) is beyond the scope of this article, but, in general terms, the PRE provides relief from tax on a realized gain depending on the number of years the property was lived in relative to the number of years it was owned, for years in which the taxpayer was resident in Canada.[12]

A taxpayer who plans on holding a former principal residence after emigrating may want to elect to trigger the accrued gain realized on departure in order to maximize the PRE.[13] The benefit of doing this is that the ratio will not be skewed by the years in which the taxpayer owned the property but was not resident for tax purposes in Canada or did not ordinarily inhabit it. If the election is made, the cost of the property will be increased to the FMV of the property at the time of departure. When the property is eventually sold, only the accrued gain from the time of departure until the date of sale will be taxable. For example, a taxpayer's principal residence has an FMV of $400,000 on the date of departure; the taxpayer elects to trigger the gain and claims the PRE for the year of departure. After departure, if the taxpayer sells the home for $500,000, they will be subject to Canadian tax on the $100,000 increase in FMV from the date of departure.

Unfortunately, many countries do not provide for an increase in the cost base of property on immigration. As a result, the taxpayer may have to pay tax in the foreign jurisdiction on the gain for which the PRE was claimed, and there is no Canadian tax on which to claim a foreign tax credit. Some Canadian tax treaties provide relief for this.[14]

Caution is needed if the property is held post-departure and there is a plan to rent it out to earn income. The exemption from departure tax will still apply on the property, but the owner may still be deemed to have disposed of the property because of the "change in use" rules, which will apply because there is a shift from personal-use property to rental property.[15] If this is the case, an election is available to avoid the deemed disposition, which can allow the tax to be deferred until the sale.[16]

> Caution is needed if the property is held post-departure and there is a plan to rent it out to earn income. The exemption from departure tax will still apply on the property, but the owner may still be deemed to have disposed of the property because of the "change in use" rules, which will apply because there is a shift from personal-use property to rental property

Where Canadian real estate is actually sold or deemed to be sold after the taxpayer ceases to be resident in Canada, the purchaser of the property will be required to withhold and remit tax to the CRA on behalf of the non-resident owner because the property is TCP.[17] If no steps are taken, the purchaser will be required to withhold and remit 25 percent of the purchase price. If the non-resident applies for a clearance certificate,[18] the withholding tax may be reduced to 25 percent of the accrued gain. The timing for applying for the clearance certificate is very sensitive. Application should be made prior to the closing of the sale of the property, or within 10 days of closing, to access this reduced withholding tax.

A detailed analysis of the application of Canadian tax and compliance in respect of a non-resident earning rental income is beyond the scope of this article, but these should be considered prior to making a decision to retain the property post-departure. In basic terms, *gross* rental income earned by a non-resident is subject to 25 percent withholding tax. However, this tax can be reduced to 25 percent of *net* rental income where the taxpayer elects to file a separate Canadian tax

12 See section 54 for the definition of "principal residence" and paragraph 40(2)(b) for the calculation of the exemption amount.
13 See paragraph 128.1(4)(d).
14 The Canada-US tax treaty and the Canada-Australia tax treaty are two examples.
15 See subsection 45(1).
16 See paragraphs (b) and (d) of the definition of "principal residence" in section 54, and subsection 45(2).
17 See section 116.
18 See section 116.

return.[19] To access this reduction in withholding tax, the non-resident must have a Canadian agent or a tenant remit the tax on their behalf by the 15th of the month after the month for which the rental income is paid. This can help alleviate cash flow issues. If, as a result of rental expenses, the tax owing is less than 25 percent of the net rental income, a refund will be issued after the return is filed. Note that capital cost allowance cannot be claimed in this instance without voiding the election to defer the deemed disposition on the change in use of the property.[20]

Canco Owning Canadian Real Estate

Where a taxpayer decides to leave Canada owning shares of a private company that owns real estate (rather than liquid assets), the shares will be deemed to be disposed of and departure tax will apply on the accrued gain in the shares. As discussed above, the taxpayer will get an increased cost in the shares of Canco equal to the FMV of the shares at the time of departure; however, the PUC of the shares will not be increased.

Unfortunately, unlike the situation where real estate is held directly, there is no exemption from departure tax for the shares of a Canco that owns real estate. However, many of the cumbersome compliance issues discussed above with respect to directly held real estate continue to apply. For example, where more than 50 percent of the FMV of the shares of Canco derive their value, directly or indirectly, from Canadian real property or Canadian resource property, the shares of Canco will qualify as TCP. This results in the application of section 116 on any future disposition or deemed disposition of the shares of Canco.

For example, if the non-resident decides to sell shares of Canco post-departure, the result will be a disposition of TCP for tax purposes, and section 116 should be complied with to minimize withholding tax on the gain. In this case, the gain will be limited to the increase in value since the time of departure, because the taxpayer has an increased cost in the shares of Canco as a result of the deemed disposition on departure. If a clearance certificate is not obtained, the taxpayer will be considered to be non-compliant and the purchaser will need to remit 25 percent of the sale proceeds.

Where Canco decides to redeem shares held by the non-resident, the result will be a deemed dividend equal to the difference between the redemption proceeds and the PUC of the shares.[21] As noted above, while the cost of the shares was increased on departure, the PUC remains unchanged. This deemed dividend amount will be subject to Canadian withholding tax and can result in double tax for the taxpayer (even without considering the tax implications in the foreign jurisdiction). In most cases, consideration should be given to extracting funds prior to departure or planning to increase PUC.

As occurs with a redemption, where Canco declares dividends to the non-resident shareholder, the Canadian withholding tax rate of 25 percent will apply to the taxable dividend and to any capital dividend (not taxable to Canadian tax residents), unless the rate is reduced by an income tax treaty. Most Canadian treaties include provisions to reduce withholding rates to 15 percent for dividends received by an individual, depending on certain ownership criteria.

In addition to all of the family, lifestyle, and economic factors to consider, a taxpayer should consider the above-noted tax issues as part of the planning process when contemplating a potential departure.

19 See section 216.
20 See subsection 45(2).
21 See subsection 84(3).

Advising the Executor: The Lawyer's Tax Checklist for Estate Administration

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The presentation by William Dion-Bernard, Ruth March, and Catherine Watson Coles at STEP Canada's 25th Annual National Conference provided helpful reminders and useful tips for those of us working in the world of estate administration. This article collects some of the highlights from the session.

A Tax Checklist for Estate Administration

- ❑ Gather relevant asset information
- ❑ Consider the tax effect and burden of each asset, whether the asset is passing through or outside the estate
- ❑ Consider whether there is sufficient liquidity to pay estate expenses and taxes
- ❑ Consider whether there are foreign assets
- ❑ Consider whether the deceased died testate or intestate, and whether probate is required
- ❑ Consider whether any life events affected planning, such as marriage, divorce, or change of residency
- ❑ Consider whether there are charitable donations
- ❑ Chart the tax plan and filing deadlines

Impact of Common-Law Partner Versus Spouse Status

The treatment of common-law partners varies between Canadian jurisdictions when it comes to whether the partner inherits on intestacy or has the first right to administer the estate. However, qualifying common-law partners are treated the same as spouses under the *Income Tax Act*.

A surviving spouse or common-law partner may have capital property and land inventory rolled over to them, such that they acquire these assets at the deceased's adjusted cost base. These rollovers defer the income tax that would otherwise have been applicable on the death of the first-to-die spouse or common-law partner.

The rollover of assets to a surviving spouse or common-law partner happens automatically for tax purposes. However, the executor can elect out of the rollover of capital assets, such that the disposition will take place at fair market value rather than at the deceased's adjusted cost base, and capital gains will be reported on the deceased's terminal tax return. This election is made on a property-by-property basis. For example, the election can be made on a specific number of shares of a corporation (but not a fractional share). This election is particularly helpful where there are losses or other strategies available to minimize the payment of income taxes. There is no ability to elect out of the rollover on land inventory.

Consider RRSPs and RRIFs

Generally, the fair market value of a pension or savings plan as of the date of death is included in the terminal tax return. If the spouse or common-law partner is named as the beneficiary of the plan, the plan can be rolled over to the spouse or common-law partner without taxation. Where the surviving spouse or common-law partner is the residuary beneficiary of the estate but is not named as a beneficiary of the plan, a rollover can still be effected by the filing of a joint election by the executor and the spouse or common-law partner. If the survivor is named as the successor annuitant of a registered retirement income fund (RRIF), the survivor takes over the plan as their own. If the survivor is named as the beneficiary of a RRIF, the RRIF is transferred to the spouse or common-law partner and must be contributed to their own registered plan. Registered retirement savings plans (RRSPs) and RRIFs must be transferred to the survivor by the end of the calendar year following the year of death of the first-to-die to avoid taxation on the income earned after that period.

Successor Holder Designation on Tax-Free Savings Accounts

It is preferable to name a spouse or common-law partner as a successor holder rather than as a beneficiary of a tax-free savings account (TFSA) because the successor holder designation allows the survivor to take over the plan as their own. This designation avoids the taxation of income or gains in the TFSA after the death of the first-to-die until it is transferred to the survivor. Where other persons are designated as beneficiaries, any income earned after death is taxable.

Registered Education Savings Plans

Registered education savings plans (RESPs) are an asset of the subscriber, not the beneficiary named on the plan. Spouses or common-law partners may be named as joint subscribers on RESPs. A successor subscriber may also be named in the will. A successor subscriber will have control of the plan and may wind up the plan or change the designated beneficiary. For this reason, care should be taken in choosing successor subscribers.

Remember the Impact of Life Events

Marriage revokes a will in numerous Canadian jurisdictions, unless there is particular language included in the will that contemplates the particular marriage and satisfies the contemplation rule in that jurisdiction. Interestingly, in Prince Edward Island, a will containing the "in contemplation of marriage" clause must be signed within one month of the marriage. If the marriage occurs later than that date, it will revoke the will.

In some jurisdictions, divorce has a significant impact on the interpretation of a will. A divorced spouse will be treated as predeceased. The divorced spouse will be passed over as the first named in the will to administer the estate. If the divorced spouse was the residuary beneficiary, they will be bypassed and the alternative beneficiaries named in the will inherit. In other jurisdictions, divorce has no impact on the terms of the will.

Upon separation or divorce, there is no automatic change to beneficiary designations on insurance or registered investments. Revisions to such designations should be made as soon as the holder's intent has changed.

Further Exploration Required for Joint Property

There is a great deal of confusion surrounding jointly held property. Some clients are surprised to learn that jointly held assets are still subject to income tax. The beneficial interest of the deceased must be confirmed in order to properly report the disposition of the interest at death. Understanding the history of the arrangement can be essential. The deceased may have beneficially owned 100 percent of the asset, or some lesser amount. By way of illustration, where spouses jointly held an account, a presumption of gift applies unless otherwise rebutted by evidence. In this situation, a rollover between spouses is available. By way of further illustration, in a *Pecore*-style joint tenancy, a child may be named as a joint owner but hold their interest in trust for the parent and, ultimately, that parent's estate. The result in this circumstance is a full disposition of the asset in the hands of the deceased parent upon their death. In a similar arrangement with a different intent, a child may be added as a joint owner and a 50 percent disposition to the child may have occurred at the time of the change in ownership, resulting in a further disposition of the parent's remaining interest upon death. It is ideal to have documentation that provides clarity regarding the intention at the time of the transfer, but such documentation is often lacking or entirely non-existent.

> It is preferable to name a spouse or common-law partner as a successor holder rather than as a beneficiary of a tax-free savings account (TFSA) because the successor holder designation allows the survivor to take over the plan as their own.

Intestate Administration

If a deceased dies without a will, intestacy legislation sets out who will inherit the estate. There is generally a correlation between the beneficiaries of the estate and those who have first priority to administer the estate. Residence in the province in which the estate is to be administered is also generally a requirement for the appointment of an estate administrator. Heirs who may be next in line to inherit the estate may not be next in line to administer it if they reside outside the jurisdiction.

While a common-law partner in some jurisdictions will both inherit a preferential share of the estate and have first priority to administer it, in other jurisdictions common-law partners do not inherit on intestacy or have the right to administer their partner's estate.

Identify Issues Early

On a preliminary review of estate debts and tax estimates, consider whether there will be sufficient funds in the residue of the estate to cover these costs. If the estate is insufficiently liquid, it may have to obtain a loan. If a loan is made by the executor or a

beneficiary, repayment must occur within one year of the date of death in order to protect the estate's graduated rate estate (GRE) status.

Consider whether the will document is compliant with the legislative requirements of the jurisdiction in which probate is sought. If there are issues with the documentation, find out whether they can be rectified. Rectification may require further evidence from witnesses or other supporting documentation.

Legal and tax advice should be obtained if the client has assets in multiple jurisdictions or countries. Foreign countries may also have forced heirship laws or other unique administrative processes that can be difficult to navigate. Residence of the deceased or the named executor outside Canada can also have substantial implications from an administrative and tax perspective. It is ideal to engage with practitioners in the foreign jurisdiction prior to death to develop a plan.

Clearance Certificates

A clearance certificate is a document that confirms that an individual or estate has paid all income tax as of the date the certificate was issued. The executor may request a certificate up to the date of death once they receive the notice of assessment with respect to the terminal tax return. Further clearance certificates may be requested after the final estate tax return is assessed. The executor of the estate should obtain a final clearance certificate before distributing the estate assets. This step protects the executor from personal liability for unpaid taxes. Where the executor is the sole beneficiary of the estate, the clearance certificate may not protect the individual from tax liability, since the Canada Revenue Agency could issue a reassessment and pursue a beneficiary for outstanding amounts even if a certificate has been obtained. If the deceased had a GST, HST, or QST account, the account should be closed and a clearance certificate obtained.

Tax Filing Deadlines

If the deceased died without filing the previous year's tax return, the deadline is extended to six months after the date of death. The extension also applies to the filing deadline of the surviving spouse or common-law partner for their personal tax return.

The terminal tax return must be filed by April 30 of the year following death or six months after the date of death, whichever is later. In practical terms, if the deceased dies in November or December, the extension goes beyond the April 30 filing-due date.

If the deceased was self-employed, the terminal return must be filed by June 15 of the year following death or six months after the date of death, whichever is later. In practical terms, an extension beyond June 15 applies only if the deceased died later than December 15.

Estate tax returns must be filed for each year that the estate earns income. The estate tax return is due 90 days after the year-end. If the estate qualifies as a GRE, the executor has the ability to select the year-end. Any date up to the anniversary of the date of death may be selected as the year-end. The selection of year-end can be strategic and allow for four taxation years while the estate has GRE status. An estate loses its GRE status 36 months after the date of death, and as a result there will be a deemed year-end at that time. When the estate has lost its GRE status, it will be required to file a tax return with a December 31 year-end from that point forward.

Tax and Trust Issues to Consider when Planning with Spousal or Life Interest Trusts

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This article provides a high-level summary of the presentation that we gave at this year's STEP Canada 25th Annual National Conference.

Life Interest Trusts

Life interest trusts—alter ego trusts (AETs) and joint partner trusts (JPTs)— were introduced into the *Income Tax Act*[1] ("the Act") in 1999. An AET is a trust created by an individual who is at least 65 years of age ("the settlor") where the settlor is entitled to all trust annual income,[2] and no one but the settlor may be entitled to receive or obtain the use of trust income or capital during the settlor's lifetime. A JPT is similar to an AET except that the settlor and their spouse[3] are entitled to all trust annual income, and no one but the settlor and their spouse may be entitled to receive or obtain the use of trust income or capital during their lifetimes. There is no age requirement for the spouse.

The benefits of a life interest trust are primarily non-tax-related because probate is not required for assets held in a trust. Without probate, there are no probate fees and no delays while awaiting grant, and there is privacy of distributions and potential simplicity of administration. For these reasons, life interest trusts are commonly used in provinces with high probate fees, such as British Columbia, Ontario, and Nova Scotia.

Spousal Trusts

A qualifying spousal trust can be inter vivos but is more commonly used in a testamentary context. The spouse must be entitled to all trust income, and no one but the spouse may be entitled to receive or obtain the use of trust income or capital during the spouse's lifetime. There is no age requirement for the settlor or the spouse.

Income Tax Treatment

Life interest and spousal trusts are not eligible for graduated rate taxation—they will be taxed at the top marginal tax rate for individuals in the province where the trustees reside, assuming that the trustees exercise central management and control over the trust.

Property can be transferred to a life interest trust or a qualifying spousal trust on a tax-deferred basis provided that both the settlor and the trust are resident in Canada. However, it is possible to "elect out" to trigger gains on a property-by-property basis in order to use losses or to claim any unused capital gains exemption of the settlor.

It is possible to jointly settle property upon a JPT provided that both spouses are 65 years of age or older. Note that if a spouse was younger than 65 at the time the JPT was created, that spouse cannot settle property on a tax-deferred basis to the trust once he or she turns 65.

In order for the transfer of property to a testamentary spousal trust to occur on a tax-deferred basis, the settled property (not substituted property) must vest indefeasibly within 36 months from the testator's date of death, or within a longer reasonable period if a written request is made.

Generally speaking, income that is paid or payable to the settlor or spouse will be taxed in their hands, subject to the potential attribution of income and capital gains. Furthermore, if the reversionary trust rules[4] apply, income will be taxed in the hands of the settlor even if it is not payable to the settlor or if paid or payable to the spouse. As noted above, income for this purpose is computed on the basis of trust law principles, not tax law principles,[5] and this must be considered (and tracked appropriately) when, for example, the trust realizes capital gains or redeems shares of a private corporation (which do not constitute income for trust law purposes).

The need for appropriate tracking can be illustrated in the case of an AET that owns shares of a private corporation and each year some number of

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1 *Income Tax Act*, RSC 1985, c. 1 (5th Supp.). Unless otherwise stated, statutory references in this article are to the Act.
2 Subsection 108(3) provides that trust income is computed without reference to the Act. In other words, trust income is determined on trust law principles, not tax law principles.
3 All references to "spouse" in this article include a same-sex spouse and a common-law partner.
4 See subsection 75(2).
5 Unless the trust deed defines income by reference to tax law principles.

shares are redeemed in the context of a wasting freeze during the settlor's lifetime, as follows:

Basis on which trust deed defines income		
	Trust law principles	*Tax law principles*
Subsection 75(2) applies	Deemed dividend taxed in settlor's hands but not payable to settlor	Deemed dividend taxed in settlor's hands and payable to settlor
Subsection 75(2) does not apply	Deemed dividend taxed in trust and not payable to settlor	Deemed dividend taxed in settlor's hands* and payable to settlor
* A subsection 104(13.1) designation may be available if taxable income, after the election is made, is not greater than nil.		

This issue will be particularly important to consider in the case of a testamentary spousal trust that is established for a blended-family situation where the trust deed defines income on the basis of trust law principles, because this may result in a conflict between the income beneficiary (for example, the spouse) and the ultimate capital beneficiaries (for example, children of a former marriage). In this case, it may make sense either to define income as including proceeds of share redemptions or to ensure that there is an annual minimum amount payable to the spouse.

If trust income of an AET or JPT is in excess of the amounts required by the settlor or spouse, consideration should be given to putting the excess "back into" the trust. It is not clear whether an amount receivable from an AET or JPT can merely be resettled upon the trust without the debt forgiveness rules applying. It would be preferable to "circle funds"—that is, to repay the amount owing by the trust with a subsequent settlement.

A life interest or spousal trust may own real property. Rent-free use of such property should not give rise to a taxable benefit. Occupancy expenses should be paid by the settlor or spouse (not the trust) to avoid an income inclusion. The settlor or spouse may choose to allow third parties (such as children) to use the real property—this should not taint the trust's status provided that the terms of the trust do not allow such use during their lifetimes. The trust may claim the principal residence exemption,[6] but doing so may impact any contingent beneficiaries who meet the conditions of ordinarily inhabiting the property.

There will be a deemed disposition and reacquisition of the trust's assets at fair market value at the end of the following days:

- for an AET, the settlor's death;[7]
- for a JPT, the later of the settlor's and the spouse's death; and
- for a spousal trust, the spouse's death;

and, if the trust continues to exist, every 21 years thereafter.[8] Any accrued gains or losses that arise on a deemed disposition will be taxed in the trust, except for deemed dispositions from spousal trusts created prior to 2017, which are able to have the net capital gain taxed in the deceased spouse's final return.[9] There will also be a deemed year-end at the end of each of the above days, with an additional "short" year-end on December 31 in the year of death.

The impact of the deemed disposition rule may result in a higher tax bill compared to that for personal ownership, because there is no access to the deceased's graduated tax rates and no unused capital gains exemption. If there is an overall net loss and subsection 75(2) applies to the trust, there will be no prior-year trust capital gains against which the loss can be applied. Also, subsection 111(2) cannot be used to claim the loss against other income of the deceased for the year of death and the prior year.

Charitable gifting through these trusts can be more complex than bequests:

- there is a shorter time frame for making gifts—90 days after the calendar year of death versus 60 months for bequests;
- there is a reduced limit for claiming charitable donations —75 percent versus 100 percent for the year of death[10]; and

6 Subsection 40(4) includes periods prior to the establishment of the trust.
7 An AET is able to "elect into" the 21-year rule, in which case the relevant day would be the 21st anniversary of the date of settlement.
8 The 21-year period may be shortened where a testamentary spousal trust created under Québec law provides for distributions to successor trusts, because the start date would be the date of the testator's death and not the date of the spouse's death.
9 Paragraph 104(13.4)(b.1).
10 The proposed changes to Alternative Minimum Tax (AMT) per the August 4, 2023 draft legislation must be considered. AMT does not apply in the year of death. Graduated rate estates (GRE) (but not spousal and life interest trusts) are to be exempted from these changes.

- a charitable residual beneficiary of a trust is not treated the same as a residual beneficiary of an estate, and, depending on how the trust document is drafted, a donation credit may not be available.

Where the trust owns voting control shares of a private company, changes in trustees can give rise to an acquisition of control (AOC) and adverse income tax implications, including a deemed year-end of the company.

There is potential for double taxation on shares of a private company with an accrued gain, regardless of whether the shares are held personally or in a trust. The methods of eliminating double taxation are similar—loss carryback planning and pipeline/bump planning—but there are differences in planning mechanics and in the steps that can be taken to address technical issues, as shown below.

Other Issues

An AET or JPT should not be used to own assets subject to US estate tax because the individual pays the US estate tax whereas the trust pays Canadian tax on any capital gains. Since the individual and the trust are different taxpayers, no foreign tax credit is available. In the case of a spousal trust, the Canada-US tax treaty does allow a deduction for the US estate tax.

Foreign taxes paid by these trusts may be problematic—foreign income and taxes can be allocated to a beneficiary if the income is subject to tax in their hands under subsection 104(13), but if subsection 75(2) applies, no foreign tax credit is available.

The terms of the trust must be properly drafted to ensure that the trust is not tainted by provisions such as the ability to make loans on non-commercial terms and by the potential purchase of life insurance policies.

Conclusion

Life interest and spousal trusts can be a useful part of an estate plan. There are a number of income tax issues that must be taken into account throughout the trust's lifespan—from the initial drafting of the documents, to the lifetime of the settlor/spouse, to the consequences on their death. This is because the rules are not the same as those for personal ownership, and in some cases are more complex.

The best practice in dealing with these trusts is to prepare annual trust financial statements from inception and to ensure that amounts owing to the settlor/spouse are correctly calculated on the basis of trust law principles rather than tax law principles.

A) Loss Carryback Planning	
Personal ownership	*Trust ownership*
Subsection 164(6) planning must be done within one year from the date of death	Three-year loss carryback rules (short post-death year plus two following calendar years) will apply
Estate must qualify as a GRE	Not relevant
Subsection 40(3.61) relief from affiliated stop-loss rules is available for subsection 164(6) planning	May have to undertake "windup" planning and rely on paragraph 69(5)(d) exemption from affiliated stop-loss rules
Capital dividend stop-loss rules (50%/50% solution) will apply	Capital dividend stop-loss rules (50%/50% solution) will apply—"grandfathered" share status (100% solution) flows through to trust

B) Pipeline/Bump Planning	
Personal ownership	*Trust ownership*
Paragraph 88(1)(d.3) deems an AOC as a consequence of death, allowing a potential bump to non-depreciable capital property	Trust terms must be drafted to require distribution of voting control shares as a consequence of death; otherwise, no bump is available
Non-resident beneficiaries of GRE are exempted from section 212.1 potential deemed dividend rule by December 2, 2019 comfort letter	December 2, 2019 comfort letter does not address trust ownership; planning must consider impact of any non-resident beneficiaries

Beneficiary Designations: A Dive into Uncertain Waters

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Clients have long been interested in the seemingly elegant solution of joint tenancy as a means of passing assets to their adult children, but often they have been stymied by the application of the presumption of resulting trust. Practitioners have long been aware of the presumption that when a parent gratuitously transfers property to an adult child, that child holds the property in resulting trust for the parent's estate.[1] Therefore, practitioners have urged their clients to document intention to rebut this presumption where it is not intended to apply. They have also watched courts inconsistently expand the application of the presumption of resulting trust beyond jointly held property to beneficiary designations. This expansion has generated a line of conflicting case law and added to the uncertainty surrounding this deceptively complex estate-planning tool.

In this article, we review the recent divergent case law on the presumption of resulting trust. We also review a potpourri of issues adding to the uncertainty surrounding beneficiary designations: the nature of beneficiary designations as testamentary dispositions; the application of unjust enrichment and rectification as remedies when beneficiary designations create unfair results; and creditors' claims against beneficiary designations.

Review of Divergent Case Law on the Presumption of Resulting Trust

The question of whether the presumption of resulting trust applies to beneficiary designations was brought to the forefront of practitioners' minds by *Calmusky v. Calmusky*,[2] in which the Ontario Superior Court found that the principle of resulting trust applied not only to bank accounts held jointly by a father and his adult son, but also to a registered retirement income fund (RRIF) for which the father had designated only one of his twin adult sons. The designated beneficiary argued that there was no binding authority to extend the principle of resulting trust to RRIF beneficiary designations. However, the court reasoned that there was no principled basis for applying the presumption of resulting trust to jointly owned bank accounts and not to RRIF beneficiary designations. The court also explained that it was sensible for the designated beneficiary to bear the burden of showing that the proceeds were intended to go to him or her. The court reasoned that the beneficiary "is better placed to bring evidence of the circumstances of the transfer."[3]

The Ontario Superior Court acknowledged that *Calmusky* ruffled some feathers among banks, financial advisers, and estate-planning lawyers and soon released a further decision, *Mak (Estate) v. Mak*,[4] in which it noted, in divergence from *Calmusky*, that there is good reason to doubt the conclusion that the presumption of resulting trust applies to beneficiary designations. In *Mak*, a mother of four adult sons designated one son as the beneficiary of her RRIF. The son's three brothers argued, among other things, that the presumption of resulting trust applied to the beneficiary designation made for their mother's RRIF. However, the court did *not* apply the presumption of resulting trust and noted that "[t]he whole point of a beneficiary designation ... is to specifically state what is to happen to an asset upon death."[5]

In quick succession, other courts have also dealt with the question of whether the presumption of resulting trust should apply to beneficiary designations. In *Fitzgerald Estate v. Fitzgerald*,[6] the Supreme Court of Nova Scotia articulated several reasons why

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1 *Pecore v. Pecore*, 2007 SCC 17; and *Madsen Estate v. Saylor*, 2007 SCC 18.
2 *Calmusky v. Calmusky*, 2020 ONSC 1506.
3 Ibid, at paragraph 56, quoting *Pecore*, supra note 1, at paragraph 26.
4 *Mak (Estate) v. Mak*, 2021 ONSC 4415.
5 Ibid, at paragraph 46.
6 *Fitzgerald Estate v. Fitzgerald*, 2021 NSSC 355.

the reasoning in *Calmusky* should not apply to a tax-free savings account (TFSA):[7]

- A TFSA is not a jointly held asset.
- Transfers into joint names and transfers via beneficiary designations may both be gratuitous, but beneficiary designations do not result in an immediate transfer of assets into joint names.
- A beneficiary designation is a contract that binds a financial institution.
- A child who is designated as a beneficiary does not have access to funds prior to their parent's death.
- A designated beneficiary is not a fiduciary.
- A beneficiary designation is akin to a testamentary instrument.
- The application of the presumption of resulting trust creates transactional uncertainty and poses evidentiary challenges for the transferee.

In *Simard v. Simard Estate*,[8] the British Columbia Supreme Court (BCSC) applied the presumption of resulting trust to the designation of an adult daughter by her mother on a host of registered accounts. The BCSC also concluded, however, that the presumption was rebutted in regard to accounts for which the investment adviser's notes supported the mother's intention to gift the accounts to her daughter.

The decisions cited above underscore the need for clarity, which practitioners have called for in the form of legislative reform. At the time of writing, provincial statutes have not been amended to state that the presumption shall not apply to beneficiary designations. It is therefore of paramount importance that advisers and clients clearly document intention.

Further Uncertainty Around Beneficiary Designations

The line of case law on the presumption of resulting trust alone has generated plenty of uncertainty. Unfortunately, as discussed below, beneficiary designations have also been the subject of other challenges.

Testamentary Dispositions

Another issue is whether revocation clauses in wills that revoke previous testamentary dispositions also revoke beneficiary designations. According to the Ontario Court of Appeal in *Alger v. Crumb*,[9] the answer depends on the wording of the revocation clause. In Ontario, the revocation clause is effective to revoke a beneficiary designation if the revocation relates expressly to the designation, either generally or specifically.[10]

Secret trusts can also affect clients' estate planning and arise where

- a person gives property to another (the donee),
- the person communicates to the donee an intention that the property be dealt with in a specific way upon the happening of an event, and
- the donee accepts the obligation.

In addition to these requirements, the three certainties necessary for an express trust must be exhibited:

- the words making the trust must be imperative,
- the subject of the trust must be certain, and
- the object or person intended to take the benefit of the trust must be certain.

In *Gough v. Leslie Estate*,[11] the Nova Scotia Court of Appeal (NSCA) applied a secret trust to a beneficiary designation. The NSCA also found that secret trusts are not testamentary in nature and accordingly cannot be revoked by subsequent wills. It is therefore

7 Ibid, at paragraphs 103 to 108 and 117.
8 *Simard v. Simard Estate*, 2021 BCSC 1836.
9 *Alger v. Crumb*, 2023 ONCA 209; aff'g 2021 ONSC 6076.
10 The court in *Alger* focused on section 52(1) of the *Succession Law Reform Act*, RSO 1990, c. S.26.
11 *Gough v. Leslie Estate*, 2022 NSCA 25 ; rev'g 2021 NSSC 63.

important to ask clients if there are any other agreements with family members that may constitute secret trusts, because these may affect beneficiary designations and any subsequent wills.

A beneficiary designation can also fail because it is ambiguous, as was the case in *Sun Life Assurance Company of Canada v. The Estate of Juanita Nelson*.[12] In this case, a mother of two adult children designated her spouse, who was not the father of her children, as the beneficiary of her group life insurance policy. She later irrevocably changed the beneficiary designation to her two children, but the original designation of her spouse remained on file. Then, shortly before her death, she executed a will declaring that "the proceeds of the insurance policy shall be paid to my estate trustee to be held in a separate trust in the same manner and on the same terms as I have provided for the residue of my estate by my Will."[13] The Ontario Superior Court ruled that the declaration in the will was not valid because the will did not define "insurance policy" or make any reference to a specific policy.

Unjust Enrichment

Courts have also been confronted with claims of unjust enrichment in relation to beneficiary designations, which can supplant beneficiary designations, even those that are irrevocably made. In *Moore v. Sweet*,[14] a husband purchased a life insurance policy and designated his wife as the revocable beneficiary. They later separated and entered into an oral agreement whereby the wife (now ex-wife) would continue to pay the life insurance policy premiums and the husband would maintain her beneficiary designation. However, the husband irrevocably changed the beneficiary of this policy to his new common-law spouse without telling his ex-wife, who continued to pay the premiums until his death, after which she discovered the change in beneficiary designation. She commenced an unjust enrichment application regarding her entitlement to the policy proceeds, and the application judge impressed the policy proceeds with a constructive trust in her favour. The Ontario Court of Appeal (ONCA) set aside the judgment and found that the ex-wife was entitled only to the premiums she paid under the policy. The matter proceeded to the Supreme Court of Canada (SCC), which reversed the ONCA's decision. The SCC found that the common-law spouse was enriched and that the ex-wife was correspondingly deprived without a juristic reason. The SCC imposed a constructive trust for the ex-wife's benefit despite the irrevocable beneficiary designation that the husband made during his lifetime.

The BCSC subsequently applied similar logic in *Knowles v. LeBlanc*.[15] In this case, a husband failed to update a life insurance beneficiary designation prior to his death from his ex-wife to his common-law spouse. In awarding the common-law spouse with a constructive trust for the insurance proceeds, the BCSC found that the husband intended to leave the insurance proceeds to his common-law spouse and that the common-law spouse paid for the premiums from a joint account.

> Until provincial legislation clarifies that the presumption does not apply to beneficiary designations, documenting clients' intentions is essential.

Rectification

Courts have also applied the equitable remedy of rectification to beneficiary designations where there is clear evidence that the designations do not reflect the intentions of the persons who made them. The BCSC did so in *Simpson v. Simpson Estate*.[16] In this case, a shareholder's will stated that his children were to receive his private company shares on his death. The shares were subject to a buy-sell agreement and were to be redeemed by the surviving shareholder using life insurance proceeds. The deceased shareholder's wife, however, was named as irrevocable beneficiary on the life insurance policy. The BCSC overturned the irrevocable beneficiary designation, stating that it was the deceased shareholder's intention to leave the full fair market value of the shares to his children; therefore, the wife could

12 *Sun Life Assurance Company of Canada v. The Estate of Juanita Nelson*, 2017 ONSC 4987.

13 Ibid, at paragraph 5.

14 *Moore v. Sweet*, 2018 SCC 52.

15 *Knowles v. LeBlanc*, 2021 BCSC 482.

16 *Simpson v. Simpson Estate*, 2021 BCSC 1486; rev'd 2022 BCCA 208.

not receive the insurance proceeds. The British Columbia Court of Appeal disagreed with the BCSC and instead rectified the shareholder's will to state that the deceased shareholder's children would equally receive the fair market value of the shares *net* of the insurance proceeds and that the wife would receive the insurance proceeds as originally designated.

Creditors' Claims

Lastly, claims by creditors have contributed to the uncertainty surrounding beneficiary designations. In *Amherst Crane Rentals Ltd. v. Perring*,[17] the ONCA determined that creditors have no claim to the proceeds of a registered retirement savings plan (RRSP) if a beneficiary has been designated.

The Canada Revenue Agency (CRA), however, has successfully collected tax owing by a deceased taxpayer from the designated beneficiaries of that taxpayer's registered plan. In *Dreger v. The Queen*,[18] a deceased father designated his daughters as beneficiaries of a life income fund of which he was the annuitant, and at his death they each received approximately $100,000 in satisfaction of their beneficial interests. The CRA assessed each daughter pursuant to section 160 of the *Income Tax Act* (Canada),[19] which is a provision that aims to prevent taxpayers from avoiding tax liability by transferring property to non-arm's-length persons. This provision has been referred to as "draconian" given its potential to produce unjust results[20] and underscores the reality that beneficiary designations are not unassailable.

In the case of *Goldman v. The Queen*,[21] the Tax Court of Canada (TCC) found that section 160 did not apply to part of an RRSP transferred to an individual as a trustee of a valid oral trust. Also, in *Higgins v. The Queen*,[22] non-registered segregated fund proceeds were paid as a death benefit to the two daughters of the deceased owner of the registered segregated fund. Since this was a hybrid fund where the overarching feature was the life insurance component, the CRA was unsuccessful in arguing that the payment of the death benefit constituted a section 160 transfer. Recently, however, the CRA refused to accept that section 160 cannot apply to a death payment made out of a segregated fund. The CRA stated that "with so many unique financial products, and various legislation governing them, the application of section 160 of the Act is decided on a case-by-case basis."[23]

Conclusion: Documenting Intention Is Always a Good Practice

The area of beneficiary designations is a complex one involving many facets. The presumption of resulting trust has created a great amount of confusion and uncertainty around beneficiary designations. Until provincial legislation clarifies that the presumption does not apply to beneficiary designations, documenting clients' intentions is essential. Documenting intention is also helpful if a challenge is made to a beneficiary designation by way of secret trusts, unjust enrichment, or rectification. Designating a beneficiary without clearly documenting intention is akin to diving into uncertain waters because it is often intention that determines the result.

17 *Amherst Crane Rentals Ltd. v. Perring*, 2004 CanLII 18104 (ONCA); leave to appeal to SCC dismissed, [2004] SCCA no. 430.
18 *Dreger v. The Queen*, 2020 TCC 24.
19 *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), as amended.
20 *Wannan v. Canada*, 2003 FCA 423, at paragraph 3.
21 *Goldman v. The Queen*, 2021 TCC 13.
22 *Higgins v. The Queen*, 2013 TCC 194 (CanLII).
23 CRA document no. 2022-0928911C6, Conference of Advanced Underwriting (CALU) Roundtable question 11, May 3, 2022.

IN THE HEADLINES

THE UNCERTAINTY OF DISCRETIONARY TRUSTS: COTTRELL V. COTTRELL

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Clients frequently approach their advisers with questions about how to protect their assets from the future ex-spouses of their children. They often want assurance that the discretionary trusts benefiting their children offer complete protection. However, we, the advisers, have been unable to definitively state that discretionary trusts will protect trust assets from the potential claims that a child's spouse might make on the breakdown of the child's relationship. Instead, we have had to explain that discretionary trusts, which give trustees the latitude to decide how much beneficiaries receive and when they receive it, may provide a degree of protection. The law is too uncertain to say that discretionary trusts offer complete protection.

In *Cottrell v. Cottrell*, 2022 BCSC 1607, Justice Brongers confirmed that there is no clear jurisprudence on how to adjudicate a claim under British Columbia's *Family Law Act*, SBC 2011, c. 25 (FLA) in respect of an alleged increase in the value of a spouse's beneficial interest in a discretionary trust settled and controlled by someone other than the spouse. The case considered two discretionary trusts set up by Robert and Patricia Muster ("the Muster trusts"). The Muster trusts benefited Robert and Patricia Muster and their children, including their married daughter, Joanne Cottrell. When Patricia Muster passed away, Joanne Cottrell and her brother became co-trustees with Robert Muster. However, they were not active in the management of the Muster trusts. Joanne Cottrell and her husband, Paul Cottrell, subsequently separated, and Paul Cottrell claimed an interest in the Muster trusts.

The legislative framework for Paul Cottrell's claim is set out in section 81(b) of the FLA, which states that, on separation, spouses are presumptively entitled to an undivided half interest in all family property. The FLA distinguishes between "family property" and "excluded property." Section 84 of the FLA defines family property to include property owned by at least one spouse on the date of separation. Section 85 of the FLA sets out categories of excluded property that, if proven, remain a spouse's sole property and are not subject to division. One such category is a spouse's beneficial interest in property held in a discretionary trust that was not settled by or contributed to by the spouse (section 85(1)(f)). However, the legislative framework is not so simple as to end the discussion there. This section must be read in conjunction with section 84(2)(g) of the FLA, which states that if there has been an increase in the value of excluded property during the spouses' relationship, that increase is family property.

At the core of the interplay between these two sections are the words "a spouse's beneficial interest" in section 85(1)(f) of the FLA. These words dictate that only the increase in the value of the spouse's beneficial interest in a discretionary trust is family property, not the increase in the assets of the discretionary trust as a whole. Therefore, the question in this case became, "What was Joanne Cottrell's beneficial interest?" Paul

Cottrell claimed to have determined her beneficial interest in the increased value of the Muster trusts by determining the increase in the value of the trust assets, accounting for taxes, and dividing the resulting amount equally among the three beneficiaries of the Muster trusts.

This calculation is at odds with the traditional trust law notion that beneficiaries of discretionary trusts do not have an interest in the property of the trust—the operative term here being "discretionary." Although Joanne was a beneficiary, this fact did not guarantee that she would receive any of the assets of the Muster trusts. She did not have the ability to compel a distribution to herself from the trusts. She could be removed as a beneficiary of the trusts, she could die before the trust assets were fully distributed, or the trust assets could be fully or largely distributed to other beneficiaries. Therefore, there was too much uncertainty for Justice Brongers to find that Joanne Cottrell's beneficial interest was greater at the date of separation than it was when the Muster trusts were settled.

The decision in *Cottrell* will provide some comfort to trust planners and their clients. However, it is likely not the final word on the topic. Justice Brongers cautioned that his finding was fact-specific and that a different conclusion could well be reached in another case. Further, an appeal has been filed. Therefore, advisers will likely continue to advise their clients about the potential importance of ensuring that their children do not have the ability to compel a distribution to themselves (for example, by appointing multiple trustees) or gain any certainty over distribution that would allow the increase in their beneficial interest to be valued.

THE SLAYER RULE, HEARSAY, AND SUMMARY JUDGMENT IN ALBERTA: MAGNUSON ESTATE

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In Canada, public policy does not permit wrongdoers to profit from their wrongful acts. This principle, sometimes referred to as "the criminal forfeiture rule" or "the slayer rule," finds its source in the common-law doctrines *ex turpi causa non oritur actio* ("from a dishonourable cause, an action cannot arise") and *nullus commodum capere potest de injuria sua propria* ("one cannot profit from one's own crime"). In the estate context, Canadian courts have repeatedly confirmed that where the death of a testator was caused by a crime, the person criminally responsible is prohibited from receiving any benefit from the testator's estate.

In the recent decision of *Magnuson Estate*, 2023 ABKB 305, the Court of King's Bench of Alberta (Surrogate Matters) was called upon to determine whether a gift to a residuary beneficiary was void because of the personal representative's belief that the beneficiary had caused the death of the testator. The application relied on rule 7.3 of the *Alberta Rules of Court*, Alta. Reg. 124/2010, which permits the court to grant summary judgment in respect of all or part of a claim.

Janet Elizabeth Magnuson ("the testator") commenced a relationship with Corey Anderson in 2012. The testator and Anderson later married. In May 2021, the testator executed a will leaving the entire residue of her estate to Anderson. Shortly thereafter, the testator and Anderson purchased a $2 million joint life insurance policy on the lives of each other.

The testator died on November 25, 2022 in what was originally believed to be a farm accident. However, following an investigation by the Royal Canadian Mounted Police (RCMP), Anderson was named as a suspect in the testator's death.

According to an affidavit sworn by Joseph Magnuson, the personal representative of the testator's estate, on December 16, 2022 Anderson surrendered to the RCMP, confessed to causing the testator's death, and was arrested and charged with first degree murder. Magnuson stated that the basis for these allegations was that he had been so advised by K Division of the RCMP in Edmonton.

Anderson has not been found guilty or convicted of a crime in connection with the testator's death.

Magnuson, believing that Anderson had caused the testator's death, applied to void the residual gift to Anderson, on the basis that the gift offended public policy.

In his reasons for decision, Justice Feth reviewed the law in relation to the criminal forfeiture rule and noted that the public policy rule applies to murder and manslaughter, but does not apply where a person is found not criminally responsible due to mental disorder. Similarly, the court commented that, in absence of criminal misconduct, the criminal forfeiture rule likely does not apply. The court also noted that the rule may be invoked in civil proceedings (subject to the civil standard of proof) even if no criminal conviction has been entered.

Having regard to these principles, Justice Feth considered the evidence and concluded that Magnuson's assertion that Anderson had caused the testator's death was based on Anderson's alleged confession to the RCMP, an alleged drug overdose suffered by Anderson shortly after the RCMP investigation, the criminal charge, and inferences drawn from the purchase of the joint insurance policy—all of which constituted hearsay evidence. Justice Feth specifically noted that no criminal conviction had been entered in respect of Anderson and that no finding of guilt had been made.

The court noted the prohibition in rule 13.18(3) of the *Alberta Rules of Court* against the inclusion of hearsay evidence in an affidavit in support of an application to dispose of all or part of a claim. However, the court, citing the Alberta Court of Appeal in *Saito v. Lester Estate*, 2021 ABCA 179, remarked that, particularly in estate cases, some flexibility may be required, and rule 13.18 "should not be read as an absolute bar to the use of hearsay evidence" (at paragraph 40). A key consideration as to whether hearsay evidence may be used in a summary judgment application in an estate matter is "whether the underlying source of the information is reliable and would be admissible at trial" (at paragraph 40).

The court remarked that an applicant seeking summary judgment bears the initial burden of demonstrating that a claim or defence to a claim is without merit, based on facts established on a balance of probabilities. In *Magnuson Estate*, however, the facts were imprecise, vague, and based on hearsay evidence. Because no exception to the hearsay rule was applicable, on the sparse evidentiary record before him, Justice Feth was not satisfied that the information provided in Magnuson's affidavit was sufficiently reliable or would be admissible at trial. Further, there was no evidence as to Anderson's mental state at the time of the alleged offence.

In dismissing Magnuson's application, the court noted that Magnuson had failed to meet the evidentiary burden of establishing that the residuary gift to Anderson was void by operation of public policy. However, the court left the door open to a different conclusion in the event that Anderson were to be convicted.

The court's decision in *Magnuson Estate* provides an interesting look at the intersection between public policy considerations, the laws of evidence, and the rules applicable to summary judgment.

DIGITAL WILLS SOON A REALITY IN SASKATCHEWAN

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On May 17, 2023, *The Wills Amendment Act, 2022*, SS 2023, c. 45, received royal assent ("the Saskatchewan Act"). It will come into effect by order of the lieutenant governor in council.[1] The amendments primarily serve to permit the execution of "digital wills" in Saskatchewan, and will have a profound impact on the way in which estate planning is completed in the province.

Digital Wills: A Brief History

Saskatchewan has been something of a trailblazer with regard to digital documents and signatures. It was the first province to introduce legislation that provided legal recognition of documents in electronic format (*The Electronic Information and Documents Act, 2000*). Although this legislation had general application, wills were specifically exempted from its application. A few years later, the Law Reform Commission of Saskatchewan released a report on electronic wills, which concluded that the recognition of electronic wills would eventually be necessary and appropriate, but not at that time. During the COVID-19 pandemic, Saskatchewan (like other provinces in Canada) saw the creation of remote witnessing rules for estate planning, which were eventually made permanent. However, much of the flexibility respecting the remote witnessing of documents was limited to transactions where a lawyer was present.

Prior to the introduction of the Saskatchewan Act, the only other province in Canada to introduce legislation around the electronic creation of wills and digital signatures was British Columbia (the *Wills, Estates and Succession Amendment Act, 2020*). No other jurisdictions (to date) have taken the leap into electronic wills.

Summary of the Amendments

Section 7 of the Saskatchewan Act sets out the criteria for a valid electronic will. They include the following:

- the will must be in electronic form;
- the will must be signed by the testator with the electronic signature of the testator, or by another person in the testator's presence and at the testator's direction with that person's electronic signature; and
- the will must be signed in the presence of two or more witnesses, who must attest and sign.

The document is considered to be "signed" if an electronic signature is attached to or associated with the will (section 7(2)), and persons can be present either virtually or physically. Essentially, there are now two main

1 At the time of writing, the order has not yet been issued, but it is anticipated in fall 2023.

ways to gather signatures: (1) the testator and the two witnesses are all in the same room, with the electronic will appearing on a screen for them to sign; or (2) the testator and the witnesses are in different physical locations and appear by virtual presence.

A testator can revoke an electronic will (section 16.1) by (1) making another will; (2) making a written declaration that revokes the electronic will; (3) deleting the electronic will with the intention of revoking it; or (4) burning, tearing, or otherwise destroying a paper copy of the electronic will in the presence of a witness.

Substantial compliance (section 37(2)) can still be relied upon with respect to electronic wills, but provisions in the legislation respecting alterations (section 11.1), revival (section 20.1), holograph wills (section 8), and the sailor/armed forces exception (section 6(4)) are not applicable to electronic wills. It is interesting to note that both the BC legislation and the Saskatchewan Act do not include any requirement for one of the witnesses of an electronic will to be a lawyer.

Takeaways for Practitioners

Prior to the introduction of the Saskatchewan Act, the government requested feedback and commentary from practitioners in the province. One of the big concerns raised by practitioners was the need to protect against undue influence and suspicious circumstances, and the importance of ensuring that there is sufficient capacity to execute the estate-planning document. It had been suggested that the availability of digital wills should be limited to execution with the participation of a lawyer. However, at this time, the Saskatchewan Act does not require a lawyer to be one of the witnesses.

There are also a number of practical considerations, such as:

- Which copy of the document is the "original"?
- Should the PDF version of the signed document be "locked" to ensure that it cannot be altered?
- Where is the document stored? Is it appropriate for there to be multiple copies of the document?
- How will digital wills impact the probate process? (Changes to Saskatchewan's Rules of Court will likely be forthcoming.)

The Law Society of Saskatchewan has indicated that it will release practice directives providing guidance for when a lawyer is witnessing a digital will. Presumably, it would be prudent to have some form of declaration by the lawyer confirming who is present, and advising whether the lawyer tested for capacity.

This new legislation may also open up some jurisdictional issues, because it is not clear what happens if an electronic will needs to be probated in a jurisdiction that does not permit such wills. The existing legislation does include a provision regarding the validity and effect of a will (section 38 of *The Wills Act, 1996*) that confirms that (1) with respect to immovable property, the law of the place where the property is situated governs; and (2) with respect to movable property, the law of the place where the testator was domiciled at death governs. But this does not address the circumstance where a testator dies in a province that has not introduced legislation to permit electronic wills, or the circumstance where immovable property of a testator is situated in such a province. Would an electronic will be accepted for probate purposes in that province? Would substantial compliance provisions be of assistance in securing probate in that instance?

Because legislation respecting electronic wills is so new in Canada, the court system has not yet had an opportunity to fully weigh in on this new frontier of estate planning. However, practitioners across the country should be aware of the potentially far-reaching impact of the BC and Saskatchewan legislation.

REVISIONS TO ASSISTED DECISION-MAKING LEGISLATION FOR MANITOBANS WITH INTELLECTUAL DISABILITIES

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Member, STEP Winnipeg

In what is expected to be the first in a series of amendments to existing legislation governing the appointment of substitute decision makers for adults with intellectual disabilities, *The Vulnerable Persons Living with a Mental Disability Act*[2] has received a new name, among other changes. *The Adults Living with an Intellectual Disability Act*[3] (ALIDA) was enacted on June 1, 2023 as a next step in the implementation plan proposed by the Manitoba government for a series of changes related to decision making for adults with intellectual disabilities.

Currently in Manitoba, an adult living with an intellectual disability under ALIDA that may have a substitute decision maker appointed by the Commissioner for Adults Living with an Intellectual Disability. In order to

2 *The Vulnerable Persons Living with a Mental Disability Act*, CCSM c. V90.
3 *The Adults Living with an Intellectual Disability Act*, CCSM c. A6.1.

meet the definition of "an adult living with an intellectual disability," the person's intellectual disability must have existed before they reached 18 years of age. Manitobans with an intellectual disability that arose after they reached adulthood do not fall under ALIDA; instead, they require a decision maker called a "committee" to be appointed by a court pursuant to *The Mental Health Act*.[4]

In Manitoba, adults are presumed to have capacity to make decisions affecting themselves, unless it is demonstrated otherwise. Substitute decision makers under ALIDA should be appointed as a last resort. The appointment of a substitute decision maker should occur only where the adult is both unable to make decisions for themselves and unable to make decisions even with the aid of their support network. A person who brings an application to be appointed as a substitute decision maker has to demonstrate an immediate or foreseeable need for decision making of a financial or medical nature, and must give evidence that the adult is not capable of making those decisions even with the assistance of their support network. The substitute decision maker may be appointed to make decisions regarding property or personal care on behalf of the adult. A single substitute decision maker may be appointed, or multiple persons may be appointed jointly. An alternate decision maker may also be named. A substitute decision maker who is appointed to govern financial matters must be resident in Manitoba, and they must post a bond or surety that is equal to the value of the property that will be managed by the substitute decision maker.

The process for appointing a substitute decision maker has remained the same under ALIDA. The initial set of changes relate primarily to terminology. "Vulnerable person" is replaced with "adult living with an intellectual disability," "supported decision making" is replaced with "assisted decision making," and "mental disability" is replaced with "intellectual disability." The definitions of abuse and neglect have been expanded to include acts or omissions that cause physical or psychological harm even if that harm is not "serious." In the prior legislation, the harm had to be serious in order to constitute abuse or neglect. This distinction is important since it forms the standard of neglect required for reporting and intervention. In Manitoba, Community Living disABILITY Services (CLDS) becomes involved in circumstances of abuse and neglect. In cases where there are reports about possible abuse or neglect of an adult living with an intellectual disability, the executive director of CLDS is now required to inform both the adult and their substitute decision maker or committee. The executive director of CLDS must also attempt to determine and accommodate the adult's wishes regarding the conduct of the investigation.

Amendments were generally made to focus on the dignity of adults living with an intellectual disability and to incorporate reference to the *United Nations Convention on the Rights of Persons with Disabilities* and the *Canadian Charter of Rights and Freedoms* under the principles of ALIDA.

The province has seen other changes in the disability sector with a recent overhaul of disability-related income support programs under *The Manitoba Assistance Act*[5] and the creation of *The Disability Support Act*,[6] which established a new stream of disability support. The new iterations of the income support programs began implementation in January 2023. Numerous persons living with intellectual disabilities find themselves under one of these new programs, and to the extent that their disability requires them to have a substitute decision maker or assisted decision making, they are further impacted by the incoming revisions to ALIDA.

This first round of revisions relates primarily to terminology and principles, and presumably lays the groundwork for more substantive changes down the road. Further discussion around decision-making options is anticipated, including the incorporation of representation agreement style options, as are currently found in British Columbia.

CONTESTING SUBSTANTIAL COMPLIANCE: WHITE V. WHITE

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Until relatively recently, Ontario was a "strict compliance" jurisdiction, which meant that a will, to be valid, had to strictly comply with the formal validity requirements in the *Succession Law Reform Act*, RSO 1990, c. S.26 (SLRA). However, as of January 1, 2022, Ontario is a "substantial compliance" jurisdiction, which means that the Ontario Superior Court of Justice now has the authority, under new section 21.1 of the SLRA, to validate a document as a will, even if it is not formally valid as

4 *The Mental Health Act*, CCSM c. M110.
5 *The Manitoba Assistance Act*, CCSM c. A150.
6 *The Disability Support Act*, CCSM c. D76.

a will, if the court is satisfied that the document sets out the deceased's testamentary intentions.

The case law in Ontario around substantial compliance is already beginning to develop. In *White v. White*, 2023 ONSC 3740, the court considered whether a solicitor's file could be ordered to be produced, *before* a will challenge had been commenced, to determine whether there was evidence to support an application under section 21.1 of the SLRA to validate an unsigned draft will.

The deceased, Violet White, made a will in 2014 in which she left 90 percent of her estate outright to one son, Raymond, and the remaining 10 percent in trust to her other son, Thorne. In 2021, Mrs. White engaged a solicitor and began the process of updating her will. While Mrs. White asked Thorne to help her schedule meetings, the solicitor was careful to ensure that she discussed the will only with Mrs. White. On the day that Mrs. White was to sign her new will, she suffered a stroke. Through Thorne, Mrs. White arranged a meeting at the hospital to discuss the will with her solicitor. Mrs. White subsequently cancelled the hospital meeting after her solicitor had arrived because she did not feel up to the discussion. She died less than a week later, before a further meeting could take place, leaving the 2014 will as the final executed will.

The executor named in the 2014 will applied for a certificate of appointment. Thorne did not oppose the application for the certificate; instead, he brought an application for directions seeking production of the drafting solicitor's file and notes with respect to the unsigned will. Thorne argued that there may be evidence in the solicitor's file that would enable him to validate a draft of the unsigned will under section 21.1 of the SLRA. As authority, Thorne relied on rule 75.06 of the *Rules of Civil Procedure*, RRO 1990, reg. 194, which governs applications for directions, and section 9 of the *Estates Act*, RSO 1990, c. E.21, which allows a court to order the production of a testamentary document or the examination of a person with knowledge of a testamentary document. Neither LAWPRO (a provider of professional liability insurance) nor the executor named in the 2014 will opposed the application.

Although his comments on section 21.1 of the SLRA were obiter, Judge Myers did not think that a draft will could meet the legal test that has been applied in other substantial compliance jurisdictions—namely, that the document must reflect a "fixed and final" intention of the will-maker. However, he also noted the possibility that the solicitor's notes could demonstrate a consistent intention. Notwithstanding, the judge was reluctant to order production of the solicitor's file at an uncontested case conference, for several reasons.

First, Thorne did not challenge the 2014 will or plead section 21.1 of the SLRA, and was essentially seeking non-party discovery before asserting a cause of action. Thorne was not prepared to wait for the certificate of appointment to be issued to allow the estate trustee to exercise the deceased's legal privilege to see the lawyer's file. This kind of discovery, Judge Myers argued, was ripe for fishing expeditions. Second, the judge was not convinced that the scope of section 9 of the *Estates Act* should be expanded beyond testamentary documents to include "things that creative people can try to get a court to accept as a will" (at paragraph 27). Third, Judge Myers stated that the court must balance "expensive and intrusive investigations against the need for efficiency and affordability in estate matters" (at paragraph 32). Finally, since section 21.1 of the SLRA is novel, the relief sought in Thorne's application may have broader reach than just this case, and there was no legal research on which Judge Myers could base a decision.

Therefore, Judge Myers directed Thorne to schedule a further case conference to propose a process for bringing the matter before the court in which multiple sides can be heard, and on the basis of a well-researched legal argument. Interestingly, Judge Myers suggested that if, in the end, there was no interested party, the profession may consider taking positions in order to develop the law in this area.

It is hard to disagree with Judge Myers's concern that the relief sought, if granted, has the potential to lead to fishing expeditions that may unreasonably burden estates. It is also hard to disagree with his suggestion that the profession has an interest in the outcome of this case. It will be interesting to see if Thorne continues with this process, and it is good to know that the court is insisting on a process that will ensure that all sides of the issue are heard.

SHAREHOLDERS' REASONABLE EXPECTATIONS IN CORPORATIONS SERVING AS ESTATE-PLANNING INSTRUMENTS

BY ANTONIO IACOVELLI, TEP
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Recently, the Superior Court of Quebec rendered a decision that is relevant for anyone undertaking estate planning. In *Ludmer*,[7] the court was tasked with

7 *Ludmer v. Ludmer*, 2023 QCCS 224.

determining a son's rights as a shareholder in a structure put in place by his father when the son was a child, and determining the father's rights to deal with the corporate assets.

David Ludmer sued his father, Montreal philanthropist Irving Ludmer, claiming a remedy for oppression under the *Canada Business Corporations Act*[8] (CBCA).

David and Irving are co-shareholders of a corporation whose assets originated in a trust settled for David's benefit. David is the equity shareholder while Irving controls the corporation with his voting shares. David believes that he alone can benefit from the corporation's assets. Irving sees the corporation as an estate-planning instrument for him to make substantial charitable donations. In a judgment rendered in English, the Quebec Superior Court dismissed David's application, holding that Irving's conduct in controlling the corporation did not violate David's reasonable expectations as a shareholder.

In 1971, Irving settled a trust for his three children. The deed stated the trust's intent as an alimentary provision for its beneficiaries. Irving contributed to the trust and was its de facto trustee, making all decisions and causing the assets to grow considerably.

By 2004, Irving had wound up the trust. Irving had previously transferred the trust's assets to three separate corporations that he had created for each of his children as sole equity shareholders, with the trust controlling each corporation through voting shares. Absent the trust, Irving now controls the corporations' assets by holding the majority of the voting shares. David's corporation ("DavidCo") received assets valued at $8,470,807 in the transaction.

In 2020, a dispute culminated in Irving informing David that DavidCo would have a philanthropic function because the value of DavidCo's assets exceeded the amount that Irving intended to leave David. Irving had already caused DavidCo to make substantial charitable donations without David's knowledge.

Having always deferred to Irving on financial matters, David became alarmed and retained counsel to obtain copies of DavidCo's corporate records and those of the long-terminated trust. Irving, through counsel, refused.

David petitioned the court, primarily invoking the oppression remedy under section 241 of the CBCA and seeking to have DavidCo wound up and its assets distributed to David.

The oppression remedy empowers a court to enforce the reasonable expectations of stakeholders or shareholders of a corporation who face conduct that is "oppressive" or "unfairly prejudicial" or that "unfairly disregards" their interests, and is thus wrongful. The conduct need not be illegal, only wrongful, and its effect in thwarting a stakeholder's reasonable expectations governs. The court's analysis is necessarily fact-specific, based on an objective finding of a reasonable expectation in light of the given context, since conduct that is oppressive in one case may not be oppressive in another.

With these principles in mind, the trial judge reminded the parties that DavidCo is distinct from its shareholders, whose shares do not confer a right to DavidCo's underlying assets, which belong to DavidCo alone.

DavidCo's shareholders' agreement gives Irving full decision-making power, tempered by a director's fiduciary duties and David's reasonable expectations.

The court held that David's reasonable expectation is that the assets originally held in trust for his benefit upon their transfer to DavidCo are now held for his sole benefit as equity shareholder of DavidCo. David can thus reasonably expect no encroachment on the value of his share of the trust's assets invested in DavidCo, valued at $8,470,807. Irving's past practice over 20 years of making regular discretionary distributions to David from DavidCo's assets, as well as David's status as sole equity shareholder, support this view.

On the other hand, the court found that it was unreasonable for David to expect Irving to refrain from using the growth in the value of DavidCo's assets for his estate-planning purposes, including philanthropic endeavours, since the growth in the value of the assets resulted entirely from Irving's unpaid efforts and skill.

David's reasonable expectation thus essentially concerns the preservation of the trust's initial contribution to DavidCo of $8,470,807.

Since Irving did not cause DavidCo's donations to encroach on the $8,470,807 threshold, the court found that David had not met the test for an oppression remedy. Had he met the test, liquidating or dissolving DavidCo would not have been appropriate, because David has no reasonable expectation of receiving DavidCo's assets prior to Irving's death. On this latter point, the court also reminded the parties of Irving's testamentary freedom to bequeath DavidCo's controlling shares to whomever he wishes.

The court regretted the lack of resolution, condemning the parties to carry on together as shareholders, but also noted that its role is not to solve a dysfunctional relationship. The decision has been appealed to the Quebec Court of Appeal.

8 *Canada Business Corporations Act, RSC 1985, c. C-44.*

RECENT CHANGES TO INTER VIVOS TRUST-BASED PROBATE PLANNING IN NOVA SCOTIA RELEVANT TO NON-RESIDENTS

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Associate, Stewart McKelvey;
Member, STEP Atlantic

The surprising introduction of Nova Scotia's *Non-resident Deed Transfer Tax Act*, SNS 2022, c. 4, as amended by SNS 2023, c. 2, sections 17-26 ("the Act"), announced in the 2022-23 provincial budget and effective as of April 1, 2022, resulted in the application of a new 5 percent non-resident provincial deed transfer tax (PDTT) to the transfer of residential properties with three or fewer dwelling units to one or more grantees where more than 50 percent of the ownership interest in the property is granted to non-residents of Nova Scotia.

The PDTT significantly impacted the cost-effectiveness of inter vivos trust-based probate planning in Nova Scotia for non-residents of the province. While the PDTT presents no legal impediment to non-residents setting up an inter vivos trust for probate planning, because the probate tax rate in Nova Scotia is approximately 1.7 percent and the PDTT rate is 5 percent, it was no longer cost-effective to do this kind of planning for non-residents purely for probate planning purposes, since substantially more in PDTT taxes would need to be paid in comparison to probate taxes, and the PDTT would be paid at the time of transfer rather than on death. However, recent changes to the PDTT regime appear to have the effect of permitting trust-based probate planning techniques involving non-residents to occur on a cost-effective basis once again in Nova Scotia.

Following amendments made to the PDTT regime in July 2023, section 4(2) of the Act now provides as follows:

> Every person who on or after July 1, 2023, tenders for registration in the Province a deed in respect of residential property that grants an ownership interest to one or more non-residents shall, before the deed is registered, pay to the Minister [of Finance and Treasury Board] a deed transfer tax of five per cent of the greater of:
>
> a. (a) the sale price; and
> b. (b) the assessed value of the residential property,
>
> multiplied by the percentage ownership interest granted to each non-resident.

However, there are several exemptions to the application of the PDTT set out in section 5 of the Act. They include exemptions for transfers between spouses or common-law partners (section 5(1)(a)), and exemptions for transfers "from an executor to a beneficiary under a will, where the beneficiary is a spouse, common-law spouse, child, grandchild, parent or sibling of the testator or a child or grandchild of the testator's spouse or common-law spouse" (section 5(1)(e)). Section 5(4) further provides that "[t]he deed transfer tax does not apply in such other circumstances as may be prescribed," and additional exemptions can be found in the *Non-resident Deed Transfer Tax Regulations* ("the Regulations").

When the Act originally came into effect, there were no exemptions available for a transfer into an inter vivos trust under either the Act or the Regulations. However, the list of exemptions to the application of the PDTT was recently updated, and regulation 4 now provides as follows:

> The deed transfer tax does not apply if a deed or instrument transfers residential property in any of the following ways: ...
>
> c. (b) from an individual to a trust of which the individual is the sole beneficiary if the trust is considered an alter ego trust as defined in subsection 248(1) of the *Income Tax Act* (Canada) or a trust having similar requirements if the individual is a non-resident of Canada;
> d. (c) from an individual to a trust if the individual and their spouse or common-law partner are the only beneficiaries and the trust is considered a joint spousal or common-law partner trust as defined in subsection 248(1) of the *Income Tax Act* (Canada), or a trust having similar requirements if the individual is a non-resident of Canada;
> e. (d) to or from a trust if there is no change in beneficial ownership of the residential property.

In light of these recent changes to the PDTT tax regime, inter vivos trust-based probate planning in Nova Scotia using alter ego, joint spousal/common-law partner, and bare trusts should once again be a topic for further discussion with clients who are non-residents of Nova Scotia.

For additional information on the PDTT, including a discussion of the available exemptions and how the residency of an individual, a corporation, or a trust is determined for the purposes of the PDTT, see the guidelines provided by the provincial government at https://novascotia.ca/finance/en/home/taxation/tax101/docs/Nova-Scotia-Provincial-Non-resident-Deed-Transfer-Tax-Guidelines.pdf.

atlantic

AVAILABLE NOW

CLIENT SERVICE RESOURCE

A GUIDE FOR ASSISTING PERSONS IN VULNERABLE SITUATIONS

STEP CANADA

Accessible Through Your Online Member Account

Peter Weissman, FCPA, FCA, TEP, CEA
Chair of the STEP Canada Public Policy Committee

Rachel Blumenfeld, LLB, MA, TEP
Chair of STEP Canada

Increasingly, STEP members are encountering clients in vulnerable situations. All adults have the right to make decisions that may not be in their best interests or with which some may disagree. However, when a client lacks capacity to make decisions, is being unduly influenced, or is at risk of financial, psychological, or physical harm, the client, and those around them, seek assistance through legal solutions, services, and supports.

Often finding the right supports for a client requires complex navigation through the public and private service sector. In March 2021 STEP Canada's Public Policy Committee (PPC) hosted a virtual symposium to start a cross-sector conversation about the challenges facing advisors seeking to support and better serve their clients in vulnerable situations. This Guide is an outcome of that event.

This guide serves as a compass to assist our members when navigating the law and various resources in order to help clients respond to a situation, or plan ahead to prevent situations from arising. It establishes a framework for understanding vulnerable situations, provides the context in which vulnerable situations exist, and identifies solutions and resources for members to assist their clients.

We hope that through our knowledge exchange efforts and the preparation of this guide, the process of assisting your clients will be less daunting.

The publication of this guide has been provided as a benefit of membership through the dedicated efforts of the STEP Canada Public Policy Committee (PPC) and an advisory committee of industry experts. The delivery of this valuable resource would not have been possible without the collective expertise, diverse perspectives, and collaborative spirit of all those involved.

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STEP Canada wishes to acknowledge with gratitude the expertise and writing skills of Kathleen Cunningham, BComm, LLB, MPS, TEP, for the preparation of the Client Service Resource: A Guide to Assisting Persons in Vulnerable Circumstances.

CHAIR'S MESSAGE

RACHEL BLUMENFELD, TEP

Greetings to all members of STEP Canada!

I am honoured to introduce myself as your new chair. I have had the opportunity to meet many of you during my volunteer activities with STEP and professionally. As a member of STEP since 2001, I have held numerous local and national positions, including as a member of the STEP Toronto executive and chair of programming; chair of the National Conference Program Committee; and member of the National Executive Committee since 2015, where I have served as secretary, deputy chair, and now chair.

I took the helm from Chris Ireland at the national board meeting in June. Chris's term as chair was certainly challenged by the pandemic, but, with the support of the national board, leadership at our 11 branches and chapters, and the dedicated team at our national office, we were able to return to our activities with hybrid events, offering in-person and online participation. I congratulate Chris on completing a victorious term as chair, leading STEP Canada to these "better days" with great precision and dedication.

I want to extend an enthusiastic thank you to the 25th National Conference Program Committee, the moderators and speakers, our ever loyal and supportive sponsors, and more than 1,000 (!) delegates who made our conference the best-attended STEP event in the world. We weren't sure what to expect after delivering conference content online for the previous three years, but we rolled out the STEP blue carpet, welcoming one and all to the pre-eminent trust and estate event in the country, and you attended both in person and online. Skilled experts delivered outstanding presentations in the technical sessions, and participants had plenty of opportunity to reacquaint themselves with colleagues from across the country. A full summary of the event can be found elsewhere in this issue.

Planning for our 2024 conference has already begun. Keep an eye on your email and the step.ca website for announcements of our plans, and be sure to mark June 3-4, 2024 in your calendars.

The 2023-24 branch and chapter events calendars are replete with new opportunities for practitioner education and networking. Most branches offered a September Showcase to welcome everyone back, and to show off the upcoming season's branch and chapter bundles. As they have in the last few years, the bundle series will offer hybrid in-person and online delivery. They provide extremely good value, filled with STEP's high-calibre technical content.

On behalf of the board of directors, I extend a sincere thank you to all the program officers and branch executives who concentrated their efforts to organize such vibrant programming.

As well as overseeing the usual operation of STEP Canada over the next two years with the support of the Executive Committee and senior staff, I plan to focus on a few special initiatives, including the following:

- *Membership growth and branding.* Over the last 25 years in Canada (and the last 32 years worldwide), the trust and estate practitioner (TEP) designation has become an industry necessity. With this designation comes distinction, incredible and increasing benefits, and interesting opportunities. I am grateful for the continued commitment of our members, and in many cases their employers, in supporting STEP's work and in recognizing its value. Beyond our industry, we will engage the public with strategic messaging and marketing tools to enhance STEP Canada's public profile and to publicize the TEP designation.
- *Collaboration.* We will continue to increase our collaborative role within the STEP organization, including the STEP global board and council, its committees, the secretariat, special interest groups, and STEP USA. In fact, planning is underway for the long-awaited STEP Canada/STEP USA in-person conference, to be held in Chicago in October 2024. In addition, we will continue to pursue opportunities to build collaborative relationships with other like-minded professional organizations, resulting in the development and preparation of joint sessions, symposia, and industry advancements. One such collaboration resulted in the 2021 Symposium on Vulnerable Clients, hosted by STEP Canada and the Public Policy Committee. This symposium initiated a cross-sector conversation about the abuse and mistreatment of vulnerable people, resulting in strategies and activities that will be pursued to support systemic change across numerous industries and that led to the now published *STEP Client Resource Guide for Assisting Persons in Vulnerable Situations*.
- *Advocacy and policy work.* As the TEP and STEP branding continues to grow, opportunities increase to showcase our advocacy and policy work among industry stakeholders, government, and the Canadian public. Our Public Policy Committee and Tax Technical Committee will intensify their study of legislation and topical issues to ensure timely and relevant communication, response, and action.

STEP Canada's education programs continue to be our greatest resource for increasing the number of TEPs in Canada. Currently, 1,000 professionals are enrolled. Graduates of the programs are published annually in the May issue of *STEP Inside*.

I will end my first official message with an expression of thanks to the members of the STEP Canada Executive Committee, Richard Niedermayer, Brian Cohen, Aileen Battye, Corina Weigl, and Chris Ireland; to our outgoing past chair, Pamela Cross; and to our dedicated STEP Canada senior staff, Janis Armstrong and Michael Dodick. All of us have worked closely and effectively in various capacities for many years on many projects and committees. I am confident that over the next two years our continued collaboration will foster an even better and stronger STEP Canada.

STEP CANADA

2023-24 | BRANCH & CHAPTER PROGRAM SCHEDULE

Branch/Chapter	*Event /Title*
Atlantic	(S1) Fiduciary Accounting; (S2) Navigating the Complexity of Disability Planning; (S5) Planning Outside the Will; (S6) The Executor's Full Monty
Calgary	(S1) Family Learning and Development; (S2) Tax Update; (S5) Alternative Dispute Resolution & Estate and Trust Case Law Update; (S6) Hot Topics in Insurance Planning
Edmonton	(S1) Farm Succession Planning; (S2) Issues in Estate Litigation; (S5) Is the Risk Worth the Reward? "Aggressive" Tax Strategies With Insurance Planning; (S6) Doing Deathcare Differently
Montreal	(S1) Survol des principales modifications législatives en matière de protection des personnes; (S2) Impôt sur le revenu fractionné (TOSI) particulièrement dans une optique successorale; (S5) Jurisprudence civile/ Civil Jurisprudence – (Bilingue); (S6) Évaluation d'entreprise – du gel successoral, au contexte familial, au décès : (i) théorie; (ii) jurisprudence; et (iii) positions administratives
National	(S3) Better Breadcrumbs: Assisting Clients in Preparing A Clear, All-Inclusive and Tax Efficient Road Map for Their Fiduciaries and Families; (S4) What to Do When Things Go Off the Rails – A Cross-Provincial Examination of Capacity Disputes
Okanagan	(S1) Doing Good Well: Maximizing your Client's Charitable Impact; (S2) Planning for Succession within Agricultural Businesses; (S5) Beautiful BC – Except When You Die? Estate Planning Issues and Opportunities for BC/Alberta Families; (S6) Cross-Border Inheritances: Common Traps
Ottawa	(S1) Planning Principles for Non-principal Residences; (S2) The ABC's of Trust Reporting; (S5) Trusts 201: Basics and Beyond; (S6) Tax Efficient Planning Strategies for People with Disabilities
Saskatchewan	(S1) Selected Issues Pertaining to Taxation at Death; (S2) Working with a Trust Company; (S5) Interspousal Agreements: An Important Estate Planning Tool; (S6) Driven by Purpose: Working With Donors to Create Estates With High Charitable Impact
Southwestern Ontario	(S1) Anatomy of a Tax Appel; (S2) New Trust Reporting Rules; (S5) Identifying the Time to Safeguard a Decision-Maker's Interests and Strategies to Begin the Conversation; (S6) The Kolbe Approach
Toronto	(S1) Probate Planning – Is It Still Worth the Hype?; (S2) Artificial Intelligence – Can It Do Your Work for You?; (S5) Foreign Beneficiaries of Canadian Estates and Trusts (Middle East, UK and East Asia) – Risks, Opportunities and Rewards; (S6) Let's Hit the Highlights – In Case You Missed It
Vancouver	(S1) The Power and the Glory: What Powers Do Fiduciaries Have, and How Are Those Balanced and Administered?; (S2) A Brave New (and Old) World: Recent Developments in the Trust Context, Including Specific Purpose Trusts, and Litigation Relating to Trusts; (S5) Great Expectations: How Family Law Principles and Case Law Affect Taxes, Particularly on Separation or Divorce, as Well as Lifetime Gifting and Planning for Bequests Between Spouses and to Family Members; (S6) The Wind in the Willows: Updates and Reflections on Tax and Trust Changes in the Planning and Litigation Context Over the Past Step Year
Winnipeg	(S1) Planning for Blended Families; (S2) Powers of Attorney, Drafting, Litigating and Investment Obligations; (S5) Creditor and Family Law Protection With Trusts: Review of Trusts Through Family Law Lens; (S6) Tax Planning Upon the Death of a Business Owner