Law Society
of Saskatchewan

What's New in Wills, Estates, and Trusts? (CPD 237)

November 7, 2019
Broadcasted Province-Wide

LAW SOCIETY OF SASKATCHEWAN

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PROGRAM:

9:00 **Registration**

9:30 **Blended Family & Farming Corporations (An Agricultural Perspective)**
Clint Gifford, CPA, *Virtus Group*

10:15 **What's New in Trusts**
Beaty Beaubier, Q.C., TEP, *Stevenson Hood Thornton Beaubier*

11:15 Refreshment and Networking Break

11:30 **Assisted Dying**
Dr. Robert Weiler, *Head of MAID Program*
Barbara VonTigerstrom, *College of Law*

12:15 Lunch

1:00 **What's New at the Public Guardian and Trustee's Office**
Sandra Bobyk, *Ministry of Justice*

2:00 **Discussing the Intestate Succession Act**
Maria Markatos, *Ministry of Justice*

2:30 Refreshment and Networking Break

2:45 **Law Society Perspective**
Jenna Kraushaar, *Law Society of Saskatchewan*

3:30 **Adjournment**

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Maria Markatos

TAB 6: **Road to Best Practice: An 8-Step Program for Lawyers (Presentation)**
Jenna Kraushaar

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Jenna Kraushaar

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ABOUT THE PRESENTERS:

The professionals who are presenting at this Law Society of Saskatchewan seminar are all volunteers who have donated their valuable time to contribute to continuing professional development.

Clint Gifford, CPA, *Virtus Group*

Clint began his accounting career in 1999 and specializes in providing tax planning and business advisory services for his many entrepreneurial clients. As a tax specialist, he focuses on providing financial solutions for professionals and business owners, structuring corporate reorganizations and optimizing Scientific Research and Experimental Development (SR&ED) tax incentive claims. His in-depth tax expertise includes advising clients in a variety of industries including healthcare, agriculture, law, engineering, residential and commercial construction and development, farm and industrial manufacturing and auto dealerships.

Clint obtained his professional designation as a CPA in 2002 and completed the Chartered Professional Accountants of Canada In-Depth tax program in 2005. As one of the leading Tax Partners at Virtus Group, he stays on top of the everchanging tax rules to ensure clients have the best tax knowledge and financial solutions available to apply to each unique business situation.

Beaty Beaubier, Q.C., TEP, *Stevenson Hood Thornton Beaubier*

Beaty works extensively in estate planning, corporate reorganizations and commercial transactions. He has prepared documentation respecting Wills, Trusts (both inter vivos and testamentary) and legal documentation needed to reorganize share ownership in corporations and to facilitate succession planning and sales to third parties. Beaty has acted as counsel for taxpayers in disputes with the Canada Revenue Agency, including counsel in several reported decisions of the Tax Court of Canada. He has been selected by peers as a leading practitioner in the 2014 - 2019 editions of The Canadian Legal Lexpert® (Estate & Tax Planning, and Corporate Tax Litigation).

Beaty has published extensively including papers for the Prairie Provinces Tax Conference, for Continuing Legal Education in Saskatchewan, the STEP National Conference (2014), and the Estates,Trusts & Pensions Journal.

Associations Memberships include the Law Society of Saskatchewan, the Society of Trust and Estate Practitioners, and the Canadian Tax Foundation. Currently serves as Chair of the STEP Awards Committee, as well as a member of the STEP Trust and Estate Technical Committee. Also serves as a member of the Editorial Board of the Estates, Trusts and Pensions Journal.

Dr. Robert Weiler, *Head of MAID Program*

Dr. Rob Weiler obtained his medical degree from the University of Saskatchewan College of Medicine and holds certification and fellowship from the Royal college of Physicians and Surgeons of Canada in Anesthesiology. He also completed the Master of Public Health at the University of Saskatchewan in 2013.

Dr. Weiler trained in Saskatoon and Vancouver and for over 20 years provided service at St. Paul's Hospital's intensive care unit. He continues to work part time in Anesthesia. Rob believes it's important to link acute care needs and community health services and is interested in working toward an integrated, sustainable health system. He is a researcher on oral health in preschool children and involved in the development of Medical Assistance in Dying in Saskatchewan.

Barbara von Tigerstrom, *College of Law*

Barbara von Tigerstrom is a Professor in the College of Law at the University of Saskatchewan, where she has been a faculty member since 2005. She holds a law degree from the University of Toronto and a Ph.D. in law from the University of Cambridge. She teaches health law, tort law, and information and privacy law, and her current research focuses on public health law, the regulation of drugs and medical devices, and information and privacy law. She is a member of the Law Reform Commission of Saskatchewan and the University of Saskatchewan Biomedical Research Ethics Board.

Sandra Bobyk, *Ministry of Justice*

Sandra Bobyk is Senior Crown Counsel with the Ministry of Justice and Attorney General. After graduating from the College of Law at the University of Saskatchewan, she spent several years in private practice before joining the ministry in 2004 when she was hired to run the then-new Support Variation Project and Family Law Information Centre. Sandra has been in-house counsel with the Public Guardian and Trustee of Saskatchewan for the last 13 years. In her spare time, she sits on the boards of the Saskatchewan Youth Ballet and Alzheimer's Society of Saskatchewan and acts as a patient-family advisor for the Saskatchewan Health Authority. Sandra was the 2015 recipient of PLEA's Cam Partridge Memorial Volunteer of the Year award and the 2016 co-recipient of the PBLS Pro Bono Service Award for her work in the area of immigration and refugee law, which she continues with today.

Maria Markatos, *Ministry of Justice*

Maria is a Senior Crown Counsel with the Legal Services Division of the Ministry of Justice. She obtained her BA from the University of Regina and her LLB from the University of Saskatchewan. She articled with the Ministry of Justice in 2004 and was called to the Saskatchewan Bar in 2005. Prior to joining the Legislative Services Branch full time in 2010, Maria shared her time with the Civil Law Division as counsel to the Maintenance Enforcement Office.

As part of the Legislative Services Branch, Maria provides legal and policy advice and assistance in the development of legislation and Orders in Council. Maria has worked on several Acts and Regulations including in the areas of wills and estates, family law, builders' liens, and privacy related matters. Maria was the Chair of the Civil Section of the Uniform Law Conference of Canada from 2017/2018 and 2018/2019.

Jenna Kraushaar, *Law Society of Saskatchewan*

Jenna Kraushaar earned a Bachelor of Arts from the University of Regina in 2009. Once she obtained her degree, Jenna worked for the Regina Qu'Appelle Health Region before moving to Saskatoon to attend the University of Saskatchewan College of Law where she earned her JD in 2014.

After graduation, Jenna moved home to Regina and articled at Olive Waller Zinkhan and Waller LLP. During her time in private practice Jenna maintained a general practice and appeared before all levels of court in Saskatchewan. Jenna joined the Law Society of Saskatchewan as Complaints Counsel in August 2017. Outside of work, Jenna enjoys spending time with family, camping, gardening and skiing.

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TAB 1: Blended Families and Farming Corporations – Tax Considerations

Blended Families and Farming Corporations – Tax Considerations

November 7, 2019

Clint Gifford, CPA, CA

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Chartered Professional Accountants & Business Advisors LLP

Areas to be Covered

- Tax consequences on death
  - Deemed disposition, related taxes, options to defer/reduce
- Complications with blended families
  - Second spouse, biological and non-biological children
- Specific Opportunities for Farm Operations
  - Capital Gains Exemptions, value of farmland
- Options for Planning
  - Avoiding issues before they happen

Marginal Tax Brackets

(Sask 2019)

0%	Income up to about $12,000
25.5%	Income up to about $45,000
33%	Income up to about $95,000
38.5%	Income up to about $129,000
43.5%	Income up to about $210,000
47.5%	Income over $210,000

- Capital gains taxed at 50% of regular income
- Dividends max at 29.64% (eligible), 40.37% (ineligible)

Deemed Disposition

- On death, an individual taxpayer is deemed to dispose of all of their property at fair market value
  - Registered investment accounts (RRSP, RRIF but not TFSA) are "regular income"
  - Gains on assets – public or private company investments, real estate, etc – is generally included as capital gains
  - Losses are also recognized and can be used to offset other income
- These amounts are added to other income sources from the calendar year pre-death on the "final return"
  - Due to be filed later of: April 30th (or June 15th) of following year, or 6 months after date of death

Exceptions to FMV Deemed Disposition

- Main exception is for assets that are transferred to spouse/common-law partner or Spousal Trust
  - Assets must vest indefeasibly within 36 months (or longer "reasonable" period approved by Court)
  - Transferee must be resident of Canada at time death occurred
- Spousal Trust has specific requirements to allow deferral of gain
  - Same vesting requirements
  - Trust created by the Will and must be resident in Canada once it receives any assets
  - Spouse/common-law partner is entitled to receive all income
  - No one but spouse/common law partner can receive or obtain use of any income or capital before their death

Exceptions to FMV Deemed Disposition

- Lessor known exception for "Farm and Fishing Property" that is transferred to child as consequence of death
  - Extended definition of child includes grandchildren as well as step, adopted and in-law children
  - Recipient child must be resident of Canada before date of death
  - Eligible property includes land and depreciable property in Canada used principally in a farming or fishing business in which the deceased, their spouse, their parent or their child was actively engaged on a regular and continuous basis
  - Same 36 month vesting requirements as above
  - Rollover can also be achieved when property is left to deceased's child through a Spousal Trust

Farm or Fishing Property Exception

- Rollover is also allowed for shares of family farm and fishing corporations and partnerships
  - Similar criteria for rollover to be applicable with regard to recipient, residency and timing
  - Criteria for family farm corporation or partnership are detailed, but mainly require ~90% or more of FMV of assets at the time of death were:
    - principally used in farming business in Canada by itself, the deceased or their spouse/parent/child, or other qualifying entities of those people
    - Shares or debt of other corporations meeting these criteria
    - Partnership interest or debt of other partnerships meeting these criteria
  - Rollover is also potentially possible for assets transferred through a Spousal Trust

Blended Families – Potential Issues

- Increased divorce rates, increased age for starting families and marriages later in life have all increase the prevalence of blended families
- Death of either parent brings additional potential issues with both economic and tax consequences:
  - Older children with less familial connection
  - Younger children still needing to be cared for
  - Potential for subsequent remarriage

Blended Families – Potential Issues

- Spousal rollover provides great tax deferral, but can leave children without protection
  - Distribution to other "side" of family in surviving spouse's Will,
  - Subsequent relationship gaining claim/access
- Spousal Trust offers same tax deferral, but no ability to distribute capital until spouse dies
  - Could be significant delay if death at young age
- Direct distribution requires payment of tax that reduces assets available for all beneficiaries

Blended Families – Potential Solutions

- Inter Vivos Trust can be set up to own assets meant for "original family" children
  - No deemed disposition at death, allocation outside of Will
- Segregation of assets so that "low tax" assets can be distributed to children while "high tax" assets are rolled over
  - As wealth changes, difficult to maintain perfect balance
- Right of first refusal on purchase of assets with sentimental value if not gifted directly

Special Considerations for Farm Families

- Besides the farming property rollovers discussed previously, there are other beneficial tax rules related to farming operations
  - "Rights or things" allows taxation of personal farming receivables and inventory on a separate personal tax return with additional tax credits
  - Capital Gains Exemption applies to similar, but not entirely the same, assets as available for rollover but expires if not used on deceased's final return

Capital Gains Exemption

- Only available to individuals to offset capital gains
  - $1,000,000 for Qualified Farm Property – can include land, shares and partnership interests, but not depreciable property
  - Property must have been owned for minimum of 24 months
  - Assets must have been used primarily in active farming business in Canada by deceased/spouse/parents/children
    - More than 50% for entire prior 24 months
    - 90% or more at the time of death
- Potential tax savings of $240,000
  - Care must be taken in the future as "ACB" created by CGE claim by deceased may have a hidden tax consequence for non-arm's length beneficiaries

Separation of Farming Components

- Common problem experienced with farm operations is concentration of wealth in single entity
  - Many farmers have a very large portion of total family wealth in the farm assets, and all of those assets held in one corporation
  - Efficient and cost-effective during life, can present a major obstacle to final wishes after death
- As an alternative, consider a separate corporation that owns the land and large equipment
  - Active farming company would lease these assets to provide an equitable economic return while maintaining separation
  - **Division of one corporation into two (or more) is significantly easier while at least one parent is alive**

Conclusion

- Proactive discussion and analysis of changing family dynamics is necessary to ensure the Will and Estate planning gives the desired results
- Ensure planning is revisited with significant changes to tax rules – ie. Graduated Rate Estate and Tax On Split Income – to adjust to changing environment

Questions?

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For more information contact us!

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Thank You!

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TAB 1A: Analysis and Planning for Tax Consequences on Death of an Individual

Analysis and Planning for Tax Consequences on Death of an Individual

Death of an individual can give rise to significant tax consequences but proper planning can ensure the potential taxes incurred are deferred or reduced while still allowing their final wishes for their assets to be respected.

Below is a helpful guide for analyzing an individual's situation and Estate tax exposure:

STEP 1 – WHAT DO THEY OWN?

Assets owned directly at the time of death will create potential tax consequences.

Marginal tax rates can be as high as 47.5% on taxable income over $210,000. Determine potential sources of taxable income – registered accounts (RRSPs, RRIFs, LIRAs), inherent gains on investments (both public and private) and real estate – to estimate the potential tax bill. Assess sources of funds for payment and allow the client to assess their willingness to have their Estate pay the estimated tax before distribution, or work to find methods to reduce/defer the taxes.

STEP 2 – WHO DO THEY WANT TO RECEIVE THEIR ASSETS?

The ability to defer tax can be as simple as leaving their assets to their spouse, and this is often the plan for couples, but if there are other wishes then further investigation should be done.

Bequests to spouses, common law partners and certain trusts for the benefit of those individuals can result in a tax-deferred transfer. As well, certain farm or fishing properties can be transferred to children/grandchildren on a tax-deferred basis. However, any other transfer will very likely create a taxable event that must be reported on the individual's final tax return.

STEP 3 – WHAT ARE POTENTIAL ALTERNATIVES?

After analyzing what they own, and who they want to receive those assets in the future, planning opportunities can be explored to achieve those goals in a tax-efficient manner.

Potential planning could be: Transfer of highly taxable assets to spouse, non-taxable assets to kids

- Create *inter vivos* trust to accrue future value in assets currently held directly to begin transfer of wealth to intended beneficiaries prior to death
- Separate eligible assets onto additional final tax return to access additional tax credits and marginal tax brackets
- Ensure all tax attributes are maximized for potential use – loss carryforwards, donations, Capital Gains Exemption
- Consider investment in life insurance to cover tax and other Estate liabilities
- Post death wind-up of corporation and capital loss carryback, or pipeline style withdrawal

For further information or with questions, please contact:

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TAB 2: Trusts - Pros and Cons in Light of New Tax Rules (Presentation)

TRUSTS – PLANNING WITH NEW (BUT NOT NECESSARILY IMPROVED) TAX RULES

Beaty F. Beaubier, Q.C., TEP

November 7, 2019

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BROAD OUTLINE

- Trust Structure
- Trust Residence
- Types of Trusts

BROAD OUTLINE

- Testamentary Trusts and the 2016 tax changes
- Tax on Split Income ("TOSI") rules and their impact on trusts (2018 tax changes)

3

BROAD OUTLINE

- 21 year rule – deemed dispositions and some planning considerations
- Family Trusts and New Identification Rules

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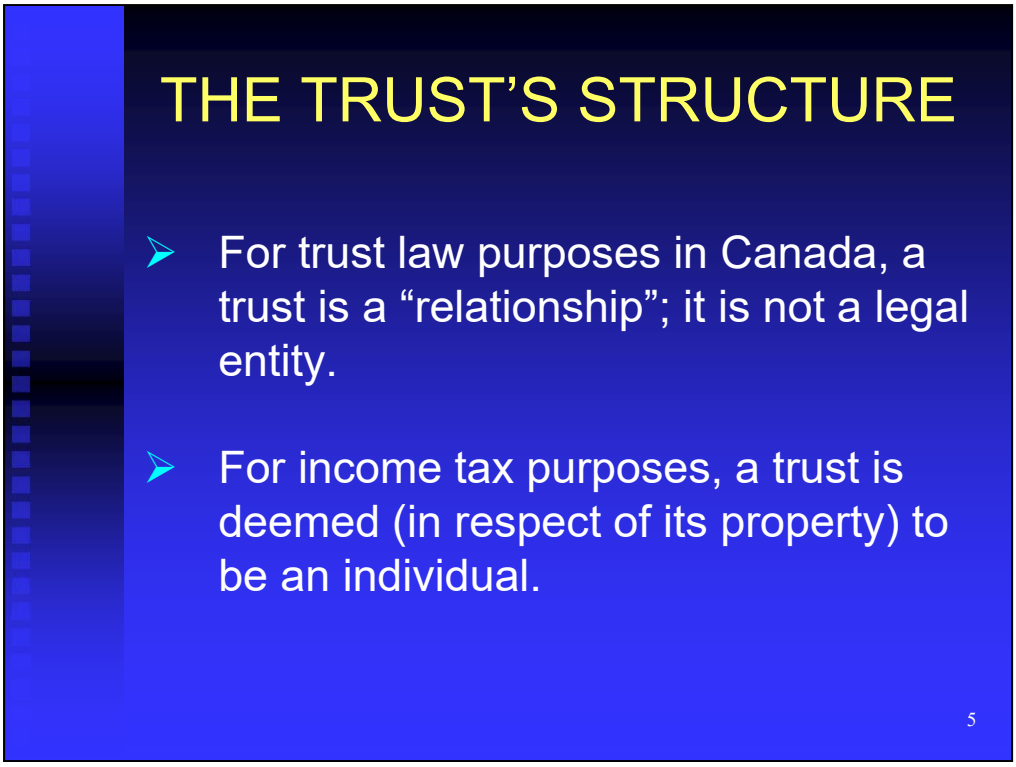

Ss. 104(2) of the Income Tax Act (Canada) (the "Act") deems a trust (in relation to its property) to be an individual.

The Canada Revenue Agency ("CRA") takes the position that because a trust is deemed to be an individual, a trust is related to each beneficiary who is related to the trustee. CRA Views 2009-031189I7 and 2009-033027IC6.

THE TRUST'S STRUCTURE

- For trust law purposes, while trusts can be established in some limited circumstances for "purposes" (such as for charitable purposes), for the most part trusts are created to hold property for the benefit of legal persons.
- This presentation will focus on trust planning for the benefit of legal persons.

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THE TRUST'S STRUCTURE

- At law, in order to create a trust:
  - A "settlor" must make a gift of property;
  - The gifted property is known as the "settled property";

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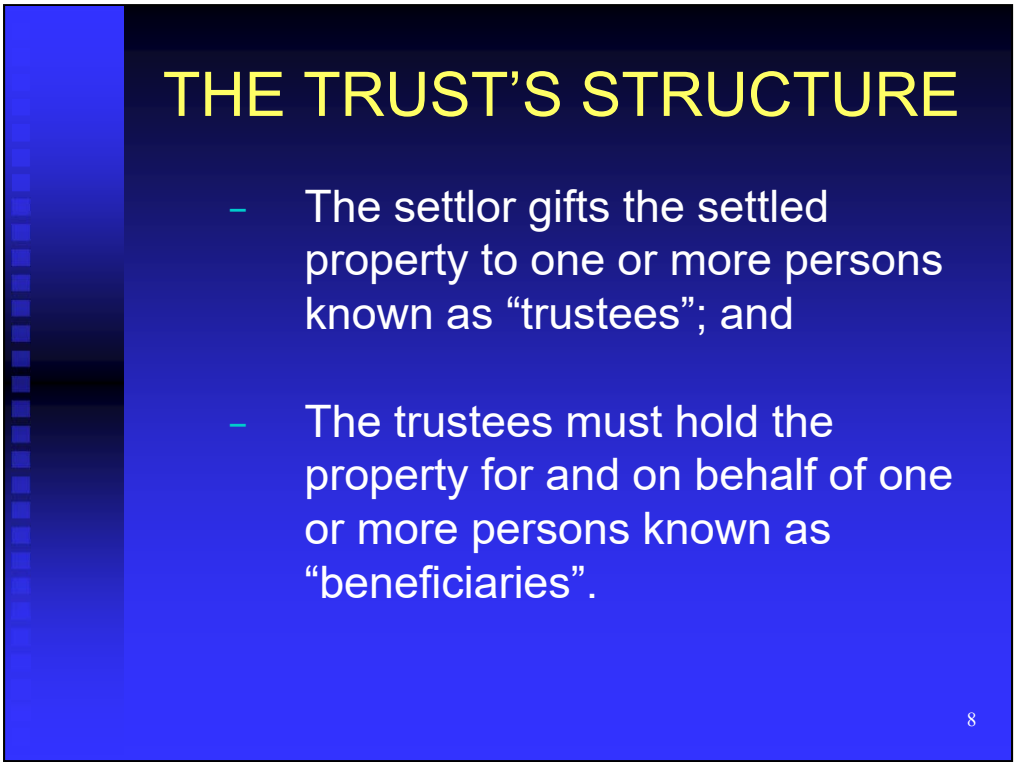

Generally speaking, it is advisable to structure the trust so that the settlor is not a trustee or beneficiary. In essence, try to avoid a reversionary or revocable trust whereby the trust property could come back to the settlor, or the settlor could be in a position to control the future disposition or distribution of trust property. Otherwise, ss. 75(2) of the Act will apply income from the property back to the settlor (so it is not income of the trust). Also, when ss. 75(2) applies to the trust, ss. 107(4.1) prevents a tax free rollover of the property out of the trust to its beneficiaries, other than the settlor or spouse thereof.

TRUST RESIDENCE

- Residence of a trust
  - The Income Tax Act (Canada) (the “Act”) does not define the residence of a trust – this is a determination made by judges

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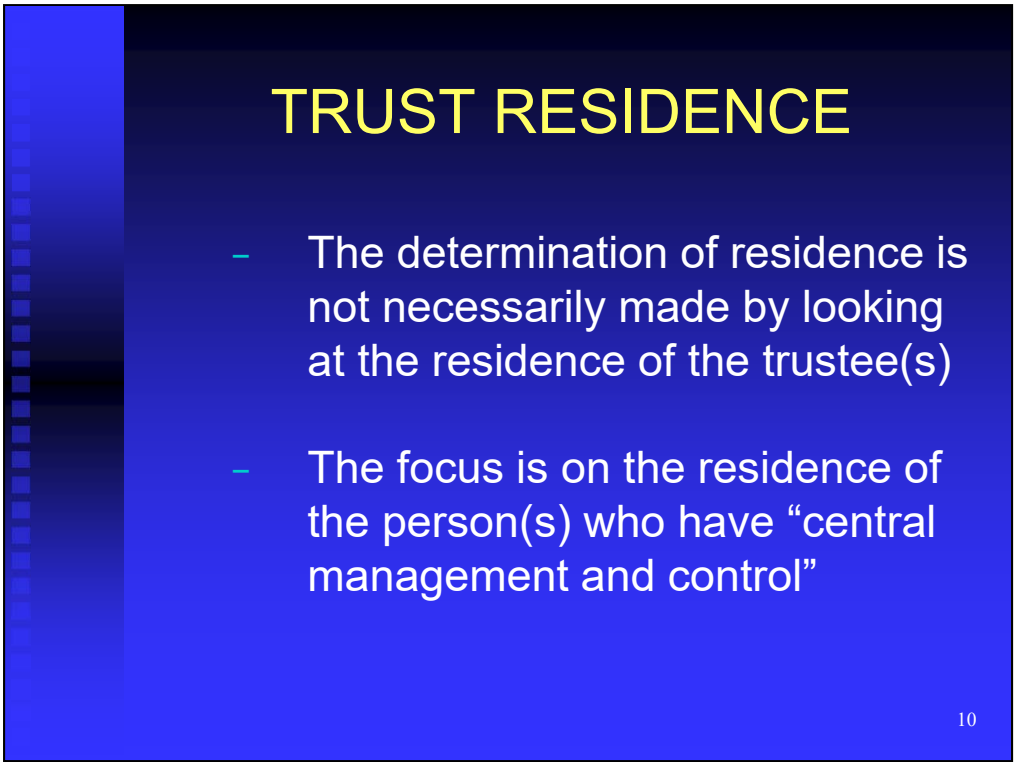

The leading case on this issue in Canada is ***Fundy Settlement* v. *R*** 2012 SCC 14. The court in that case considered the residence of two trusts in a situation respecting an estate freeze structure involving a trustee, namely St. Michael Trust Corp., which was resident in Barbados. The Canada Revenue Agency (“CRA”) took the position that the trusts were resident in Canada because the central management and control over the trusts were carried out by the main beneficiaries, who were resident in Canada, rather than the trustee. The trustee carried out administrative duties and did little else. Both the Tax Court of Canada and the Federal Court of Appeal agreed with the CRA. The Supreme Court of Canada upheld the lower courts’ decisions.

TYPES OF TRUSTS

- Under the Act, there are several different types of trusts that can be created.
- Trusts in Canada include a wide variety of classifications for income tax purposes, including:

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TYPES OF TRUSTS

- Family trusts (discretionary and non-discretionary);
- Graduated Rate Estates ("GREs");
- Qualified Disability Trusts ("QDTs");

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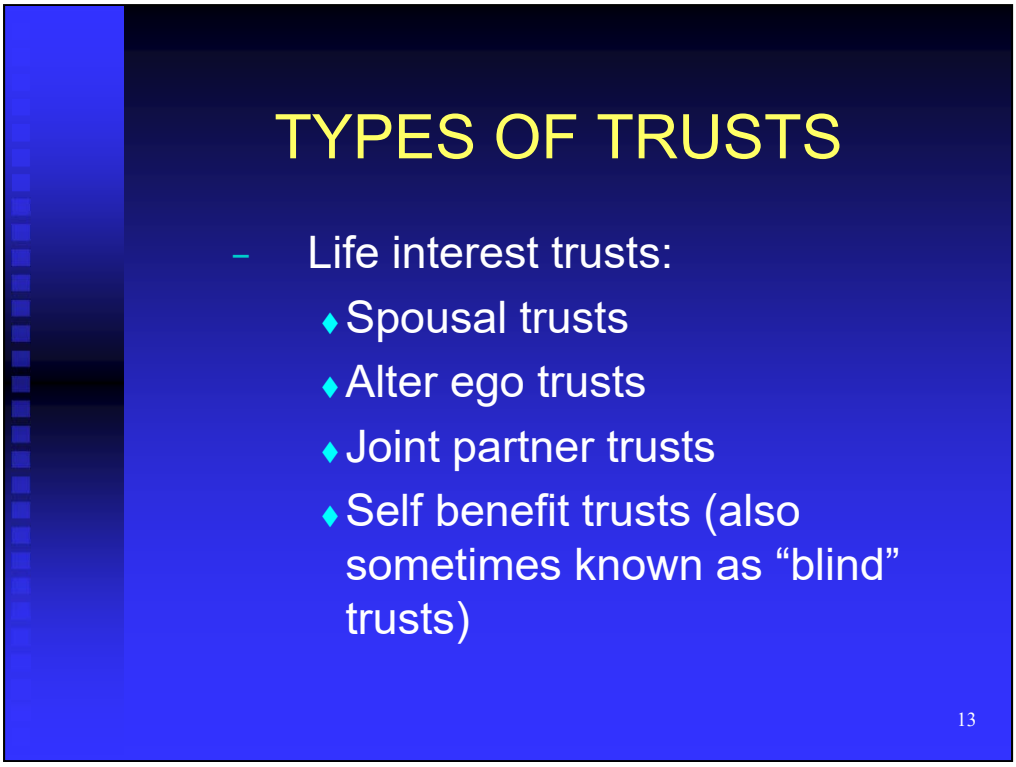

These trusts are often used in estate planning either in conjunction with or as “Will substitutes”. If structured properly:

1. The transfer of capital property (e.g. non-registered investments such as cash, shares and shareholders’ loans in private corporations, and portfolio investments) to the life interest trust can proceed on a tax rollover basis;
2. The property of the self-interest trust is generally deemed to have been disposed of at fair market value (“FMV”) on the death of the life interest beneficiary;
3. The trust assets do not form part of the estate of the deceased beneficiary, thus avoiding probate tax and maintaining privacy with respect to the property owned by the trust; and
4. The terms of the trust document can direct the distribution of the trust property following the death of the life interest beneficiary.

For an article discussing these types of trusts, see R. Daren Baxter, “Life Interest Trusts – Are They Worth The Trouble” in Tax Hyperion, Volume 16, Issue 3, May-June 2019.

FAMILY TRUSTS

- In considering the structure of a “family trust”, whether that trust is an inter vivos trust or a testamentary trust, the key building blocks are identifying the settlor, the settled property, the trustee(s) and the beneficiaries.

Testamentary Trusts and 2016 Tax Changes

- As of January 1, 2016, significant tax changes applied to testamentary trusts

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Testamentary Trusts and 2016 Tax Changes

- At its simplest, a “testamentary trust” is a trust that arose on and as a consequence of the death of an individual provided that 2 key conditions are satisfied:

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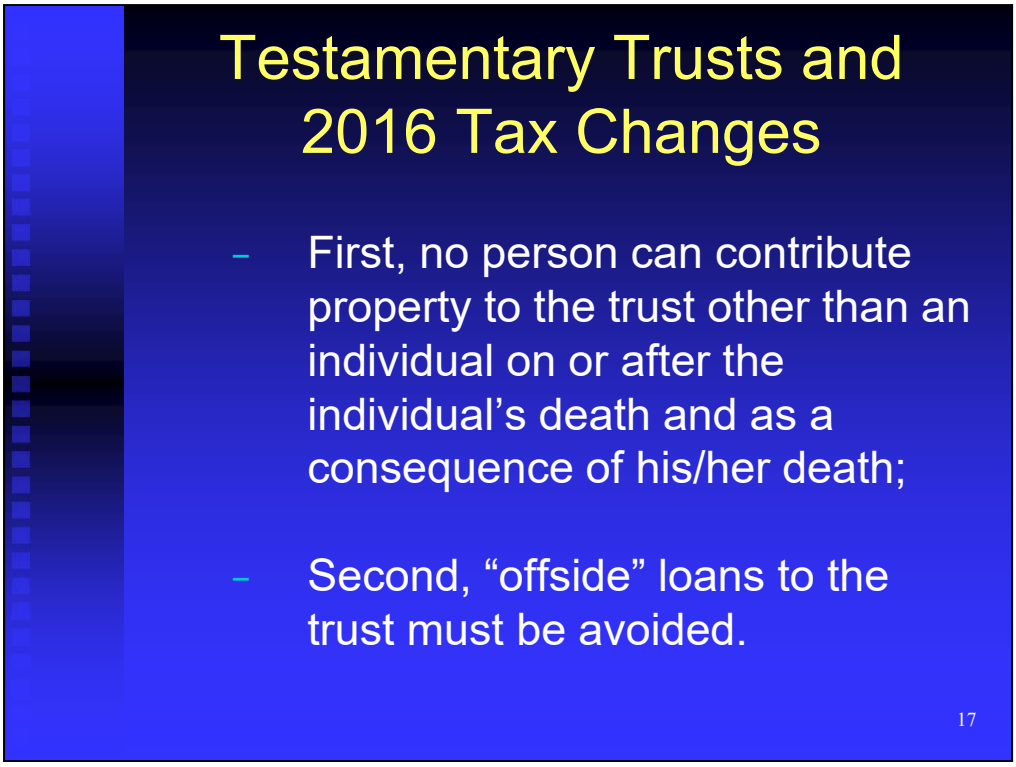

Pursuant to paragraph (d) of the definition of "testamentary trust" in ss. 108(1), a trust may be disqualified as being a "testamentary trust" if a debt is owed to or guaranteed by a beneficiary or any other person with whom any beneficiary of the estate does not deal at arm's length. There are exceptions to these "offside" loan rules where payments made on behalf of the estate to fund the funeral expenses, income taxes, professional fees or other expenses of the deceased, payments made to refinance debts on estate assets, or interim distributions to the beneficiaries of the estate, provided that such loan or debt is repaid within twelve months after the payment was made.

Testamentary Trusts and 2016 Tax Changes

- For years prior to 2016, income earned in a testamentary trust was taxed in the trust's hands at graduated income tax rates (these mirrored the same tax brackets and tax rates of an individual who was resident in the same province/territory as the trust).

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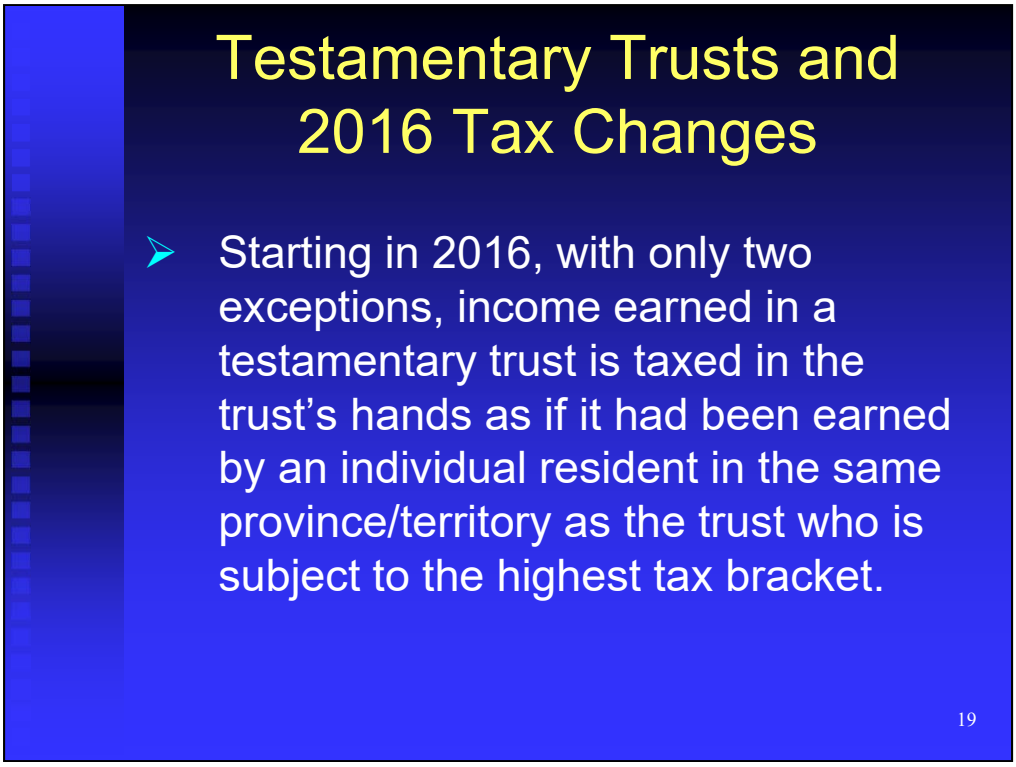

Prior to 2016, there was a considerable amount of estate planning done that made use of testamentary spousal trusts. If structured properly, on the death of the 1st spouse, a significant portion of his/her non-registered investments would be transferred to a testamentary spousal trust on a tax rollover basis on ss. 70(6). Income earned by the trust on that property would be taxed in the hands of the trust, and would make use of the graduated tax brackets and tax rates making use of certain elections that were available prior to 2016 in ss. 104(13.1) and (13.2). Starting in 2016, these elections are not available if the trust has any taxable income [ss. 104(13.3)].

Testamentary Trusts and 2016 Tax Changes

- The two exceptions to this new rule (such that the graduated tax rates still apply to income earned by the trust) are for:
  - Graduated Rate Estates ("GREs")
  - Qualified Disability Trusts ("QDTs")

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Testamentary Trusts and 2016 Tax Changes

- A Graduated Rate Estate [ss. 108(1)] is an estate that arose on and as a consequence of the death of the individual, provided that all of the following criteria are met:
  - No more than 36 months have passed since the death of the individual

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Testamentary Trusts and 2016 Tax Changes

- The estate is a testamentary trust
- The individual's Social Insurance Number is disclosed in the tax return of the estate for the year and for each prior taxation year ending after 2015

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Testamentary Trusts and 2016 Tax Changes

- The estate designates itself as a GRE in its first taxation year that ends after 2015
- No other estate designates itself as a GRE of the individual

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Testamentary Trusts and 2016 Tax Changes

- A Qualified Disability Trust [ss. 122(3] must satisfy the following criteria:
  - The trust must be a testamentary trust.
  - The trust must be resident in Canada for the trust year.

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Testamentary Trusts and 2016 Tax Changes

- The trust and one or more electing beneficiaries must jointly file an election in prescribed form T3QDT for each taxation year.
- The electing beneficiaries must be named in the will or testamentary instrument.

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Testamentary Trusts and 2016 Tax Changes

- The electing beneficiaries must have a disability tax credit certificate and a social insurance number.
- The electing beneficiaries can only file one election per year.

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Testamentary Trusts and 2016 Tax Changes

- QDT status is determined on a year by year basis."

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Testamentary Trusts and 2016 Tax Changes

- Note that a QDT for income tax purposes can also be a Henson trust for estate planning purposes
- The advantage of a Henson trust is that the beneficial ownership of an interest in the trust does not generally give rise to a denial of social assistance benefits

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Testamentary Trusts and 2016 Tax Changes

- To succeed as a Henson trust, the trust must be fully discretionary in the hands of the trustees, and the beneficiary must not have the legal power to terminate the trust (e.g. under the doctrine of *Saunders* v. *Vautier*)

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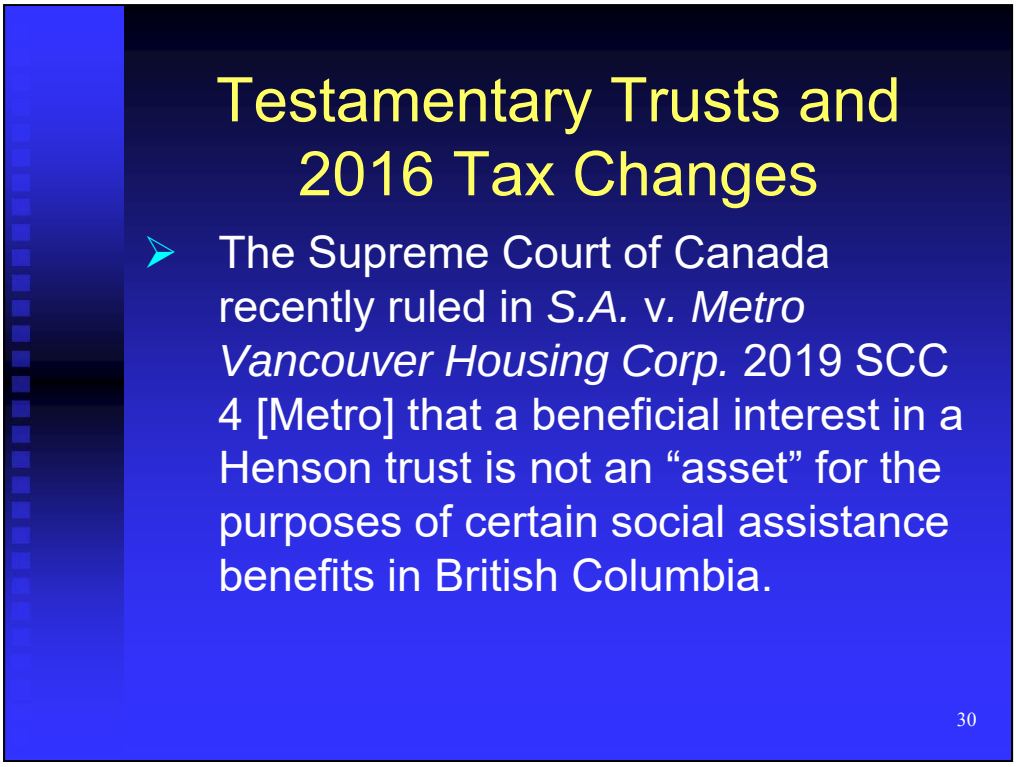

The following passage is taken from the decision of Côté J. writing on behalf of the majority of the Supreme Court of Canada in the Metro decision:

[1] At issue in this appeal is whether the interest that the appellant, S.A., has in a trust that was set up for her care and maintenance should be treated as an "asset", which would negatively affect her eligibility to participate in a rental subsidy program offered by her landlord, the respondent, Metro Vancouver Housing Corporation("MVHC").

[2] Resolving this issue requires this Court to consider, for the first time, the nature of a specific type of trust — commonly known as the "*Henson* trust" — settled for the benefit of a person with disabilities who relies on publicly funded social assistance benefits (see: *Ontario (Director of Income Maintenance Branch of the Ministry of Community and Social Services) v. Henson* (1987), 26 O.A.C. 332 (Div. Ct.), aff'd in (1989), 36 E.T.R. 192 (Ont. C.A.)). The central feature of the *Henson* trust is that the trustee is given ultimate discretion with respect to payments out of the trust to the person with disabilities for whom the trust was settled, the effect being that the latter (a) cannot compel the former to make payments to him or her, and (b) is prevented from unilaterally collapsing the trust under the rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482.

Because the person with disabilities has no enforceable right to receive any property from the trustee of a *Henson* trust *unless and until* the trustee exercises his or her discretion in that person's favour, the interest he or she has therein is not generally treated as an "asset" for the purposes of means-tested social assistance programs (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., Waters*' Law of Trusts in Canada* (4th ed. 2012), at pp. 572-73). The *Henson* trust therefore makes it possible to set aside money or other valuable property for the benefit of a person with disabilities in a manner that jeopardizes that person's entitlement to receive social benefits as little as possible.

[3] S.A. is a person with disabilities for whose benefit a *Henson* trust was settled in 2012 (the "Trust"). She resides in a housing complex operated by MVHC. In addition to providing affordable housing in the Greater Vancouver area, MVHC offers rental assistance in the form of rent subsidies to certain eligible tenants on a discretionary basis. An "eligible tenant" is one who, among other things, has less than $25,000 in assets. At issue in this case is whether S.A.'s interest in the Trust should be treated as an "asset" for the purpose of determining whether she is eligible to be considered by MVHC for a rent subsidy. Both of the courts below answered this question in the affirmative. S.A. appeals to this Court.

[4] I would allow the appeal. In my view, S.A. has no actual entitlement to the trust property under the terms of the Trust. Although she is a co-trustee, she has no independent, concrete right to compel any payments to be made to her or for her benefit, and cannot unilaterally terminate the Trust. Her interest in the trust property therefore amounts to a "mere hope" that the trustees will exercise their discretion in a manner favourable to her (Waters, Gillen and Smith, at p. 1204, note 155). For this reason, I conclude that her interest in the Trust is not an asset that could disqualify her from being considered by MVHC for a rent subsidy.

Testamentary Trusts and 2016 Tax Changes

- Structuring a testamentary trust for a disabled person to satisfy the hallmarks of both a QDT and a Henson trust can give rise to multiple legal and tax advantages.

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TOSI RULES AND THEIR IMPACT ON TRUSTS

- Starting January 1, 2018, new tax rules dealing with “tax on split income” (“TOSI”) apply, particularly with respect to family-owned corporations.
- These new rules have a direct impact on where and when family trusts can be used favourably as shareholders.

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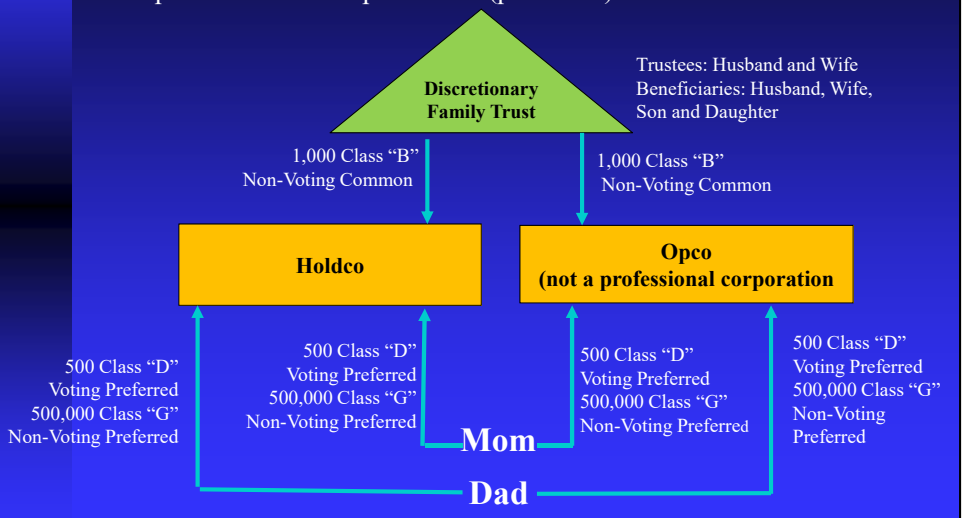
FAMILY TRUSTS & TOSI

Example of an ownership structure (pre-TOSI)



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FAMILY TRUSTS & TOSI

Notes:

1. Husband is active in Opco's business working an average of 20 hours per week during the year.
2. Wife is not active in Opco's business, and works as a teacher in a public school.
3. There are 2 children:
   a. Son: age 21 in full time attendance at university; and
   b. Daughter: age 28; married; up until recently, had been working as a lawyer in a law firm, but is on a maternity leave for the next year.

FAMILY TRUSTS & TOSI

- Pre-TOSI Rules (before 2018)
  - Dividends could have been paid by Holdco or Opco to the Family Trust.
  - The Family Trust could have paid the dividends out to any of Husband, Wife, Son and Daughter in whose hands the dividend income would have been taxed at graduated income tax rates.

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FAMILY TRUSTS & TOSI

- Pre-TOSI Rules (before 2018)
  - If the Family Trust sold its shares in Opco and realized a capital gain eligible for the lifetime capital gains exemption ("**LCGE**"), it could pay out the capital gain (or taxable capital gain) to each capital beneficiary of the trust who is a resident of Canada, and that beneficiary could use his or her LCGE to shield the gain from income tax. TOSI would not apply (unless the capital gain arises pursuant to a non-arm's length sale and the capital gain is distributed to a minor).

FAMILY TRUSTS & TOSI

Pre-TOSI Rules (before 2018)

- Rollover of trust property from Family Trust to Canadian resident capital beneficiaries permitted under s. 107(2).

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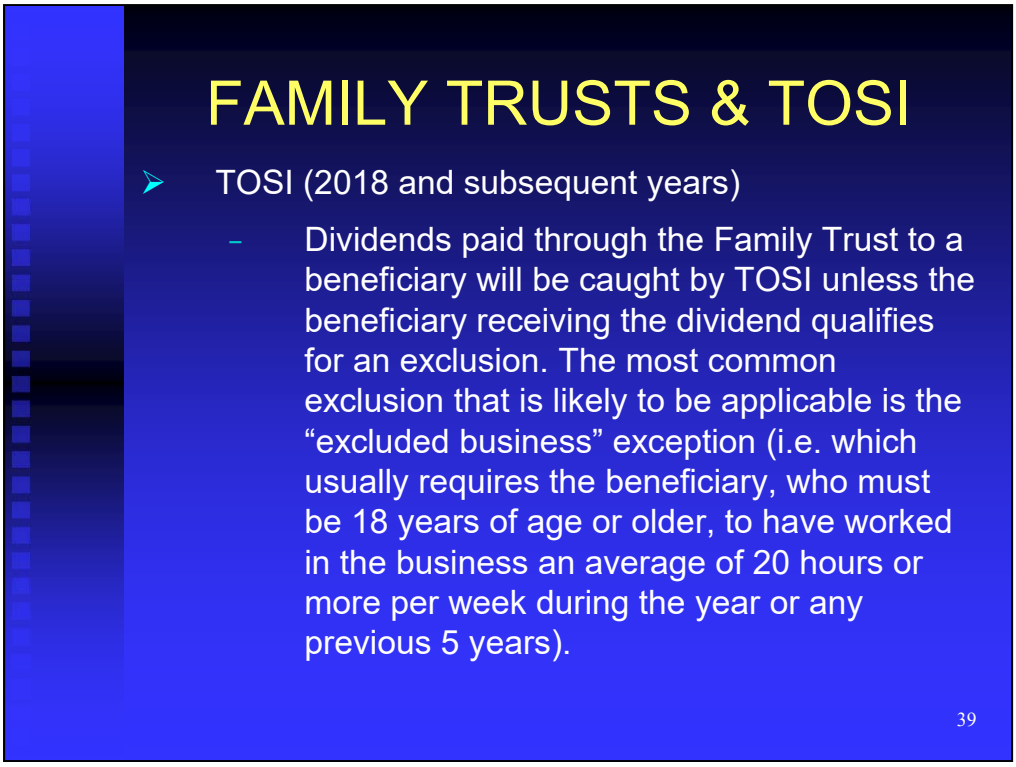
FAMILY TRUSTS & TOSI

Pre-TOSI Rules (before 2018)

- For estate planning purposes, the Family Trust provided an advantage as compared to personal ownership of shares or other capital property.
- With personal ownership, parents leaving property (e.g. shares) to a child faced a FMV deemed disposition (unless a “farm rollover” of shares or other property was available).



TOSI does not apply to an "excluded amount". Subparagraph (e)(ii) of the definition of "excluded amount" in ss. 120.4(1) provides an exception to TOSI for an individual who is at least 18 years of age in the particular year and earns a taxable capital gain or income from a property to the extent that amount is "derived directly or indirectly from an excluded business of the individual for the year".

The definition of "excluded business" is found in ss. 120.4(1). It requires the specified individual to be "actively engaged on a regular, continuous and substantial basis" in the activities of the business in the taxation year or any 5 prior taxation years. Paragraph 120.4(1.1)(a) states that an individual is deemed to be actively engaged on a regular, continuous and substantial basis in the activities of a business in a taxation year if the individual works in the business at least an average of 20 hours per week during the portion of the year in which the business operates.

FAMILY TRUSTS & TOSI

- TOSI (2018 and subsequent years)
  - Capital gains arising from dispositions of qualified farm or fishing property or qualified small business corporation ("QSBC") shares will be exempt from TOSI, even if realized through a Family Trust (but if the capital beneficiary of the trust is under 18 years old, the capital gains must have been realized as part of an arm's length disposition)

FAMILY TRUSTS & TOSI

- TOSI (2018 and subsequent years)
  - Rollover of trust property from Family Trust to Canadian resident capital beneficiaries continues to be permitted under s. 107(2).

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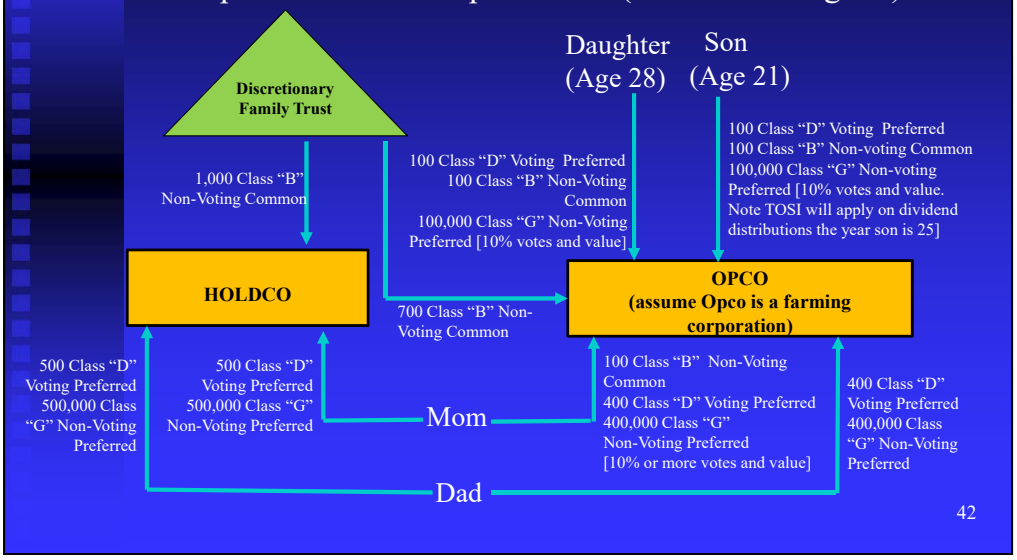
FAMILY TRUSTS & TOSI

Example of an ownership structure (under TOSI regime)



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FAMILY TRUSTS & TOSI

- Steps:
  1. Mom gifts to Daughter 100 Class “D” Voting Preferred and 100,000 Class “G” Non-Voting Preferred shares of Opco [rollover under s. 73(4) & (4.1)]
  2. Dad gifts to Son 100 Class “D” Voting Preferred and 100,000 Class “G” Non-Voting Preferred shares of Opco [rollover under s. 73(4) & (4.1)]
  3. Family Trust transfers 100 Class “B” Non-Voting Common shares to each of Mom, Daughter and Son [rollover under s. 107(2)]
  4. Opco is not a professional corporation. Furthermore, less than 90% of its business income for its last taxation year was from the provision of services.

FAMILY TRUSTS & TOSI

- Result:
  - Mom, Daughter and Son now own 10% or more of the “votes and value” shares of Opco. TOSI will not apply provided that a particular shareholder receiving the dividend is 25 years of age or more in the current year. (The Son is 21 and will not fall outside the TOSI rules for another 4 years.)
  - Dad does not have to own shares directly in Opco. He can receive dividends from Opco via the Family Trust and avoid TOSI because of the “excluded business” exception.

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FAMILY TRUSTS & TOSI

- What if different classes of common shares are held by each of the Family Trust, Mom, Daughter and Son, and the share rights permit dividends to be paid on one class of common shares independently of the others? Quaere whether this affects the valuation of the shares?

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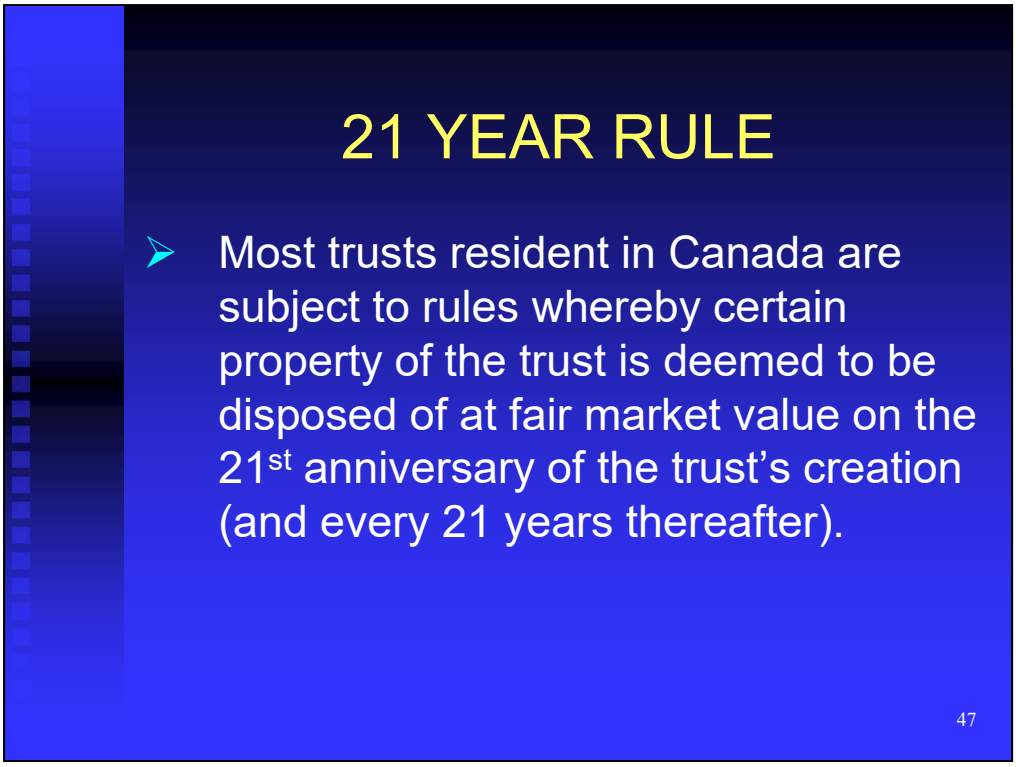
FAMILY TRUSTS & TOSI

- If a shareholder owns 10% of common and preferred shares, does that shareholder own 10% of value? Quaere whether there is any need to be concerned about valuation concepts respecting “control premiums” or “minority discounts” in family-owned corporations?



See paragraphs 104(4)(b) and (c).

Ss. 104(4) references capital property and land included in the inventory of the business of the trust. Ss. 104(5) captures depreciable property, and ss. 104(5.2) deals with the deemed disposition of resource property.

21 YEAR RULE

- The following property is not subject to the 21 year rule:
  - Inventory (other than land inventory that is in the business of the trust); and
  - Interests in life insurance policies.

21 YEAR RULE

- The following trusts are not subject to the 21 year rule:
  - RRSP/RRIF/TFSAs
  - RCAs

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21 YEAR RULE

- Bare Trusts
- Life Interest Trusts, namely:
  - Spousal trusts
  - Alter ego trusts
  - Joint partner trusts
  - Self benefit trusts

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21 YEAR RULE

- The 21 year period starts to run from the following dates:
  - Testamentary trust – date of death of the deceased individual
  - Inter vivos trust – date of creation of the trust

21 YEAR RULE

- Planning considerations:
  - Wind up the trust prior to its 21st anniversary
  - Indefeasible vesting of trust interests

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21 YEAR RULE

- Pipeline planning

21 YEAR RULE

- Assume that the trust is approaching its 21st anniversary.
- Its sole property consists of:
  - Original settled property: $100 bill
  - 100% of the issued shares of Opco

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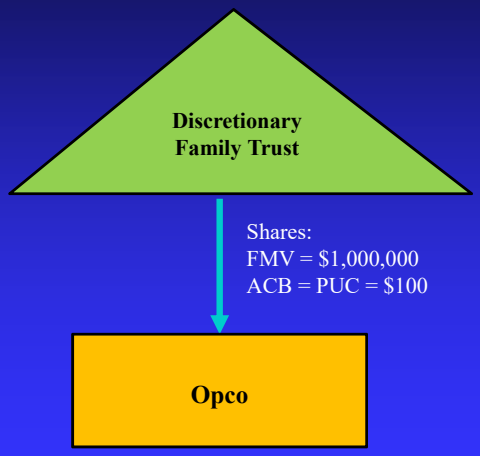
21 YEAR RULE



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21 YEAR RULE

- The trust's shares in the capital stock of Opco have the following attributes:
  - FMV - $1,000,000
  - Adjusted Cost Base - $100
  - Paid-up Capital - $100

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21 YEAR RULE

- On the 21st anniversary, the trust will be deemed to dispose of its shares Opco at FMV, with the following result:

Deemed Proceeds of Disposition:	$	1,000,000.00
Adjusted Cost Base	$	100.00
Capital Gain	$	999,900.00
Taxable Capital Gain (50%)	$	499,950.00
Estimated Federal/Sask. tax (47.5%)	$	237,476.25

21 YEAR RULE – WIND UP TRUST

- Unless the wording of the trust deed expressly contemplates and permits "deemed" income and capital gains to be distributed and allocated to its beneficiaries, the trust will be liable to pay the income tax that results from the deemed disposition.

21 YEAR RULE – WIND UP THE TRUST

- Ss. 107(2) permits the trust to distribute its capital property (e.g. in this case, the shares of Opco) at its ACB to Canadian resident capital beneficiaries.

21 YEAR RULE – WIND UP THE TRUST

- If the trust distributes its capital property (i.e. the Opco shares) that has accrued gains to the trust's capital beneficiaries prior to the 21st anniversary of the trust, then the income taxes that would otherwise result from the deemed disposition are avoided (or at least deferred until the beneficiaries dispose of the Opco shares in the future).

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21 YEAR RULE – WIND UP THE TRUST

- Problems that might arise when considering a wind up of the trust:
  - The trust might have non-resident beneficiaries;
  - The trust may be disqualified from utilizing the ss. 107(2) rollover rule

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21 YEAR RULE – WIND UP THE TRUST

- Ss. 107(2) does not permit a rollover of the trust's capital property to a non-resident beneficiary.
- Also, ss. 107(2) does not permit a rollover where s. 107(4.1) applies.

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21 YEAR RULE – WIND UP THE TRUST AND NON-RESIDENT BENEFICIARIES

- One planning consideration in these circumstances may be to distribute trust property to a Canadian-resident corporate beneficiary

21 YEAR RULE – WIND UP THE TRUST AND NON-RESIDENT BENEFICIARIES

- The individual shareholders of such corporate beneficiary would be non-residents.
- To successfully implement this type of planning, there are several issues to consider, such as:

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21 YEAR RULE – WIND UP THE TRUST AND NON-RESIDENT BENEFICIARIES

- Perhaps the non-resident individual beneficiary needs to sell/assign his/her capital interest in the trust to a Canadian-resident corporation under s. 85(1).

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21 YEAR RULE – WIND UP THE TRUST AND NON-RESIDENT BENEFICIARIES

- If so, because an interest of a discretionary beneficiary cannot ordinarily be assigned, before any such transfer or assignment takes place, the trust needs to fix the interests of the beneficiaries so that the trust is no longer a discretionary trust.

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21 YEAR RULE – WIND UP THE TRUST AND NON-RESIDENT BENEFICIARIES

- Does the trust document include corporations as capital beneficiaries? If not, does the transfer of a capital interest in a non-discretionary trust to a corporate transferee result in the transferee becoming a beneficiary of the trust?

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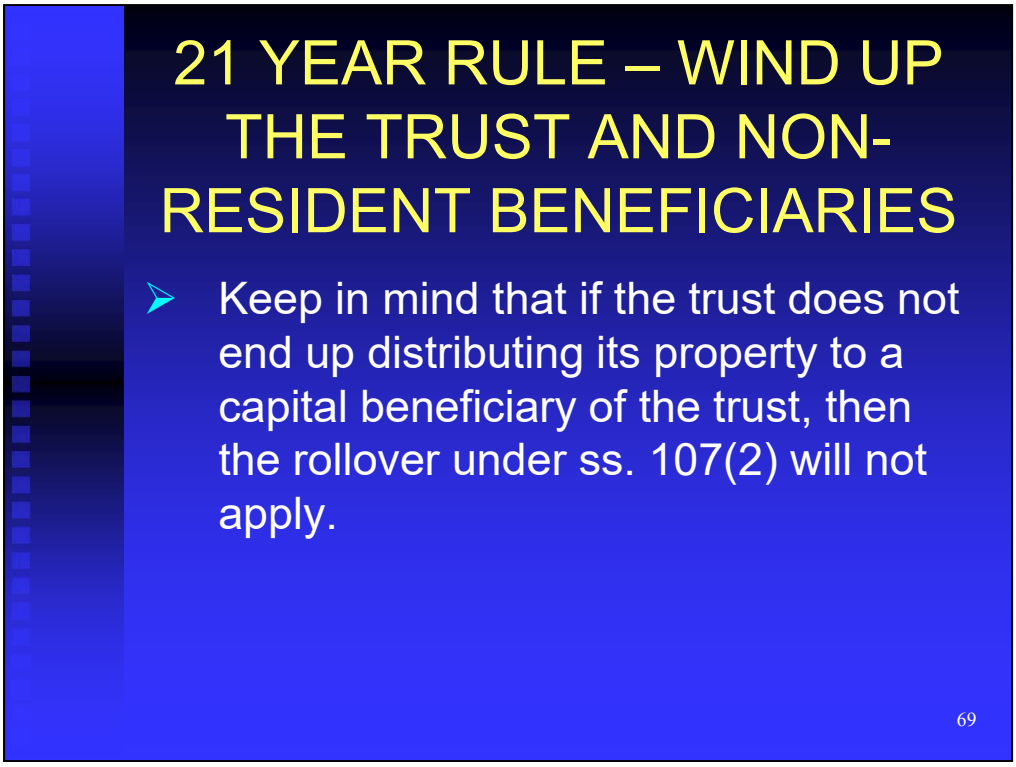
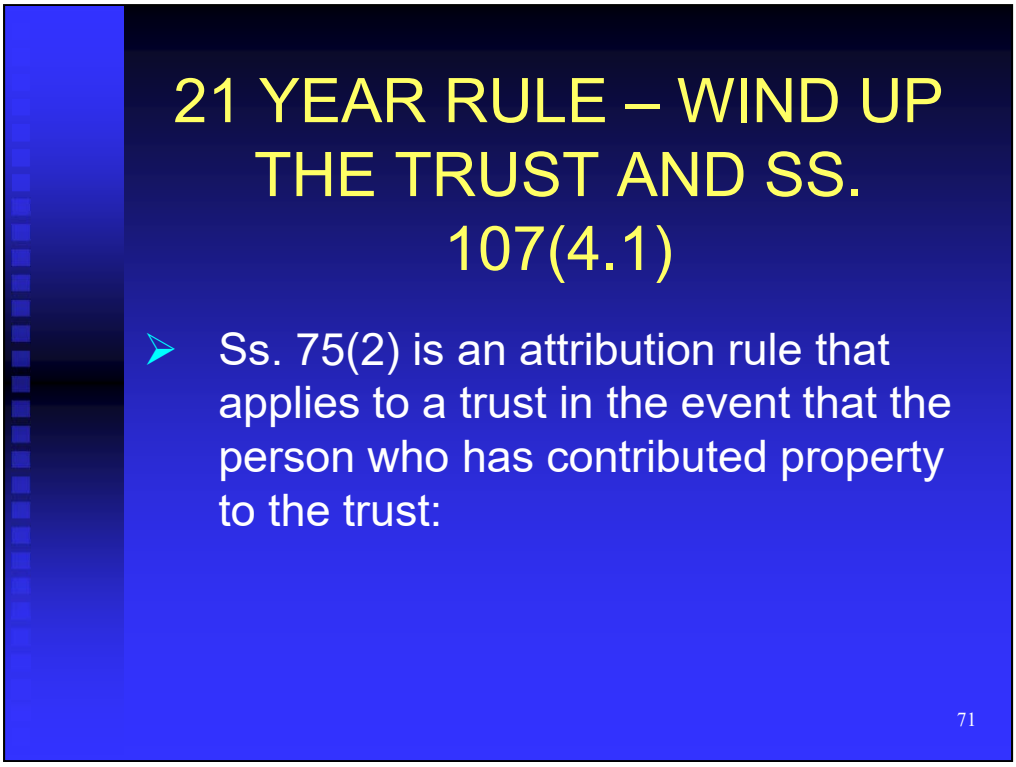


See CRA Technical Interpretation 2017-068302117 (dated June 8, 2018). Also see Jin Wen, "Twenty-One Year Planning: Consider Broadening Trust Beneficiaries" (Canadian Tax Focus: August 2019).

21 YEAR RULE – WIND UP THE TRUST AND SS. 107(4.1)

- Ss. 107(2) also does not permit a rollover of the trust's capital property if ss. 75(2) has previously applied to the trust. In that event, ss. 107(4.1) denies a rollover to beneficiaries in respect of the trust's property (at least until the settlor's death).



It is beyond the scope of this presentation to provide a detailed analysis of ss. 75(2). For additional information on this tax provision, see E. Roth, T. Youdan, C. Anderson and K. Brown, “Canadian Taxation of Trusts” (Canadian Tax Foundation, 2016), 423 – 495; Saunders, “Inter vivos Discretionary Family Trusts”, 1993 Conference Report (Canadian Tax Foundation), 37:6 – 14.

21 YEAR RULE – WIND UP THE TRUST AND SS. 107(4.1)

- Has a reversionary right to the property contributed by that person to the trust or substituted property;
- Can decide where and when such property passes to other persons; or

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21 YEAR RULE – WIND UP THE TRUST AND SS. 107(4.1)

- Can decide whether or how such property is disposed of by the trust.

- Be careful where you have a trust where the settlor is the sole trustee or a capital beneficiary.

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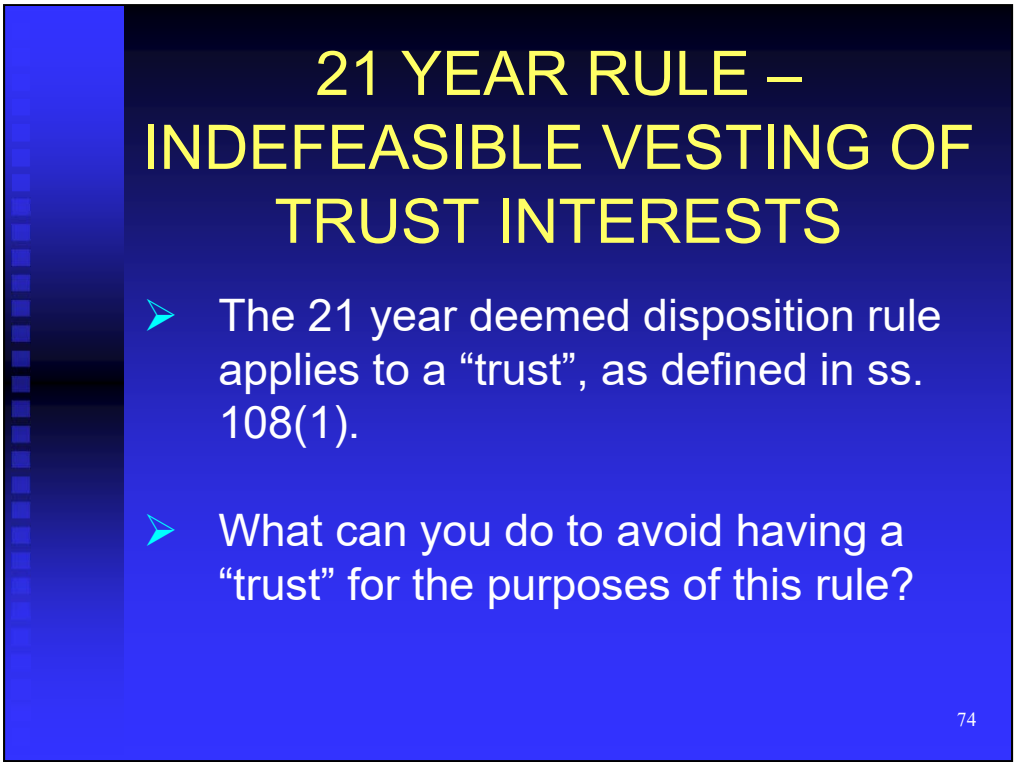
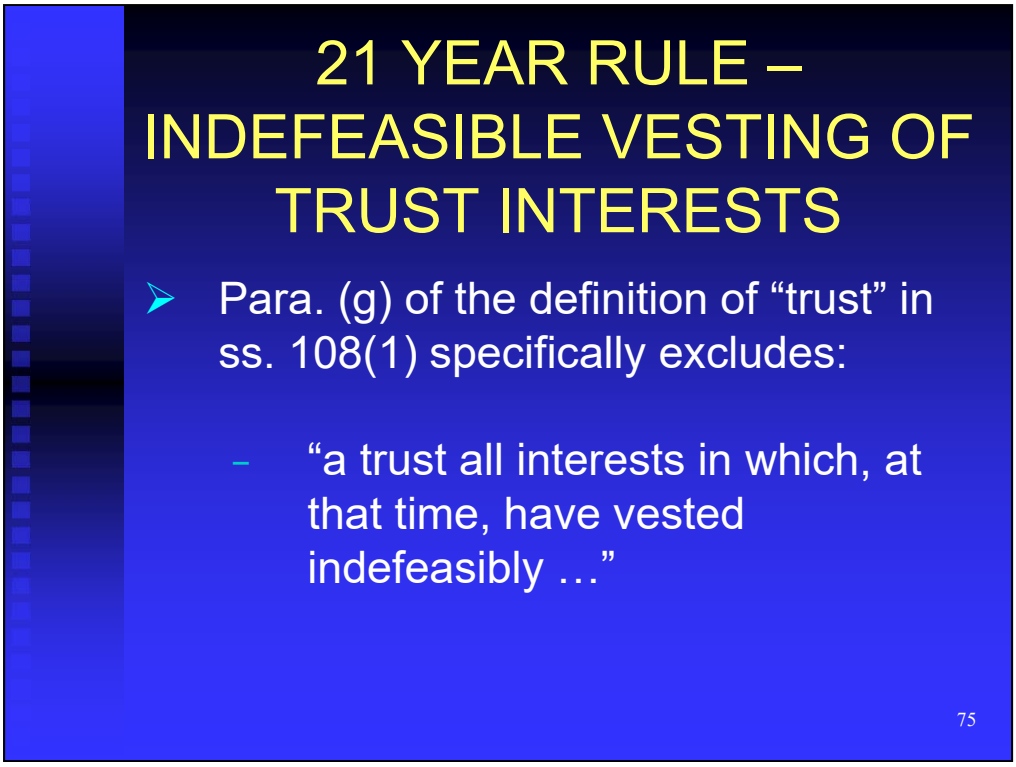
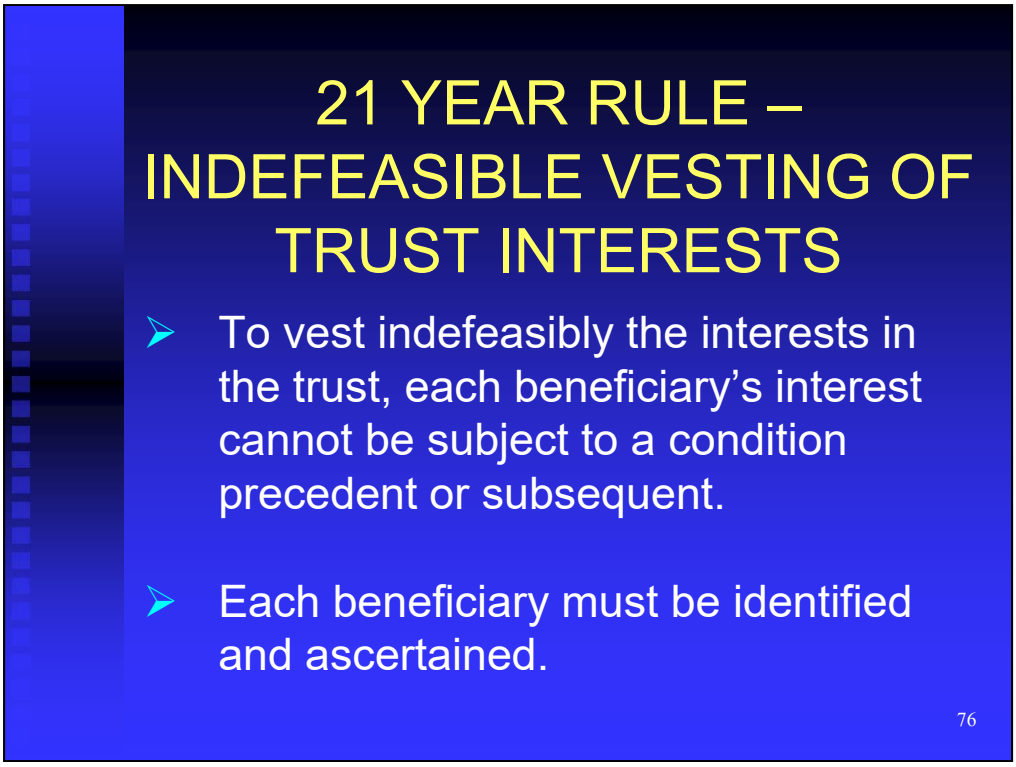


For a discussion respecting paragraph (g) of the definition of “trust” in ss. 108(1), see E. Roth, T. Youdan, C. Anderson and K. Brown, “Canadian Taxation of Trusts” (Canadian Tax Foundation, 2016), 551 – 559.



Note that the exclusion from the definition of “trust”, whereby all interests in the trust have vested indefeasibly, does not apply where the interests in the trust held by non-resident beneficiaries exceed 20% of the total fair market value of all interests in the trust. See subparagraph (g)((iv) of the definition of “trust” in ss. 108(1).



For the CRA's view on "vested indefeasibly" in the context of paragraph (g) of the definition of "trust" in ss. 108(1), see 2018 STEP National Conference, CRA Roundtable Q. 9, 2018-0744111C6 – Vested Indefeasibly.

21 YEAR RULE – INDEFEASIBLE VESTING OF TRUST INTERESTS

- The trustees can retain the discretion to determine the timing of distributions out of the trust but not the choice of recipients of distributions. Having said that, presumably the beneficiaries could call for the trust property under the rule in Saunders v. Vautier.

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E. Roth, T. Youdan, C. Anderson and K. Brown, “Canadian Taxation of Trusts” (Canadian Tax Foundation, 2016), at 553.

21 YEAR RULE – INDEFEASIBLE VESTING OF TRUST INTERESTS

- It is important to ensure that the trust document governing the trust gives the trustees the power to vest interests in the trust.

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21 YEAR RULE – INDEFEASIBLE VESTING OF TRUST INTERESTS

- A vesting strategy may be appropriate where:
  - trust property cannot be distributed on a tax rollover basis to capital beneficiaries

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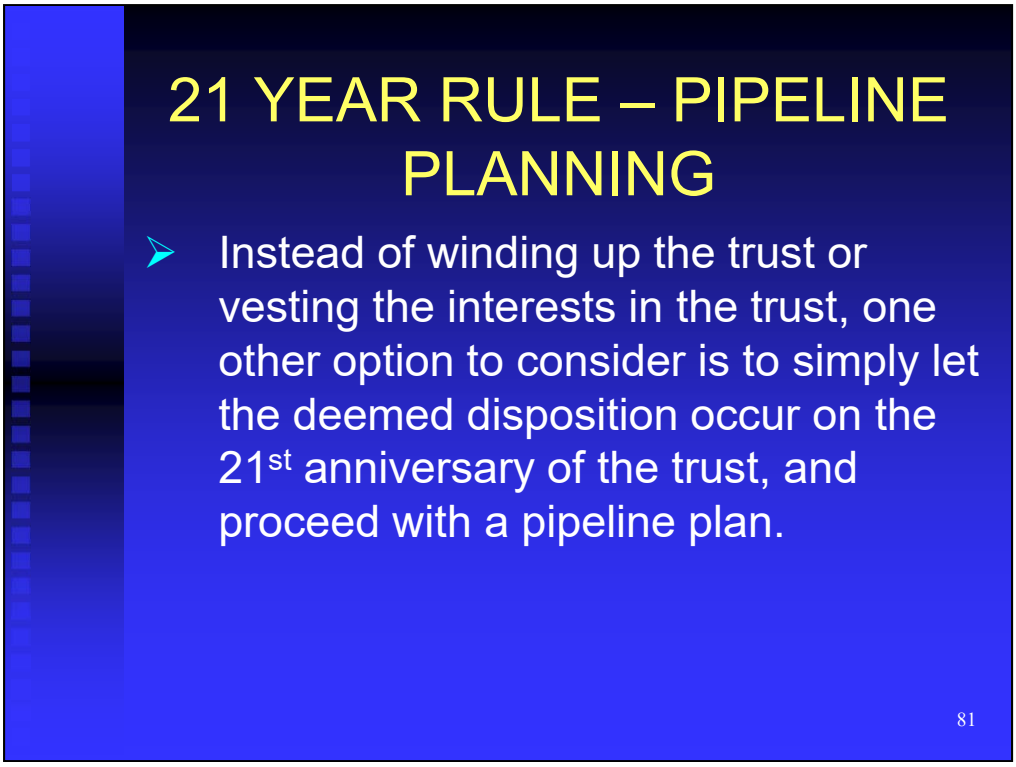
21 YEAR RULE – INDEFEASIBLE VESTING OF TRUST INTERESTS

- A distribution by the trust of a controlling interest in a corporation would give rise to a “loss restriction event” (i.e. an acquisition of control) that ends up restricting or eliminating tax losses in the particular corporation



CRA Technical Interpretation 2018-0765411R3 (released February 13, 2019) was the first time the CRA confirmed an advance ruling for series of transactions resulting in a "pipeline plan" where the shares in question were subject to a deemed disposition on a trust's 21st anniversary. Also see Eric Hamelin, "Pipeline Transactions and the 21-Year Rule", in Tax for the Owner-Manager (April 2019).

21 YEAR RULE – PIPELINE PLANNING

- Under these circumstances, the trust is now deemed to own the Opco shares (immediately after the deemed disposition) as follows:
  - FMV and "bumped" adjusted cost base - $1,000,000
  - Paid-up Capital - $100

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21 YEAR RULE – PIPELINE PLANNING

- Following the deemed 21 year disposition, the trust would transfer its Opco shares to a Newco for preferred shares of Newco with the following tax characteristics:
  - FMV, adjusted cost base, and paid-up capital - $1,000,000

21 YEAR RULE – PIPELINE PLANNING

- Paragraph 84.1(1)(a) did not reduce the paid-up capital of the Newco shares issued to the trust
- There must be a delay of time between:
  - The sale date by the trust of its Opco shares to Newco; and

21 YEAR RULE – PIPELINE PLANNING

- The time when Newco starts to redeem (or buy) back its preferred shares from the trust.

- Also, there must be a progressive distribution of Newco's surpluses and Opco must continue its business/commercial activities.

21 YEAR RULE – PIPELINE PLANNING

- If these conditions are satisfied:
  - No deemed dividend will arise (whether under s. 84.1 or ss. 84(2);

21 YEAR RULE – PIPELINE PLANNING

- The net tax effect is capital gains tax rates (23.75%) rather than dividend tax rates (40.37% for non-eligible dividends or 29.64% for eligible dividends), resulting in an overall tax savings.

21 YEAR RULE – PIPELINE PLANNING

- The net tax savings in Saskatchewan using a pipeline plan would be:

Tax Savings Using a Pipeline Plan - $999,900 of income:		
Saving: Capital Gain vs. Non-Eligible Dividend		$166,183.38
Saving: Capital Gain vs. Eligible Dividend		$ 58,894.11

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21 YEAR RULE – PIPELINE PLANNING

- Caution: where you have a Canadian resident trust (including an estate) which has one or more non-resident beneficiaries, be aware of recent changes (in 2018) to s. 212.1. That provision may apply in place of s. 84.1 and give rise to a deemed dividend.

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Recent amendments to ss. 150(1.1) and (1.2) of the Act, and new Regulation 204.2 expand the trust reporting regime for taxation years that end December 31, 2021 or later.

CRA's T3 Guide states that a return is required to be filed by a trust only if:

1. The trust has:

    (a) Tax payable;
    (b) A taxable capital gain;
    (c) Total income of more than $500;
    (d) A benefit of more than $100 payable to any beneficiary;
    (e) Income that is allocated to a non-resident beneficiary;

2. The trust holds property that is subject to s. 75(2); or

3. The trust is a deemed resident trust [e.g. see para. 94(3)(a)].

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Starting with the December 31, 2021 tax year, all “express trusts”, unless specifically excepted, are subject to new reporting rules.

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- While not defined in the Act, it is understood that an “express trust” is one arising and settled by a settlor with a clear intent to settle property for the benefit of the beneficiaries of the trust.

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Express trusts would not include implied trusts, resulting or constructive trusts, or trusts arising by operation of law or court order.

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Express trusts (which are “Additional reporting trusts”) will file T3 income tax returns annually, whether or not they have income.
- Regulation 204.2 uses the phrase “Additional reporting trusts” in its heading.

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- These “Additional reporting trusts” must also provide additional information to the CRA, being the name, address, date of birth (in the case of an individual other than a trust), jurisdiction of residence, and TIN (tax identification number, as defined in s. 270) for:

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Each trustee;
- Each settlor as defined in s. 17(15) – person who has transferred or loaned property to the trust except where there is an arm's length relationship with the trust and:

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Any such loan is made at a reasonable rate of interest, or
- Any such property transfer is made for FMV consideration

➢ Each beneficiary; and

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Each person who has the ability (through the terms of the trust or a related agreement) to exert influence over trustee decisions regarding the appointment of income or capital of the trust (e.g. a protector).

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- The obligation to gather this information is imposed on every person “having control of, or receiving income, gains or profits in a fiduciary capacity, or in a capacity analogous to a fiduciary capacity” (Regulation 204.2).

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Gathering this information regarding "beneficiaries" could, in some circumstances, be problematic.
- Depending on how the "class" of beneficiaries is defined in the trust document, it may be challenging to identify and locate all beneficiaries.

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Who is a “beneficiary” under the Act?
- Ss. 108(1) does not define “beneficiary” for the purposes of the Act; only for subdivision “k” of Division B of Part I of the Act (i.e. sections 104 – 108)

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- The definition of “beneficiary” in ss. 108(1) includes “a person who is beneficially interested therein”, but that definition applies solely for the purposes of s. 104 – 108 of the Income Tax Act (Canada).

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It is questionable whether the term "beneficially interested", defined in ss. 248(25), applies for the general purposes of the Act. This phrase could include someone who may become beneficially interested by the exercise of a discretion by any person (e.g. a power to amend the trust or add a beneficiary). The Federal Court of Appeal in *Propep Inc. v. R* 2009 FCA 274 (leave to appeal denied 2010 CarswellNat 506 (SCC)) held that s. 248(25) should apply for the purposes of interpreting the word "beneficiary", not just in s. 104 – 108 but for purposes outside of those sections. This legal interpretation (which is likely obiter as it was not required in order to arrive at the court's decision) is arguably incorrect, and is to be contrasted with the decision of the Tax Court of Canada in *Lyrtech RD Inc. v. R* 2013 TCC 12, where (at paragraph 56) the court was of the view that ss. 248(25) did not apply to paragraph 251(5)(b). The Tax Court's decision was affirmed by the FCA at 2014 FCA 267, albeit on other grounds.

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- The term “settlor” is also more expansive that simply identifying the person in the trust document who “settled” (i.e. gifted) property to the trustees.

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Ss. 17(15) defines a settlor for the purposes of the new identification rules to include anyone who has made a loan to a trust or has made a transfer of property to or for the benefit of the trust.

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- One author has expressed that view that under the new identification rules, a settlor may include non-arm's length persons:
  - Who have participated in an estate freeze in favour of a trust;

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See Richard Weiland, "Planning with Trusts: Challenges and Opportunities", 2018 British Columbia Tax Conference (Canadian Tax Foundation).

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Have sold or loaned money or property to a trust or to a corporation or partnership the shares of which are owned by a trust; or
- Have paid expenses on behalf of a trust.

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- There are several trusts listed in new s. 150(1.2) that are “exception trusts”, and do not have to comply with these new reporting requirements. Notable among these exceptions are the following:
  - A registered charity;

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- A trust in existence for less than 3 months at the end of the year;
- Trusts holding only cash, government bonds, and portfolio securities with a FMV of $50,000 or less;

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Lawyers' pooled trust accounts (but not funds held by a law firm in trust in a specific client account);
- Graduated rate estates;
- Qualified disability trusts;

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Employee life and health trusts; and
- Registered plans (e.g. RRSPs, RRIFs, TFSAs, RESPs, RDSPs, and RPPs), but note that RCAs are not included in the list of exception trusts.

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- If the required reports are not filed with the CRA, then penalties can be assessed:
  - Ss. 162(7) - $25 per day with a minimum of $100 and a maximum of $2,500;

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Consider whether a “due diligence” defence applies.
- Arguably it does. See CRA Views 2009-0335321E5 where the CRA stated that the defence is available provided the taxpayer provides a “high degree of diligence”.

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Ss. 163(5) and (6) – gross negligence penalties equal to the greater of $2,500 and 5% of the highest amount of total FMV of all property held by the trust

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- It appears the penalty may be imposed on the “person or partnership” making or omitting to make the statement in the trust’s return – presumably the trustee can be made personally liable under these rules.

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Quaere whether the trustee can apply for indemnity out of the trust's assets in a situation of "gross negligence".
- Presumably the answer to this question will depend on the wording of the trust document.

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FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- Note that while the new disclosure rules for Canadian income tax purposes do not apply until 2021, if a Canadian trust decides to open a bank account, you will likely find that the financial institution will require a considerable amount of information respecting the following persons:

FAMILY TRUSTS AND NEW IDENTIFICATION RULES

- settlor,
- trustee; and
- beneficiaries.

For a recent article discussing the relevant Canadian legislation and the international information sharing agreements, see Elise Henry, “Protecting Taxpayers’ Privacy in the Era of Automated Exchange of Information”, in 2019 Corporate Tax Conference.

CONCLUSION

- While some recent tax changes have reduced (and in some cases eliminated) certain tax advantages with respect to the use of trusts, the utilization of trusts in planning for clients continues to have numerous advantages both for non-tax and tax purposes:

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CONCLUSION

- Non-tax purposes include:
  - Protection and management of property where a beneficiary is not capable of doing so on his/her own; and
  - Privacy;

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CONCLUSION

- Tax purposes include:
  - Avoidance of probate with respect to trust property;
  - Continued access to graduated income tax rates on trust income earned by GREs and QDTs;

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CONCLUSION

- The continued ability to sprinkle capital gains realized by the trust on QSBC shares and qualified farm or fishing property; and
- The continued ability to “roll out” trust property to Canadian resident beneficiaries.

Law Society
of Saskatchewan

TAB 3: Medical Assistance in Dying (Presentation)

MAiD in Saskatchewan

Medical Assistance in Dying (MAiD)
Law Society of Saskatchewan
Nov 7, 2019

Dr. Rob Weiler
M.D., M.P.H, FRCP
Medical advisor to the provincial MAiD program

Presentation Outline

- How did we get here
- How MAiD is administered in Saskatchewan
- Practitioner knowledge and skills required for MAiD
- Some legal implications
- Changes to C14 considerations

3 stories to change our future

Sue
Rodriguez

Gloria Taylor and Kay Carter

All had made application for assisted death

- Sue Rodriguez died with unknown help but the Supreme Court of Canada ruled that her rights could not supersede the risk to society 1993 5-4 decision
- Gloria Taylor and Kay Carter worked with Dying with Dignity to seek legal change through the Charter and the Supreme Court of Canada. 2015
- This time a unanimous decision was made that the government could draft legislation that provided individual autonomy while still protecting society.

The legal requirements for practitioners

- As C14 is an exemption from a criminal act, compliance with the act is essential.
- The law has language that allows for clinical flexibility
  - This can permit clinical assessments with flexibility to address individual needs.

“ permissive not compulsive ”

What had been the Saskatchewan response

- Health Care is administered at the provincial level so provinces each developed their approaches differently and initially
  - Coroners' involvement
  - The term suicide on the death certificate
- Each region even within Saskatchewan had its own response (some none)
- Difficult to inform public of availability and erratic access

Decision to have a provincial program

- Federal reporting more complex so now done by provincial MAID program of the SHA
- Provincial standardization of process and forms
- Assistance from the program for information sharing, distance support and funding.
- Single process for the province.

What we do

- No reliable oral preparation so only intravenous options provided
- Replaced coroners with a provincial oversight committee to include the regulators (CPSS, SRNA, CSPP)
- Centralized access through the HealthLine at 811
- Coordinated response and provincial reporting.
- Program support for education, provision and providers.

What patients do

- They need to make a written application with two independent witnesses.
- Must be competent to understand their condition, options and impact of their decisions.
- Their suffering can be physical or psychological
- They must be in some end of life trajectory toward death.

What happens

- Patients are assessed for eligibility for MAiD
- If eligible, dates, locations, people etc are determined in collaboration between providers, patient and families
- Patients are often followed and reassessed over time
- Day of procedure the patient must re-consent.
- IV started, good byes to family, and a large dose anesthetic is administered.
- The Patient is pronounced dead, Medical Certificate of Death completed, normal process follows.

End of Life discussions for physicians

- Medical training has prioritizes active treatment emphasizing optimism and longer life and generally avoids end of life discussion
- Few physicians get much training or experience in end of life management of patients including limiting active, aggressive interventions, palliative care or assisting dying.

Legal and privacy challenges

- Words such as “reasonably foreseeable death” and “intolerable suffering” involve interpretation
- The documentation of information and storage of charts is prescriptive and daunting.
- Legal support and advice (CMPA) is biased toward physician protection and not best clinical care.

Conscientious objection

- Some physicians believe that assisting death goes against their fundamental training of preserving life
- Some (like the rest of society) have religious or personal beliefs that prevent assisted deaths.
- Others have as their prime motivation prevention of suffering and in this way see MAID as an end of life choice.

Acceptance by the profession

- Like the general public the majority of physicians support MAiD as an end of life option but……
- Few are willing to participate in the processes
- There is a continuous need for education
- Cost and time barriers are problematic for this time intensive and poorly remunerated work.

Training and experience

- Skills are required in patient assessment in end of life conditions, including options such as palliative care and maximizing quality of life .
- Objective assessments of capacity (task specific, context specific and temporal) are not common skills
  - This leads to a need to find expert opinions on communication challenges or capacity assessments

Technical challenges

- Even for clinicians who are familiar with the medications there are unique challenges.
- Anesthesiologists and intensivists might use these medications but rarely in these doses, locations and social circumstances.
- There are often technical challenges in IV access for patients with poor venous access, high pressure social environments, and remote locations.
- Oral prescriptions are difficult to produce and administer safely.

Unique to this process

- Isolation of practice in roles and locations
- Psychological stress to providers and families
- Administrative burden
- Time commitment
- Small number of providers

Potential changes to C14

- Planned review of three exclusions
  - Mature minors
  - Purely psychiatric diagnosis
  - Advanced directives
- Removal of reasonably foreseeable death
  - No longer an “ end of life” choice

Benefits to the patients

- Choice at the end of life (Autonomy)
- Patient centered care where we meet their unique needs
- Planning allows for families to be there for the patient in a non-chaotic, calm and supportive environment

Benefits to Families

- Time lines are clearer often allowing for visits and communication
- Planning optimal times and locations for families to be with patients at this crucial time
- Time to prepare emotionally for the upcoming death

Benefits to providers

- Learning to listen to the stories and wishes of patients
- Personally rewarding experiences in truly improving quality of care by providing patient centered decisions
- Gratitude from patients and families
- Becoming more comfortable with discussion of end of life for other patients, families and yourself.

What I have learned

- We need to listen more
- Only the patient can determine the quality of their life and their suffering.
- It takes time to understand the individual situations that our patients and families experience.
- It is a challenge to educate health provides on good end of life.
- We will be led by our patients and our social contract

Thanks.

Law Society
of Saskatchewan

TAB 3A: Medical Assistance in Dying: Legal Framework and Current Issues (Presentation)

Medical assistance in dying: Legal framework and current issues

What's New in Wills, Estates and Trusts
November 7, 2019
Prof. Barbara von Tigerstrom
College of Law, University of Saskatchewan

Presentation outline

- Brief history: how did we get to where we are now?
  - *Carter v. Canada*
  - Bill C-14
- New *Criminal Code* provisions on medical assistance in dying (MAID)
  - Eligibility criteria
  - Procedures and safeguards
- Provincial legislation
- Current issues
  - Reasonably foreseeable natural death as an eligibility requirement
  - Issues under review: advance requests, mature minors, and mental illness as the sole underlying condition
  - Conscientious objection, referrals, and access

Carter v. Canada (AG), 2015 SCC 5

Decision:
- Infringement of s. 7 rights to life, liberty, security of the person
- Contrary to principles of fundamental justice because overbroad
- Not saved by s. 1 because not a minimal impairment of rights

Declaration:
"Section 241(*b*) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."
(suspended for 12 months, later extended a further 4 months, to June 2016)

Bill C-14 (as enacted)

- Exemptions created for:
  - Homicide
  - Aiding a person to die by suicide (but "counselling" still prohibited)
  - Administering poison or "noxious thing"
- Scope of exemption:
  - What:
    - Administering substance that causes death
    - Prescribing or providing substance that person can self-administer
  - Who:
    - Physician, nurse practitioner
    - Pharmacist
    - Persons aiding these or aiding patient
    - Social worker, therapist, or HCP providing information

Bill C-14 (as enacted)

- Eligibility criteria:
  - Eligible for public health care services (resident)
  - Adult
  - Capable of making health care decision
  - Voluntary request (no external pressure)
  - Informed consent (including being informed of means available to relieve suffering)
  - Grievous and irremediable medical condition:
    - Serious and incurable illness, disease, or disability
    - Advanced state of irreversible decline in capability
    - Enduring and intolerable suffering that cannot be relieved under conditions they consider acceptable
    - Natural death reasonably foreseeable

Bill C-14 (as enacted)

- Safeguards:
  - 2 independent Drs/NPs confirm eligibility
  - Request is written, signed, dated, witnessed (x2); made after being informed of grievous and irremediable condition
  - 10 day waiting period (unless death or loss of capacity is imminent)
  - Person informed that request can be withdrawn and is given an opportunity to withdraw; gives express consent immediately before assistance is provided
  - Measures to ensure understanding and communication
  - Reasonable knowledge, care and skill; compliance with applicable provincial laws, rules or standards
  - Pharmacist to be informed of purpose of substance

Bill C-14 (as enacted)

- No individual compelled to provide or assist in providing MAID
- Offences:
  - Knowingly failing to comply
    - Protection for reasonable and honest belief
  - Forgery or destruction of documents relating to request
- Filing of information required by regulations
- Ministerial guidelines on death certificates
- Amendments regarding federal pensions and benefits
- Reviews:
  - Independent review of: mature minors, advance requests, mental illness
  - 5 year review

Relevant Saskatchewan legislation

- *The Coroners Regulations, 2000*
- *The Vital Statistics Regulations*
- *The Saskatchewan Insurance Act*
- *The Health Care Directives and Substitute Health Care Decision Makers Act*
- Policies and guidelines of the College of Physicians and Surgeons of Saskatchewan, Saskatchewan Registered Nurses' Association, Saskatchewan College of Pharmacists

Reasonably foreseeable natural death

- Definition of "grievous and irremediable condition" as a criterion for eligibility includes:

  s. 241.2(2)(d): their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

Reasonably foreseeable natural death

Interpretation?

- Need not be terminally ill; no specific prognosis
- "on a trajectory toward death"; "tak[ing] into account all of the circumstances of a person's medical condition", including the "nature of the illness, and the impacts of other medical conditions or health related factors such as age or frailty"; "natural death [is] foreseeable in a period of time that is not too remote" (or "in the not too distant future") (AG Canada/DOJ)
- *AB v Canada (Attorney General)*, 2017 ONSC 3759: "natural death need not be imminent and … what is a reasonably foreseeable death is a person-specific medical question to be made without necessarily making, but not necessarily precluding, a prognosis of the remaining lifespan"; foreseeability must be connected to natural causes

Reasonably foreseeable natural death

Constitutional challenges:

- *Lamb v. Canada (Attorney General)*
  - B.C. Supreme Court
  - Filed June 2016; discontinued September 2019
- *Truchon c. Procureur général du Canada*, 2019 QCCS 3792 (September 2019)
  - s. 241.2(2)(d) violates ss. 7 and 15 of the *Charter*; not saved by s. 1

Capacity and advance requests

- *Carter*: "competent adult person who clearly consents"
- *Criminal Code* provisions
  - s. 241.2(1)(b) person making request must be "capable of making decisions with respect to their health"
  - s. 241.2(3)(h) provider must "immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying"
- Advance requests one of three issues designated for independent review in Bill C-14
  - Council of Canadian Academies Expert Panel on Medical Assistance in Dying Report: *The State of Knowledge on Advance Requests for Medical Assistance in Dying* (December 2018)

Other issues under review

- Mature minors
  - Council of Canadian Academies Expert Panel on Medical Assistance in Dying Report: *The State of Knowledge on Medical Assistance in Dying for Mature Minors* (December 2018)
- Mental disorder as the sole underlying medical condition
  - Council of Canadian Academies Expert Panel on Medical Assistance in Dying Report: *The State of Knowledge on Medical Assistance in Dying Where a Mental Disorder is the Sole Underlying Medical Condition* (December 2018)

Conscientious objection

- *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393
  - Challenge to CPSO policies requiring "effective referral" as a violation of ss. 2(a) and 15 of the *Charter*
  - Policies upheld by ONCA: infringement of s. 2(a) but justified under s. 1; no infringement of s. 15(1)
- CPSS Policies
- Institutional policies

Law Society of Saskatchewan

TAB 3B: Medical Assistance in Dying: Legal Framework and Current Issues (Paper)

Medical assistance in dying: Legal framework and current issues

What's New in Wills, Estates and Trusts

November 7, 2019

Prof. Barbara von Tigerstrom

College of Law, University of Saskatchewan

Legislation

Criminal Code, RSC 1985, c C-46.

- Medical Assistance in Dying

  Definitions

  241.1 The following definitions apply in this section and in sections 241.2 to 241.4.

  medical assistance in dying means

  > (a) the administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death; or
  >
  > (b) the prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death. (*aide médicale à mourir*)

  medical practitioner means a person who is entitled to practise medicine under the laws of a province. (*médecin*)

  nurse practitioner means a registered nurse who, under the laws of a province, is entitled to practise as a nurse practitioner — or under an equivalent designation — and to autonomously make diagnoses, order and interpret diagnostic tests, prescribe substances and treat patients. (*infirmier praticien*)

  pharmacist means a person who is entitled to practise pharmacy under the laws of a province. (*pharmacien*)

  Eligibility for medical assistance in dying

  241.2 (1) A person may receive medical assistance in dying only if they meet all of the following criteria:

(a) they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded by a government in Canada;

(b) they are at least 18 years of age and capable of making decisions with respect to their health;

(c) they have a grievous and irremediable medical condition;

(d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and

(e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

Grievous and irremediable medical condition

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

(a) they have a serious and incurable illness, disease or disability;

(b) they are in an advanced state of irreversible decline in capability;

(c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and

(d) their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

Safeguards

(3) Before a medical practitioner or nurse practitioner provides a person with medical assistance in dying, the medical practitioner or nurse practitioner must

(a) be of the opinion that the person meets all of the criteria set out in subsection (1);

(b) ensure that the person's request for medical assistance in dying was

(i) made in writing and signed and dated by the person or by another person under subsection (4), and

(ii) signed and dated after the person was informed by a medical practitioner or nurse practitioner that the person has a grievous and irremediable medical condition;

(c) be satisfied that the request was signed and dated by the person — or by another person under subsection (4) — before two independent witnesses who then also signed and dated the request;

(d) ensure that the person has been informed that they may, at any time and in any manner, withdraw their request;

(e) ensure that another medical practitioner or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria set out in subsection (1);

(f) be satisfied that they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are independent;

(g) ensure that there are at least 10 clear days between the day on which the request was signed by or on behalf of the person and the day on which the medical assistance in dying is provided or — if they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are both of the opinion that the person's death, or the loss of their capacity to provide informed consent, is imminent — any shorter period that the first medical practitioner or nurse practitioner considers appropriate in the circumstances;

(h) immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying; and

(i) if the person has difficulty communicating, take all necessary measures to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision.

Unable to sign

(4) If the person requesting medical assistance in dying is unable to sign and date the request, another person — who is at least 18 years of age, who understands the nature of the request for medical assistance in dying and who does not know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death — may do so in the person's presence, on the person's behalf and under the person's express direction.

Independent witness

(5) Any person who is at least 18 years of age and who understands the nature of the request for medical assistance in dying may act as an independent witness, except if they

> (a) know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death;
>
> (b) are an owner or operator of any health care facility at which the person making the request is being treated or any facility in which that person resides;
>
> (c) are directly involved in providing health care services to the person making the request; or
>
> (d) directly provide personal care to the person making the request.

Independence — medical practitioners and nurse practitioners

(6) The medical practitioner or nurse practitioner providing medical assistance in dying and the medical practitioner or nurse practitioner who provides the opinion referred to in paragraph (3)(e) are independent if they

> (a) are not a mentor to the other practitioner or responsible for supervising their work;
>
> (b) do not know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death, other than standard compensation for their services relating to the request; or
>
> (c) do not know or believe that they are connected to the other practitioner or to the person making the request in any other way that would affect their objectivity.

Reasonable knowledge, care and skill

(7) Medical assistance in dying must be provided with reasonable knowledge, care and skill and in accordance with any applicable provincial laws, rules or standards.

Informing pharmacist

(8) The medical practitioner or nurse practitioner who, in providing medical assistance in dying, prescribes or obtains a substance for that purpose must, before any pharmacist dispenses the substance, inform the pharmacist that the substance is intended for that purpose.

Clarification

(9) For greater certainty, nothing in this section compels an individual to provide or assist in providing medical assistance in dying.

Failure to comply with safeguards

241.3 A medical practitioner or nurse practitioner who, in providing medical assistance in dying, knowingly fails to comply with all of the requirements set out in paragraphs 241.2(3)(b) to (i) and subsection 241.2(8) is guilty of an offence and is liable

(a) on conviction on indictment, to a term of imprisonment of not more than five years; or

(b) on summary conviction, to a term of imprisonment of not more than 18 months.

Filing information — medical practitioner or nurse practitioner

241.31 (1) Unless they are exempted under regulations made under subsection (3), a medical practitioner or nurse practitioner who receives a written request for medical assistance in dying must, in accordance with those regulations, provide the information required by those regulations to the recipient designated in those regulations.

Filing information — pharmacist

(2) Unless they are exempted under regulations made under subsection (3), a pharmacist who dispenses a substance in connection with the provision of medical assistance in dying must, in accordance with those regulations, provide the information required by those regulations to the recipient designated in those regulations.

Regulations

(3) The Minister of Health must make regulations that he or she considers necessary

(a) respecting the provision and collection, for the purpose of monitoring medical assistance in dying, of information relating to requests for, and the provision of, medical assistance in dying, including

(i) the information to be provided, at various stages, by medical practitioners or nurse practitioners and by pharmacists, or by a class of any of them,

(ii) the form, manner and time in which the information must be provided,

(iii) the designation of a person as the recipient of the information, and

(iv) the collection of information from coroners and medical examiners;

(b) respecting the use of that information, including its analysis and interpretation, its protection and its publication and other disclosure;

(c) respecting the disposal of that information; and

(d) exempting, on any terms that may be specified, a class of persons from the requirement set out in subsection (1) or (2).

Guidelines — information on death certificates

(3.1) The Minister of Health, after consultation with representatives of the provincial governments responsible for health, must establish guidelines on the information to be included on death certificates in cases where medical assistance in dying has been provided, which may include the way in which to clearly identify medical assistance in dying as the manner of death, as well as the illness, disease or disability that prompted the request for medical assistance in dying.

Offence and punishment

(4) A medical practitioner or nurse practitioner who knowingly fails to comply with subsection (1), or a pharmacist who knowingly fails to comply with subsection (2),

(a) is guilty of an indictable offence and liable to a term of imprisonment of not more than two years; or

(b) is guilty of an offence punishable on summary conviction.

Offence and punishment

(5) Everyone who knowingly contravenes the regulations made under subsection (3)

(a) is guilty of an indictable offence and liable to a term of imprisonment of not more than two years; or

(b) is guilty of an offence punishable on summary conviction.

Forgery

241.4 (1) Everyone commits an offence who commits forgery in relation to a request for medical assistance in dying.

Destruction of documents

(2) Everyone commits an offence who destroys a document that relates to a request for medical assistance in dying with intent to interfere with

(a) another person's access to medical assistance in dying;

(b) the lawful assessment of a request for medical assistance in dying; or

(c) another person invoking an exemption under any of subsections 227(1) or (2), 241(2) to (5) or 245(2).

(d) the provision by a person of information under section 241.31.

Punishment

(3) Everyone who commits an offence under subsection (1) or (2) is liable

(a) on conviction on indictment, to a term of imprisonment of not more than five years; or

(b) on summary conviction, to a term of imprisonment of not more than 18 months.

Definition of document

(4) In subsection (2), *document* has the same meaning as in section 321.

…

Regulations for the Monitoring of Medical Assistance in Dying, SOR/2018-166.

- Reporting, collection, and publication of information on: requests; eligibility; prescribing, providing, administering, or dispensing substance; death from other cause

The Coroners Regulations, 2000, RRS c C-38.01 Reg 1, s 2.2.

- Medical assistance in dying deemed not to be "self-inflicted" or "cause other than disease or sickness" for the purposes of ss. 7(1) and 36 of the *The Coroners Act* (duty to notify coroner or peace officer of death; order regarding publication of evidence from inquest)

The Vital Statistics Regulations, 2010, RRS c V-7.21 Reg 1, s 14(2.1)-(2.3).

- Manner of death on death certificate to be recorded as "unclassified"

The Saskatchewan Insurance Act, RSS 1978, c S-26.

- s. 150.1(1) In this section, "medical assistance in dying" means medical assistance in dying as defined in section 241.1 of the Criminal Code.
  (2) Section 150 [regarding effect of suicide] does not apply to an insured who receives medical assistance in dying.
  (3) If a contract contains an undertaking, express or implied, that insurance money will be paid if a person whose life is insured receives medical assistance in dying, the undertaking is lawful and enforceable.
  (4) For the purposes of this Act, if an insured receives medical assistance in dying, that insured is deemed to have died as a result of the illness, disease or disability for which he or she was determined to be entitled to receive that assistance, in accordance with clause 241.2(3)(a) of the Criminal Code.

The Health Care Directives and Substitute Health Care Decision Makers Act, 2015, SS 2015, c H-0.002.

- s. 2(2) Nothing in this Act authorizes:
  (a) a decision in a directive, by a proxy appointed in a directive, by a personal guardian or by a nearest relative, with respect to an act or omission that is prohibited by the Criminal Code; or
  (b) the use of a directive to consent to active euthanasia or assisted suicide.

Judicial Decisions

Carter v. Canada (Attorney General), [2015] 1 SCR 331, 2015 SCC 5.

- Section 241(*b*) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

A.B. v Canada (Attorney General), 2017 ONSC 3759.

- [79] In this regard, those words [s. 241.2(2)(d)] are modified by the phrase "taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining." This language

reveals that natural death need not be imminent and that what is a reasonably foreseeable death is a person-specific medical question to be made without necessarily making, but not necessarily precluding, a prognosis of the remaining lifespan.

[80] Although it is impossible to imagine that the exercise of professional knowledge and judgment will ever be easy, in those cases where a prognosis can be made that death is imminent, then it may be easier to say that the natural death is reasonably foreseeable. Physicians, of course, have considerable experience in making a prognosis, but the legislation makes it clear that in formulating an opinion, the physician need not opine about the specific length of time that the person requesting medical assistance in dying has remaining in his or her lifetime.

[81] In referring to a "natural death" the language denotes that the death is one arising from causes associated with natural causes; i.e., the language reveals that the foreseeabilty of the death must be connected to natural causes, which is to say about causes associated with the functioning or malfunctioning of the human body. These are matters at the core if not the whole corpus of medical knowledge and better known to doctors than to judges. The language reveals that the natural death need not be connected to a particular terminal disease or condition and rather is connected to all of a particular person's medical circumstances.

[82] The Attorney General, in introducing Bill C-14, described the meaning of the words in s. 241.2 (2)(d), and in my opinion, she correctly said that the language does not require that people be dying from a terminal illness, disease or disability.

[83] As the Attorney General said, the language of s. 241.2 (2)(d) encompasses, on a case-by-case basis, a person who is on a trajectory toward death because he or she: (a) has a serious and incurable illness, disease or disability; (b) is in an advanced state of irreversible decline in capability; and (c) is enduring physical or psychological suffering that is intolerable and that cannot be relieved under conditions that they consider acceptable.

…

[86] Thus, as a matter of statutory interpretation, I can say that a person in circumstances like those in which AB finds herself, is a person in circumstances that fall within the meaning of s. 241.2 (2)(d) of the *Criminal Code*.

[87] There may be cases of doubt about the ambit of s. 241.2 (2)(d), but AB's case of an almost 80 year old woman in an advanced state of incurable, irreversible, worsening illness with excruciating pain and no quality of life is not one of them. Nor is hers a case

where she can say that the federal government has enacted legislation that does not go far enough in respecting her constitutional right to choose a medically assisted death.

Truchon c. Procureur général du Canada, 2019 QCCS 3792 (currently available only in French).

- Challenge to *Criminal Code*, s. 241.2(2)(d), and Quebec's *Act respecting end-of-life care*, art. 26(3) as a violation of ss. 7 and 15 of the *Charter*

Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario, 2019 ONCA 393.

- Challenge to College of Physicians and Surgeons of Ontario policy as a violation of ss. 2(a) and 15 of the *Charter*

Additional Resources

Health Canada, Medical assistance in dying: https://www.canada.ca/en/health-canada/services/medical-assistance-dying.html

- Links to Saskatchewan information at: https://www.canada.ca/en/health-canada/services/provincial-territorial-contact-information-links-end-life-care.html#a4

Health Canada, Guidelines for death certificates: https://www.canada.ca/en/health-canada/services/publications/health-system-services/guidelines-death-certificates.html

Government of Saskatchewan, Medical Assistance in Dying Information for the Public: https://www.saskatchewan.ca/residents/health/accessing-health-care-services/medical-assistance-in-dying/accessing-medical-assistance-in-dying-services

Council of Canadian Academies, Expert Panel on Medical Assistance in Dying, Reports: https://cca-reports.ca/reports/medical-assistance-in-dying/

Law Society of Saskatchewan

TAB 4A: Tips from the Public Guardian and Trustee of Saskatchewan

Tips From The Public Guardian and Trustee of Saskatchewan ("PGT")

The PGT has four main units:

- Dependent Adults Unit
- Estates Unit
- Children's Unit, and the
- Inquiries, Monitoring and Investigations Unit

and also runs the Counsel for Children and Youth Program.

Counsel for Children and Youth

- Provides for the appointment of legal counsel for children who are in the care of the Minister of Social Services pursuant to the *Child and Family Services Act*
- Receives referrals from social workers, the court, lawyers, and others
- Can receive a request for legal counsel from the child directly
- Appoints legal counsel on a case-by-case basis at the discretion of the PGT or where it is court ordered
- Does not appoint legal counsel for children involved in criminal or private custody and access matters

<u>What You Can Do</u>

- Apply to be on the roster of lawyers
    - Be an active member in good standing with the Law Society of Saskatchewan
    - Be willing to provide legal representation according to the expectations and service standards as set out in the Counsel for Children and Youth Manual
    - Complete the training required by the program, and be willing to seek the assistance of a mentor for your first three appointment files
    - Provide a Criminal Record check
    - Provide any additional information requested by the Counsel for Children Program manager
    - Note: Payment according to tariff of fees – attached

Dependent Adult's Unit

- Approximately 1200 clients
- Clients are generally adults who have been declared incapacitated by a chief psychiatrist (Certificate of Incapacity) due to dementia, mental illness, brain injury, intellectual disability, etc.

- PGT is their legal property guardian of last resort
- PGT trust officers manage the financial affairs of these individuals:
    - Arrange for real property to be inspected, maintained, checked, valued, cleaned-up, insured, sold, purchased, etc.;
    - Arrange for personal property to be inventoried, stored, sold, transported, replaced, etc.
    - Bring bank accounts or investments into the PGT's Common Fund;
    - Create budgets and arrange for payment of monthly bills;
    - Negotiate and sign leases with landlords;
    - Apply for all available funding sources (i.e. CPP, OAS, GIS, SAP, Common Experience Payment, Disability Tax Credit, etc.)
    - Attend Office of the Rentalsman hearings or Small Claims Court
    - Arrange for the preparation of income tax returns
    - In concert with the Public Guardian and Trustee or Deputy Public Guardian and Trustee, instruct legal counsel to commence, defend or settle a claim
    - Etc.

Estates Unit

- Approximately 530 files
- PGT is administrator of last resort for the province of Saskatchewan
- Can act as administrator if an estate is solvent and there is no family willing or able to act as administrator or the deceased's family is in dispute (discretion to refuse if estate worth less than $25,000)
- Can be appointed administrator pending the outcome of litigation if i.e. family is disputing the validity of a will, the status of an alleged spouse, etc.
- Can act as administrator *ad litem* – sole function is to act as the estate representative in the lawsuit in question, no administration of assets takes place
- Can be served under the *Tax Enforcement Act* if deceased has no personal representative and is in arrears of property taxes - PGT may apply to administer estate if real property has value
- Can act as property guardian under *The Missing Persons and Presumption of Death Act*
    - Determine the property of the missing person
    - Hold, manage or sell the missing person's property
    - Search for the missing person

Children's Unit

- Receives funds to hold in trust and manage on behalf of children (insurance, death benefit, permanent impairment, injury settlement, lottery or estate money)
- Holds that money in the Common Fund (diversified portfolio of equity and fixed income investments)
- Makes payments from the trust funds where authorized and appropriate
- Monitors the actions of executors and trustees managing property for children

- Consents to the sale, transfer or lease of real property where children have an interest
- Approves settlements for personal injury and fatal accident claims, releases defendants, and manages the proceeds of those claims for children
- Acts as litigation guardian of a child where the child's legal custodian appears to have an interest contrary to that of the child
- Acts as property guardian for permanent wards of the province
- Manages legal claims and settlements for children who are permanent or long-term wards of the Ministry of Social Services
- Applies for and manages RDSP's for children who are permanent or long-term wards of the Ministry of Social Services

What You Can Do

Applications for Letters

- When a minor has an interest in an estate, letters cannot be issued by the court without either a bond or the consent of the PGT
- The court was inadvertently issuing letters without making sure one of these requirements was met. Consequently, the Queen's Bench forms were updated to draw this requirement to everyone's attention (Forms 16-11C and 16-11B). Problems are still occurring.
- Update the template you use when applying for letters of administration or letters of administration with will annexed to reflect the current required wording

Obtaining the PGT's Consent to Sell Property

- PGT requires one certified appraisal or two affidavits of value from individuals who have actual knowledge of the real property's value NOT market valuations or the affidavit of value filed with ISC
- If selling the property for lower than the value provided in the certified appraisal or the two affidavits, explain why beyond just the comment that "the market has changed" (i.e. the property has been listed for 6 months, there have only been two walk-throughs by potential buyers, the utility costs are significant, etc.). The explanation should come in the form of a Statutory Declaration or affidavit.

Inquiries, Monitoring and Investigations ("IMI") Unit

- Notices to the PGT
    - After letters probate or letters of administration have been issued, the court sends a copy to the PGT along with the Notice to the Public Guardian and Trustee (Form 16-12) that was submitted to the court by the applicant with the application for letters

- The notice is supposed to list persons who are dependent adults as defined in *The Public Guardian and Trustee Act* who are entitled to a share of the estate or may have a claim against it pursuant to *The Dependants' Relief Act, 1996*, or *The Family Property Act*
- In practice, the applicant for letters of administration or probate often lists someone who is not a dependent adult as defined in *The Public Guardian and Trustee Act* but whose competency is nevertheless questionable or someone who was financially dependent on the deceased but competent (i.e. spouse)
- Trust officer will make inquiries about the situation of the named dependent adult and will try to ensure that anyone with decision-making power related to the dependent adult is aware of the dependent adult's (possible) right to a (greater) share of the deceased's estate.
- If there is no legal decision-maker, the PGT may take steps on its own to protect the dependent adult's rights in relation to the deceased's estate
- The PGT's starting point is the expectation that a deceased should treat all of his or her children equally regardless of disability

<u>What You Can Do</u>

- Anticipate questions from the PGT if the dependent adult is receiving less than an equal share and provide background facts about the dependent adult's situation and the rationale of the deceased to the PGT
- Notice to PGT form:
  - When in doubt about whether or not to list a dependent adult, err on the side of caution and list
  - Remember that "Guardian" means a court appointed guardian not simply someone who informally looks after the dependent adult

- <u>Guardianship Applications</u>
  - All applications must be served on the PGT
  - Trust officer will review application to see if all necessary forms and the criminal record check are included
  - Trust officer will also see if the PGT's bonding policy has been followed
    - PGT asks that the "Form M" bond covers 100% of the value of the incapable adult's "unprotected" assets
    - Unprotected assets are those for which no form of security or protection is in place
    - Example of a situation where an asset is "protected":
      - Court order appointing guardian states the real property of incapable adult cannot be sold without prior approval of the court or the PGT
    - PGT asks for an additional bond – a commercial bond – covering 20% of the

value of the incapable adults "unprotected" assets (rounded up to the nearest $10,000)

- I.e. $22,000 in unprotected assets
  20% = $4,400
  Commercial bond for $10,000 (not $4,400) requested

  $110,000 in unprotected assets
  20% = $22,000
  Commercial bond for $30,000 requested

- Exceptions
  - No bond will be requested if the applicant is a licensed trust corporation
  - No bond will be requested if the applicant is a long-term spouse and all of the incapable adult's children consent
  - If the applicant resides out of province, the PGT will request a commercial bond covering 100% of the incapable adult's unprotected assets
  - No commercial bond will be requested if the incapable adult has less than $10,000 worth of assets in total
  - If the applicant is seeking appointment as a property co-decision-maker or a temporary property guardian, then a commercial bond of $10,000 will be requested

- Further considerations
  - Joint assets of the incapable adult are included in calculating the amount of the value of the incapable adult's assets at 50%
  - The value of an RESP (where the incapable adult is its beneficiary) will not be included as an asset of the incapable adult but an RDSP will
  - Whether or not the incapable adult has a significant income stream that should be taken into account
  - Whether or not there is a large sum of money from a personal injury settlement or inheritance pending

- The PGT insists on bonding because property guardians have financially abused incapable adults
- If the PGT's bonding request is ignored, a submission asking for the imposition of a bond will be filed with the court

<u>What You Can Do</u>

- Be aware that the PGT has a guardianship application self-help kit on its website https://www.saskatchewan.ca/residents/justice-crime-and-the-law/power-of-attorney-guardianship-and-trusts/guardianship-and-co-decision-making-for-dependent-adults/apply-for-adult-guardianship

- Before drafting applications for guardianship, ask the applicants about their own personal finances because, in most circumstances, the PGT will insist upon commercial bonds. If the applicants aren't bondable, the PGT will raise the issue of bonding with the court by filing submissions asking for the imposition of bonds
    - Note: successful applicants can reimburse themselves for the costs of the commercial bonds and court applications from the dependent adults' funds and show that on their annual accountings to the PGT and the court
- Provide a draft of the application to the PGT before completing and serving the application
- Go over the terms of the court order with the newly appointed guardian
- Explain to guardians that they must keep track of the decisions they are making as they are required to account to the PGT and the court on an annual basis
- Impress upon guardians that they have a positive duty to account; it is neither the court's nor the PGT's responsibility to remind them of it
- Provide guardians with copies of the required accounting forms (found in the *Adult Guardianship and Co-Decision-making Regulations*) so they know what will be expected of them in advance
- Explain that the guardian cannot simply stop acting if they tire of the role and cannot delegate their authority to someone else

<u>Accountings</u>

- Property guardians and property co-decision-makers must provide annual accountings to the PGT. Those accountings must be set out on the legislated forms, Form L or Form L.1., and sworn under oath.
- If the property guardian or property co-decision-maker fails to account to the PGT, appears to be financially abusing the dependent adult or managing the dependant adult's finances in a manner contrary to the dependant adult's best interests, the PGT usually will apply to the court to remove the property guardian or property co-decision-maker from that role. Unless the situation appears urgent, the trust officer will try to resolve concerns with the property guardian or property co-decision-maker before seeking to remove that person from his/her role.
- Property guardians and property co-decision-makers must provide a final accounting to the PGT when their role ends, typically upon the death of the dependent adult
- In 2018, the IMI unit reviewed 567 accountings

<u>Financial Abuse</u>

- PGT receives reports of financial abuse related to vulnerable members of the general public on a daily basis.
- PGT receives reports from financial institutions, care homes, family members, neighbours, etc.
- Alleged wrongdoer is usually a family member and frequently the attorney named in the vulnerable person's power of attorney

- Forms of financial abuse seen by the PGT
    - Using the vulnerable person's credit card or debit card to make purchases for someone other than the vulnerable person
    - Giving away the vulnerable person's money or other personal property
    - Occupying the vulnerable person's real property without paying rent
    - Having the vulnerable person sign documents they don't understand
    - Transferring bank accounts into joint names or the abuser's name alone (*Pecore* v. *Pecore*, 2007, SCC 17, [2007] 1SCR 795 is of no practical assistance if a lawyer is not involved in the administration of the vulnerable person's estate or the money in the joint account is all spent by the abuser before the vulnerable person dies)
    - Transferring legal title to real property into joint names or the abuser's name alone

- What the PGT can do:
    - **Investigate** – section 40.7 of the *Public Guardian and Trustee Act*

        (1) The public guardian and trustee may investigate an allegation that a person the public guardian and trustee has reasonable grounds to believe is a vulnerable adult:

            (a) is being subjected to financial abuse by another person, including a person appointed as his or her property decision-maker pursuant to *The Adult Guardianship and Co-decision-making Act*; or
            (b) is unable to make reasonable judgments respecting matters relating to his or her estate and that the estate is likely to suffer serious damage or loss.

        (2) In an investigation pursuant to subsection (1), the public guardian and trustee may:

            (a) at any reasonable time, examine any record, whether in the possession of the person believed to be a vulnerable adult or any other person; and

            (b) request any person to provide any information and explanation the public guardian and trustee considers necessary to the investigation.

        (3) If requested to do so by the public guardian and trustee, a personal shall make available any record or shall provide the information and explanation mentioned in clause (2)(b) …

    - **Obtain a Warrant** – section 40.9 – enter premises, search for and seize records that a person refused or neglected to produce – *PGT has not used to date*

    - **Freeze** – section 40.6 – PGT can require a financial institution to suspend the withdrawal or payment of funds from a person's account for up to 30 days and may require the production of records from the financial institution if the PGT has reasonable grounds to believe the person is vulnerable and:
        - being financially abused or

- unable to make reasonable judgments respecting matters relating to his or her estate,

and that the estate is likely to suffer serious damage or loss.

- In 2018, the IMI unit initiated 94 "freezes" and, in any given month, had an average of 76 financial abuse investigations on the go (and this number does not include situations where the PGT had been asked to demand an accounting or a final accounting from an attorney named in a power of attorney)

- **Demand an Accounting** – sec 18(5)(b) of the *Powers of Attorney Act, 2002* - PGT can demand an accounting from an attorney if the PGT considers it necessary and in the public interest to do so

<u>What You Can Do</u>

- Include, right in the wording of the powers of attorneys you draft, sentences that indicate that the attorneys shall account to the grantors and, if the grantors are no longer competent, to "X" or to the grantors' adult family members
- Include a plain language information sheet with the power of attorney, to be read by the attorney in the event they begin acting, outlining attorney do's and don't's. For example:
  - don't make gifts totaling more than $1,000 per year to others from the grantor's funds
  - don't lend money to yourself
  - don't use the grantor's money to support yourself (unless you are the grantor's spouse)
  - don't give away the grantor's assets to beneficiaries named in the grantor's will or anyone else ---– don't "pre-distribute" the grantor's estate
  - don't add your name to land titles or bank accounts
  - do be aware that you have a legal obligation to answer, formally and in writing, for your decision-making, either to the grantor (if the grantor is competent) or the grantor's family members, and the PGT (if the grantor is incompetent)
  - do be aware that the power of attorney does not give you the authority to make health care decisions
- include, with that information sheet, a copy of the accounting form from the *Power of Attorney Regulations*
- be alert to
  - the sudden involvement of previously uninvolved relatives
  - lawyer switching

- the friend/neighbour of a vulnerable adult who is widowed with no children or children who are disabled
- The family member who lives with the vulnerable adult and relies on the vulnerable adult for financial support, is unemployed, or has a history of substance abuse or mental/physical health problems
- The child with a sense of entitlement – "It's my inheritance"

Miscellaneous

- When drafting, resist the temptation to combine a power of attorney and health care directive into one document – very confusing for health care providers
- Suggest the grantor take the power of attorney you have drafted to the financial institution where it will eventually be used to make sure the financial institution will accept it. By the time the attorney gets you to fight with the financial institution over its validity, the situation with the grantor will have become an emergency
- Let grantors know that enduring powers of attorney are effective as soon as they are signed because they do not realize this - *Power of Attorney Regulations* "Appendix – Notes for the Assistance of the Grantor of an Enduring Power of Attorney"
- On July 25, 2019, the banking industry adopted a Code of Conduct for the Delivery of Banking Services to Seniors which is supposed to be overseen by the Financial Consumer Agency of Canada https://cnpea.ca/images/voluntarycode-banks_cba_fcac_2019.pdf. Under the code, banks are supposed to provide competency-based training to staff on, among other topics, financial abuse, powers of attorney and joint deposits.
- In 2018, the IMI unit answered 3,562 calls on powers of attorney, guardianship, certificates of incapacity and other topics beyond those that resulted in the opening of a file

Law Society
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TAB 4B: Tariff of Fees

TARIFF OF FEES
Maximum Fees Calculated on an Hourly Fee Basis
Appendix 5
Effective October 1, 2014

Type of Proceedings	Service Description	Tariff
General - Preparation	Billable per hour for general preparation such as reviewing disclosure, interviewing the client, general legal advice, the drafting of any pleadings, affidavits, etc.	Up to 10 hours @ $88/Hour for matters dealt with up to, and/or concluded in Chambers
General - Chambers/Court	Actual Time – billable per hour or portion thereof	Actual time @ $88/hour
Case resolution processes	Actual time for engaging in early and out of court resolution, including negotiating with opposing parties, supporting clients in negotiation, supporting clients in alternative dispute resolution processes including case conferences, mediation, OPIK, etc.	Up to 10 hours @ $88/Hour
Pre-trial conference - preparation	Billable per hour or portion thereof for pre-trial preparation	Up to 10 hours @ $88/hour
Pre-Trial conference – court appearance	Actual Time – Billable per hour or portion thereof	Actual time @ $88/hour
Pre-Trial – Additional preparation	When pre-trial conferences last more than 5 hours, you are entitled to bill up to one hour of preparation time for each additional full hour of hearing time exceeding the first five hours. This item is applicable only if the hours for Pre-trial preparation have been maximized.	Up to 1 hour per qualifying hour of Pre-trial time
Hearing Required - preparation	Billable per hour or portion thereof for trial preparation	Up to 15 hours @ $88/hour
Hearing Required – court appearance	Actual time - Billable per hour or portion thereof	Actual time @ $88/hour

		Or flat fee: $540 for provincial court trial, $860 for Queen's Bench trial
Hearing Required – additional preparation	When a hearing exceeds 10 hours, additional preparation time is available. You are entitled to bill up to one hour of preparation time for each additional hour of Court time that exceeds the 10 hours. This item is only applicable if the hours for Trial preparation have been maximized.	Up to 1 hour per qualifying hour of trial time
All Appeals	The prior approval of the program manager or designate is required. In addition, the manager or delegate will allow reasonable disbursements for printing of transcripts, factums, and appeal books.	
Appeals - preparation	Billable per hour or portion thereof for preparation	Up to 25 hours @ $88/hour
Appeals – court appearance	Actual time – billable per hour or portion thereof	Actual time @ $88/hour
Mentoring		For up to 5 hours per file, @$88/Hour, 15 hours per lawyer. Pre-approval of Children's Counsel required for more than 15 hours mentoring time per lawyer.

The program recognizes that the office administration inherent in accepting referrals is not fully captured by tariff items. A one-time $25.00 file closure fee is available for all referrals and is to be included on the final account submitted.

Absence fees for travelling time are charged at a rate of $88/hour as follows:

a) Travel to municipalities other than the place where the solicitor resides for court appearances
b) Travel to interview a client

Travel and Sustenance Rates

(1) Chartered Aircraft) Approved where it is considered to be the most economical

(2) Scheduled Aircraft) considering expenses and loss of time. Receipt required
(3) Bus – receipt required
(4) Vehicle rental – requires pre-approval
(5) Private Vehicle

Mileage and meal rates are based on government rates and will be adjusted as those rates are adjusted. So the rates as of October 1, 2017 are as set out below:

Private Vehicle

Rates effective October 1, 2017	Ordinary	North of the 54th Parallel
Kilometers	$0.4255	$0.4582

Meals

No receipts required, however, no claim may be made for a meal when:

	Departure later than:	Return earlier than:
Breakfast	7:30 a.m.	8:30 a.m.
Dinner	11:30 a.m.	12:30 p.m.
Supper	5:30 p.m.	6:30 p.m.

Rates	Ordinary in Province	Beyond Road's End in Province	Out of Province
Breakfast	$8.00	Actual and reasonable charges supported by receipts. Where receipts not available, ordinary rates apply.	$11.00
Dinner	$14.00		$16.00
Supper	$19.00		$24.00
Per diem	$41.00		$51.00

The above rates include reimbursements for GST, gratuities and the overnight allowance.

Accommodation

1) Actual and reasonable charges, supported by receipt. Lawyers are expected to seek accommodation in the least expensive rooms of the hotel/motel they have chosen.
2) An amount of $35/night (no receipt required) will be paid for accommodation in private residence.
3) Overnight allowances are included in the revised meal rates.

Other

1) Taxis – receipts required when over $4.00
2) Telephone – receipts required
3) Parking – actual costs supported by receipts, or actual costs up to $4.00 where metered

Disbursements

Witness fees and travelling expenses of witnesses in accordance with provision of the Rules of Court. (Out of province witness fees must be approved by program manager in advance.)

- Postage, photocopying, courier, telephone and facsimile expenses will be paid as follows:
- Postage – actual disbursement to a maximum of $50
- Photocopying - $.25/page to a maximum of $100
- Courier – actual disbursements
- Facsimile - $.25/page to a maximum of $50
- Long Distance – actual disbursements to a maximum of $75
- Process Servers – actual and reasonable disbursements (receipts required)

If charges for disbursements exceed the maximum specified, detailed and actual receipts will be required.

Any other proper disbursements should be pre-approved by the program manager or designate.

The program will not pay for any research material, including on-line research costs unless authorized by the program manager. Time spent by a solicitor doing research is considered preparation time.

Law Society
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TAB 4C: Form 16-11B: Application for Grant of Administration with Will Annexed

Form 16-11B
(Rule 16-11)

COURT FILE NUMBER _____

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE _____

IN THE ESTATE OF _____ DECEASED

APPLICATION FOR GRANT OF ADMINISTRATION WITH WILL ANNEXED

The application of _____ states that:
(name and residence)

1 _____, late of _____ , deceased,
(name of deceased) *(place of residence)*

died at _____
(place of death)

on or about the _____ day of _____, 2_____, and at the time of death resided in Saskatchewan (or resided out of Saskatchewan but had at the time property in Saskatchewan).

2 The deceased made a Last Will and Testament dated the ____ day of _____, 2____, (and codicil or codicils dated the _____ day of _____ , 2 _____), and was at the time of making the will (and codicil, if any) of the full age of _____ years.

(If otherwise, see clause 16-18(1)(a) of the rules and *The Wills Act, 1996*, sections 5 and 6 and set out the applicable exception. For the applicable age see the provisions of *The Age of Majority Act*.)

3 The following beneficiary(ies), and no other person(s), is (are) entitled to share in the estate of the deceased: *(show here the name and address of each beneficiary and the relationship to the deceased).*

NAME AND ADDRESS	RELATIONSHIP

(If applicable, add:)

3(a) The deceased died intestate as to a portion of h _____ estate leaving surviving the following persons, and no others, who are entitled by law to share in the estate: *(show here the name and address of each beneficiary and the relationship to the deceased).*

NAME AND ADDRESS	RELATIONSHIP

4 Every person named as a beneficiary survived the deceased. *(If otherwise, state whether he or she was a brother, sister, child or other issue of the deceased, and if so, if he or she is survived by a child now under the age of 18. See section 22 of The Wills Act, 1996. If so, file Form 16-12.)*

5 No beneficiary is now under the age of 18 years, and no child under the age of 18 years survived the deceased, and no posthumous child has been or will be born to the deceased. *(If otherwise so state and file Form 16-12.)*

6 *(select the applicable paragraph 6 - delete the inapplicable paragraphs)*

- ☐ Attached to this application is a Bond in Form 16-31.

or

- ☐ The Applicant asks the Court to dispense with giving a Bond on the basis that *(select the applicable circumstances)*:
  - ☐ the value of the estate does not exceed the amount prescribed for the purposes of clause 9(1)(b) of *The Administration of Estates Act*;*
  - ☐ the administrator is the sole beneficiary;
  - ☐ attached to this application are the consents of all competent adults with a beneficial interest in the estate, and there are neither minors under the age of 18 nor adults who appear to lack capacity, who are beneficially interested in the estate; or
  - ☐ attached to this application are the consents of all competent adults with a beneficial interest in the estate and the consent of the Public Guardian and Trustee.

  And

  - ☐ there are no debts for which the estate is or may be liable; or
  - ☐ all the creditors of the estate consent.

7 The deceased was not survived by any dependent adult who is a beneficiary of the estate or may have a claim against it under *The Dependants' Relief Act, 1996* or *The Family Property Act. (If otherwise so state and file Form 16-12 , and either include a Bond or request relief from having to give a Bond in accordance with paragraph 6.)*

8 The deceased was _____ years of age at death.

9 The deceased was _____ at death.
(set out marital status)

10 The deceased did not, after execution of the will, marry or cohabit in a spousal relationship continuously for two years. *(If otherwise, set out the applicable exception: see clause 16-18(1)(b) of rules.)*

11 After making the will and before his or her death, the marriage of the testator was not terminated by a decree absolute or final judgment of divorce nor was it found to be void or declared a nullity by a court in a proceeding to which the testator was a party nor did the testator and his or her spouse, who were not legally married, cease to cohabit in a spousal relationship for at least 24 months. *(If otherwise, comply with subrule 16-18(2).)*

12 No executor is named in the will (*or* the executor named in the will has died since the death of the testator, *or* has renounced and the Renunciation is attached).

13 The applicant(s) is a (are) _____ under the will and no other person has a prior or equal right to Grant of Administration with Will Annexed *(or all persons having prior or equal right to grant of administration have renounced and the Renunciation of each is attached: see rule 16-26).*

14 The applicant(s) is (are) of the full age of 18 years *(or a trust company).*

15 Neither witness to the will is a beneficiary or the spouse of a beneficiary named in the will. *(If otherwise, set out the applicable exception: see clause 16-18(1)(c) of the rules.)*

16 The value of the estate for the purpose of local registrar's fees is $_____.

17 No other application for grant has been made to this Honourable Court to prove the will or for Letters of Administration with Will Annexed, to the best of the applicant's information and belief.

Therefore the applicant(s) request(s) that Letters of Administration with Will Annexed of the will of the deceased may be granted by this Honourable Court (, without bond).

DATED at _____, Saskatchewan, this _____ day of _____, 2 _____.

_____
(signature of applicant)

NOTICE

* Currently the amount prescribed in *The Administration of Estates Regulations* for the purposes of clause 9(1)(b) of *The Administration of Estates Act* is $25,000.

CONTACT INFORMATION AND ADDRESS FOR SERVICE

If prepared by a lawyer for the party:

Name of firm: _____

Name of lawyer in charge of file: _____

Address of legal firm: _____

(set out the street address)

Telephone number: _____

Fax number (*if any*): _____

E-mail address (*if any*): _____

or

If the party is self-represented:

Name of party: _____

Address for service: _____

(set out the street address)

Telephone number: _____

Fax number (*if any*): _____

E-mail address (*if any*): _____

Law Society
of Saskatchewan

TAB 4D: Form 16-11C: Application for Grant of Administration

Form 16-11C
(Rule 16-11)

COURT FILE NUMBER _____

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE _____

IN THE ESTATE OF _____ DECEASED

APPLICATION FOR GRANT OF ADMINISTRATION

The application of _____ states that:
(name and residence)

1 _____, late of _____ , deceased,
(name of deceased) *(place of residence)*

died at _____
(place of death)

on or about the _____ day of _____, 2_____, and at the time of death resided in Saskatchewan (or resided out of Saskatchewan but had at the time property in Saskatchewan).

2 The deceased died intestate leaving surviving the following person(s), and no others, who are entitled by law to share in the estate: *(show here the name and address of each beneficiary and the relationship to the deceased).*

NAME AND ADDRESS	RELATIONSHIP

3 No beneficiary is now under the age of 18 years, and no child now under the age of 18 years survived the deceased, and no child (or brother or sister, if they are beneficiaries) predeceased the deceased leaving a child who is now under the age of 18 years, and no posthumous child has been or will be born to the deceased. *(If otherwise so state and file Form 16-12).*

4 *(select the applicable paragraph 4 - delete the inapplicable paragraphs)*

□ Attached to this application is a Bond in Form 16-31.

or

□ The Applicant asks the Court to dispense with giving a Bond on the basis that *(select the applicable circumstances)*:

- □ the value of the estate does not exceed the amount prescribed for the purposes of clause 9(1)(b) of *The Administration of Estates Act*;*
- □ the administrator is the sole beneficiary;
- □ attached to this application are the consents of all competent adults with a beneficial interest in the estate, and there are neither minors under the age of 18 nor adults who appear to lack capacity, who are beneficially interested in the estate; or
- □ attached to this application are the consents of all competent adults with a beneficial interest in the estate and the consent of the Public Guardian and Trustee.

And

- □ there are no debts for which the estate is or may be liable; or
- □ all the creditors of the estate consent.

5 No dependent adult is interested in the estate or may have a claim against it under *The Dependants' Relief Act, 1996* or *The Family Property Act. (If otherwise so state and file Form 16-12, and either include a Bond or request relief from having to give a Bond in accordance with paragraph 4.)*

6 The deceased was _____ years of age at death.

7 The deceased was _____ at death.
(set out marital status)

8 The applicant(s) is (are) of the full age of 18 years and is (are) *(state the character in which the applicant claims, e.g. Official Administrator, Public Guardian and Trustee, or next of kin with a beneficial interest, and state the names and addresses of all other next of kin, with their relationship, who may have prior or equal rights to the applicant and whether any or all such persons have renounced their rights. If they have renounced attach Form 16-26. If the applicant is a trust company, so state and indicate that the company is licensed under The Trust and Loan Corporations Act, 1997).*

9 The value of the estate for the purpose of local registrar's fees is $_____.

10 No other application for grant has been made to this Honourable Court for a grant of Letters of Administration, to the best of the applicant's information and belief.

Therefore the applicant(s) request(s) that Letters of Administration may be granted by this Honourable Court (, without bond).

DATED at _____, Saskatchewan, this _____ day of _____, 2 _____ .

_____

(signature of applicant)

NOTICE

* Currently the amount prescribed in *The Administration of Estates Regulations* for the purposes of clause 9(1)(b) of *The Administration of Estates Act* is $25,000.

CONTACT INFORMATION AND ADDRESS FOR SERVICE

If prepared by a lawyer for the party:

Name of firm: _____

Name of lawyer in charge of file: _____

Address of legal firm: _____

(set out the street address)

Telephone number: _____

Fax number (*if any*): _____

E-mail address (*if any*): _____

or

If the party is self-represented:

Name of party: _____

Address for service: _____

(set out the street address)

Telephone number: _____

Fax number (*if any*): _____

E-mail address (*if any*): _____

Law Society
of Saskatchewan

TAB 4E: Form 16-12: Notice to PGT

Form 16-12
(Subrule 16-12(2))

COURT FILE NUMBER _____

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE _____

IN THE ESTATE OF _____ DECEASED

NOTICE
TO: PUBLIC GUARDIAN AND TRUSTEE *OR* PROPERTY GUARDIAN
(as the case may be)

Take notice that _____

of _____
(mailing address)

_____
(telephone) *(fax)* *(e-mail address)*

is making application to the court for grant of letters_____ in the estate of the deceased,

who died at _____
(place of death)

on the _____ day of _____, _____.

And further take notice that the deceased died (in)testate, survived by:

☐ the following competent adults entitled to share in the estate:

Name	Address	Relationship to deceased

☐ the following persons under the age of 18 years entitled to share in the estate:

Name	Name and Address of Guardian	Relationship to deceased	Date of Birth

□ the following persons under the age of 18 years who may have a claim against the estate pursuant to *The Dependants' Relief Act, 1996*:

Name	Name and Address of Guardian	Relationship to deceased	Date of Birth

□ the following persons who are dependent adults as defined in *The Public Guardian and Trustee Act* and who are entitled to share in the estate:

Name	Name and Address of Guardian	Relationship to deceased	Date of Birth
	*		

□ the following persons who are dependent adults as defined in *The Public Guardian and Trustee Act* and who may have a claim against the estate pursuant to *The Dependants' Relief Act, 1996* or *The Family Property Act*:

Name	Name and Address of Guardian	Relationship to deceased	Date of Birth
	*		

And further take notice that the following are attached to this notice:

(a) a statement of the assets of the deceased as shown on the application;

(b) a statement of the debts of the estate; and

(c) a copy of the Last Will and Testament of the deceased, if applicable.

DATED at _____, Saskatchewan, this _____ day of _____, 2 _____.

_____

(signature)

CONTACT INFORMATION AND ADDRESS FOR SERVICE

If prepared by a lawyer for the party:

Name of firm: _____

Name of lawyer in charge of file: _____

Address of legal firm: _____

(set out the street address)

Telephone number: _____

Fax number (*if any*): _____

E-mail address (*if any*): _____

or

If the party is self-represented:

Name of party: _____

Address for service: _____

(set out the street address)

Telephone number: _____

Fax number (*if any*): _____

E-mail address (*if any*): _____

Law Society
of Saskatchewan

TAB 5: The Intestate Succession Act, 2019 and The Intestate Succession Regulations

***The Intestate Succession Act, 2019* and**
The Intestate Succession Regulations

- *The Intestate Succession Act, 2019* came into force on October 1, 2019. The Act is available here: http://publications.saskatchewan.ca/#/products/102827

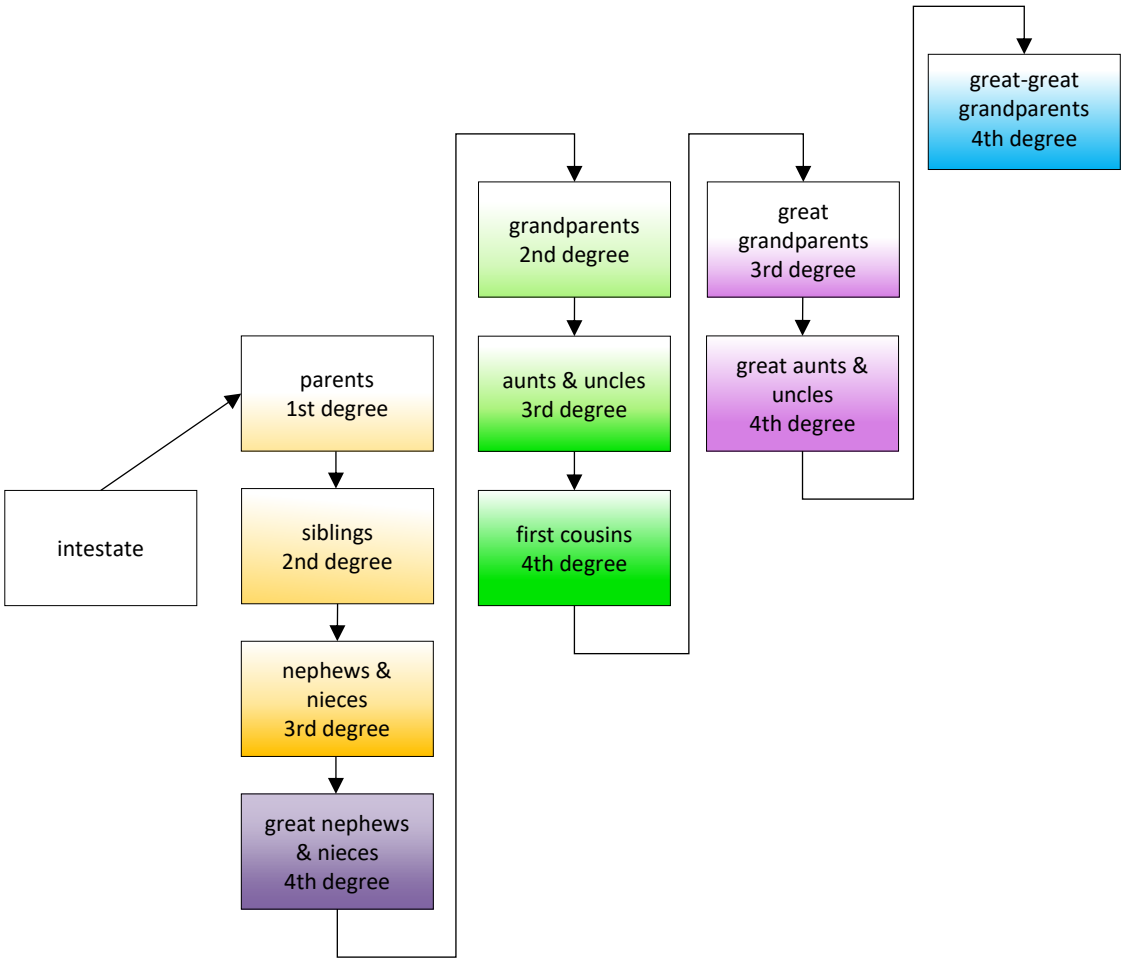
- *The Intestate Succession Regulations* also came into force on October 1, 2019. The Regulations are available here: http://publications.saskatchewan.ca/#/products/102840

- The Act builds on recommendations contained in the 2017 Law Reform Commission of Saskatchewan report title "Reform of *The Intestate Succession Act, 1996*" which can be found here: https://lawreformcommission.sk.ca/FinalReportonTheIntestateSuccessionAct.pdf

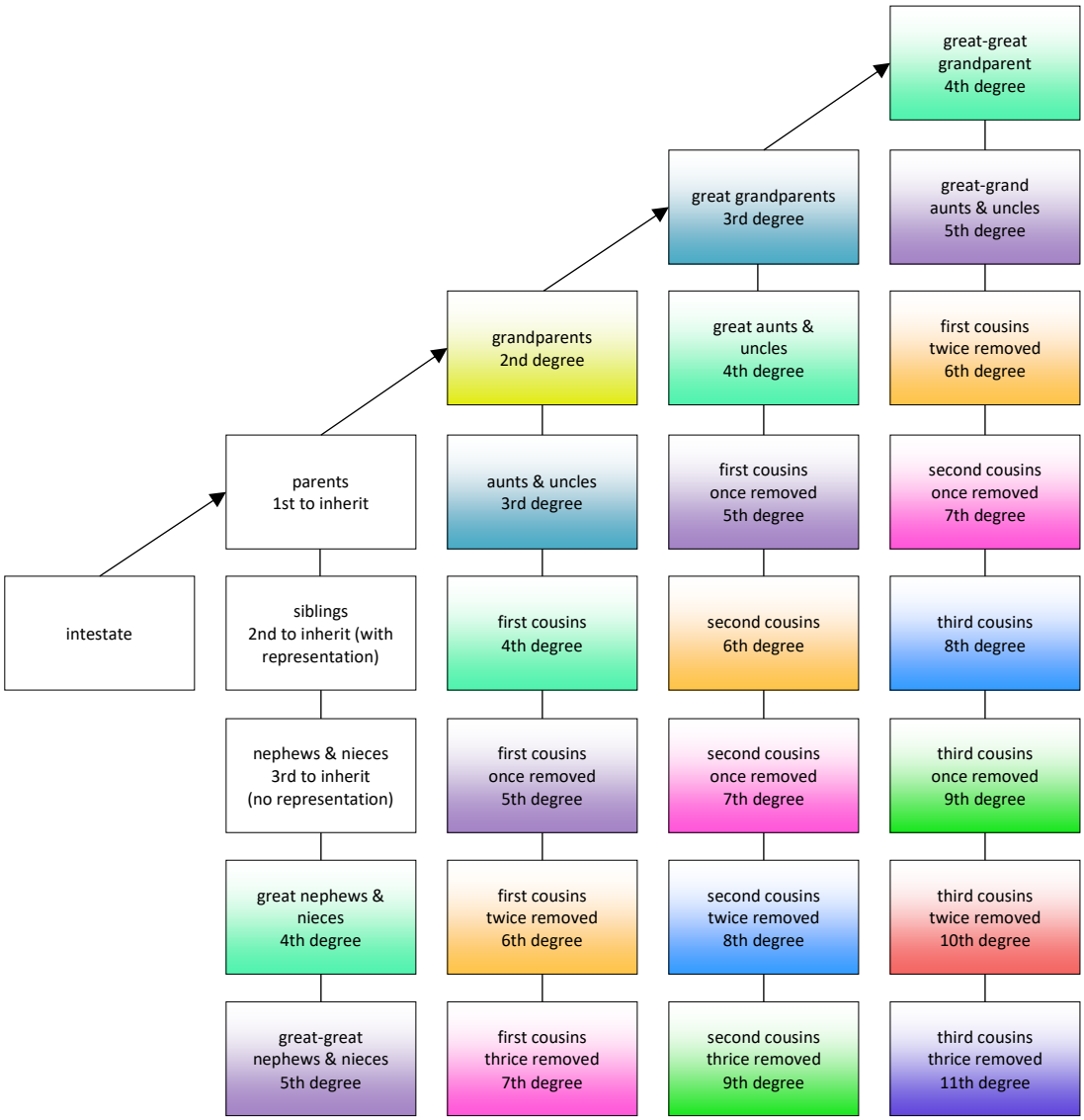
- The new Act:
    - Updates the language used in relation to descendants;
    - Revises the definition of "spouse";
    - Provides that the spousal preferential share will be set out in the Regulations;
    - Provides that the spouse inherits the entire estate if all children of the intestate are shared between the spouses;
    - Adopts a parentelic model of distribution (see Appendix A) in place of a next-of-kin model (see Appendix B);
    - Clarifies when a spousal relationship has terminated for the purposes of the Act;
    - Codifies the common law that immovables are governed by the laws of the location they are in; and
    - Eliminates the doctrine of advancement.

- Charts setting out the two models of parentelic distribution and next-of-kin distribution are attached as Appendix A and B. The charts were provided courtesy of the Law Reform Commission of Saskatchewan and are found in the Commission's 2017 Report.

Appendix A
Parentelic Distribution



Appendix B
Next of Kin Distribution



Law Society
of Saskatchewan

TAB 6: Road to Best Practice: An 8-Step Program for Lawyers (Presentation)

Law Society of Saskatchewan

Road to Best Practice: An 8-Step Program for Lawyers

For lawyers who want to avoid Claims and Complaints

Jenna Kraushaar, LSS

8-Step Program

1. **Start out right**
2. Getting out of a bad client relationship
3. What goes around comes around
4. Don’t annoy your client
5. Meet or beat deadlines
6. Don’t lie or steal
7. Ask your client how you are doing
8. Know the *Code of Professional Conduct*

Law Society
of Saskatchewan

8-Step Program

1. Start Out Right

a. ENSURE THE CLIENT UNDERSTANDS WHAT'S GOING ON
b. KEEP THE CLIENT INFORMED
c. DOCUMENT EVERYTHING
d. GET MONEY UP FRONT
e. BE SMART ABOUT WHO YOU ACCEPT AS A CLIENT

1. Start Out Right

c. DOCUMENT EVERYTHING

- Make a record of every communication (and attempted communication) on a file
- Confirm verbal communication with a follow-up written communication when possible
- Good documentation can often be a full defence to a complaint

What should you record?

1. What was discussed by you, and by the client.
2. What was your legal advice? Based on what?
3. What were the client's instructions?
4. What did you agree to do, and by when?
5. What happened during a court appearance/tribunal hearing/mediation/4-way meeting, etc.?

Why should you keep good notes?

You never know what will be important or significant in the future. What may seem trivial now may become hugely significant later.

Your notes are your protection

Claims regularly arise from an alleged failure to follow clients instructions

What did you "promise" to do?
What did the client instruct you to do?
What facts were disclosed to you?
What advice did you give the client?

1. Start Out Right
c. DOCUMENT EVERYTHING

Wills and Estates Specific:

- Make sure that you check your instructions with the final draft of the will to make sure everything is included.
- Complete a memo to file right after having signed a will documenting what you have done to ensure that the testator had testamentary capacity.
  - If you have a memo to file, and it's a good memo, you're more likely to be a witness than a party to any litigation.
  - SLIA is largely seeing allegations that a testator had a lack of capacity, or that there was undue influence, so proper documentation is imperative.

In a memory test between you and an unhappy client, you lose.

Every. Single. Time.

Civil Context

"Where there is a conflict between the version of the client and the version of the solicitor, the version of the client is to be preferred…if it is not in writing, then it seems to be that the client's statement must be accepted."

-Morton v Harper Grey Easton
(1995) B.C.L.R. (3d) 53 (B.C.S.C.)

Law Society of Saskatchewan

Except in the most extreme circumstances, the LSS does not handle general fee disputes.

HOWEVER

- We will inform clients of their rights to have your invoice taxed or assessed.
- May bring other issues to our attention that we are concerned with

BUT

If you're going to "quote" fees….Be prepared for the client to hold you to it

- Pattern of misquoting may indicate larger competence or practice problem to the LSS
  (Note: this is where good notes can help)

AND

If you're going to advertise fees…Be prepared for the LSS to hold you to it:

- Code 4.2-2 A lawyer may advertise fees charged for their services provided that:
  (a) the advertising is reasonably precise as to the services offered for each fee quoted;
  (b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and
  (c) the lawyer strictly adheres to the advertised fee in every applicable case.

Always think about Conflicts of Interest

Code, Section 3.4, including:

- Duty of Loyalty
- Consent
- Concurrent and Joint Representations
- Acting Against Former Clients
- Acting for Borrower and Lender
- Conflict from Transfer Between Firms

8-Step Program

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8. Know the *Code of Professional Conduct*

Law Society of Saskatchewan

8-Step Program

2. Getting Out of a Bad Client Relationship

a. GOOD CAUSE
b. REASONABLE NOTICE
c. WHAT TO DO

2. Getting Out of a Bad Client Relationship

b. REASONABLE NOTICE

- See Rule 3.7-1, Commentary
  - No hard and fast rules
  - If the matter covered by Statute or Rules of Court, then those will govern
  - Must protect the client's interests
  - Don't desert at a critical stage or where it would disadvantage the client's matter
- Fire a warning shot

2. Getting Out of a Bad Client Relationship

c. WHAT TO DO

Always consult Rules 3.7-8 and 3.7-9

YOU MUST:

- Try to minimize expense
- Avoid prejudice to the client
- Do all that you can reasonably do to facilitate the transfer to the new lawyer
- Notify the client **in writing** that:
  a. You have withdrawn
  b. Why you have withdrawn
  c. If litigation, that a hearing or trial will proceed as scheduled and they should retain new counsel promptly
- Give the client all property that they are entitled to
  a. Subject to your right to a lien
  b. Subject to trust conditions
- Account for all funds in trust (including those previously held)
- Render an account
- Comply with any Rules of Court re: withdrawal when applicable
- Coordinate with the client's new lawyer if known

8-Step Program

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Law Society
of Saskatchewan

8-Step Program

3. What Goes Around Comes Around

a. YOUR DUTY TO OTHERS
b. YOUR DUTY TO REPORT MISCONDUCT
c. BE COURTEOUS AND CIVIL
d. ALWAYS RESPOND

3. What Goes Around Comes Around

a. YOUR DUTY TO OTHERS

Courtesy and Good Faith:

7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

[1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

3. What Goes Around Comes Around

b. YOUR DUTY TO REPORT MISCONDUCT

Duty to Report Misconduct:

7.1-3 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

…

(d) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;

(e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and

(f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

3. What Goes Around Comes Around

c. BE COURTEOUS AND CIVIL

- Your reputation will precede you – and haunt you
- Be civil to your staff, to your clients, to other counsel, to all who deal with you.
- Act in public like you are worthy of respect. You never know who is watching you.

Keep in Mind:

- Tone can be just as important as the words used
- Your reputation in a small professional community is important
- To remain objective regarding your client's cause

Suggestions:

- Never email angry – Letters give you the opportunity to reconsider and reword
- Take a "cooling-off" period
- Vet questionable correspondence with colleague before sending

What NOT to Say:

- "I warned Ms. X not to try the same s*** with me that Ms. Y handed my client. In my respectful view they both ought to be doing something else to earn a living".
- "You are either unable or unwilling to read. I call shit when it is and will not put up with any of it."
- "Your breath smells like one of my farts"

3. What Goes Around Comes Around

d. ALWAYS RESPOND

- No matter from whom the communication (clients, colleagues, LSS)
- Set client expectations for response time
- Avoid the “non-response” response
- If you are going to have delays, be honest and forthright about them.

“Three Strikes” Rule

1. If a lawyer fails to respond to three separate communications, each sent with a reasonable time between, then it warrants referral to a Bencher Committee for failure to communicate.

2. If a lawyer fails to response to three separate communications from the Law Society, then it warrants referral to discipline for failure to respond to the Law Society.

8-Step Program

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8. Know the *Code of Professional Conduct*

Law Society
of Saskatchewan

4. Don’t Annoy Your Client

If it would annoy you…don’t do it!

Don’t:

- Keep clients waiting for a scheduled appointment
- Interrupt a meeting to take a phone call
- Look surprised when the client asks for a status update
- Surprise clients with a late invoice or bad news

8-Step Program

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3. What goes around comes around
4. Don’t annoy your client
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6. Don’t lie or steal
7. Ask your client how you are doing
8. Know the *Code of Professional Conduct*

Law Society
of Saskatchewan

5. Meet or Beat Deadlines

a. DO THE WORK

There are many excuses/reason for not completing the work:

- Work-load and priority issues
- Failure to properly diarize matters
- Health Issues
- File paralysis (unsure what to do)

If they are provided after the fact, they rarely satisfy your client

Failure to do so can lead to a Law Society Complaint (and you can't bill a client for having to deal with the complaint, see: 2000 SKLSPC 4)

5. Meet or Beat Deadlines

b. ENSURE THE WORK GETS DONE

- Set realistic deadlines, especially if there is not one imposed by the circumstances.
- Proper diary systems prevent files from stagnating or “falling off your desk”
  - Set 2 deadlines: one for you; one for the client
- Recognize your limits and inform your client:
  - Availability
  - Skill/Experience
- Cut yourself some slack
  - Murphy’s Law #3 is not “S**t Happens”, it’s “S**t will happen.”

If you need help, get it!

- Colleagues
- Lawyers Concerned for Lawyers
- EFAP
- SLIA
- Law Society

Law Society
of Saskatchewan

8-Step Program

1. Start out right
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3. What goes around comes around
4. Don’t annoy your client
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6. **Don’t lie or steal**
7. Ask your client how you are doing
8. Know the *Code of Professional Conduct*

Law Society
of Saskatchewan

6. Don’t Lie or Steal

Should be obvious:

- Stealing will put you on the fast track to disbarment

Lying is more nuanced:

- “white” lies regarding time
- Intentionally misleading the Court/LSS and/or lying in affidavits or statutory declarations
- Forgery/fabrication of legal/court documents

8-Step Program

1. Start out right
2. Getting out of a bad client relationship
3. What goes around comes around
4. Don’t annoy your client
5. Meet or beat deadlines
6. Don’t lie or steal
7. **Ask your client how you are doing**
8. Know the *Code of Professional Conduct*

Law Society
of Saskatchewan

7. Ask Your Client How You are Doing

Who cares how marvellous you think you are – what matters is what the Client thinks about you

Ask early and ask often

Ask in interviews - send surveys – call them

Law Society of Saskatchewan

8-Step Program

1. Start out right
2. Getting out of a bad client relationship
3. What goes around comes around
4. Don’t annoy your client
5. Meet or beat deadlines
6. Don’t lie or steal
7. Ask your client how you are doing
8. **Know the *Code of Professional Conduct***

Law Society
of Saskatchewan

8. Know the *Code of Professional Conduct*

- Current version is on the LSS website
- Covers (in addition to topics already covered):
  - Standards for Expected Quality of Service
  - Confidentiality
  - Changing Firms
  - Fees and Billing Requirements
  - Relationships with Lawyers, Students, Employees and Others
  - Conduct of Lawyers:
    - As Advocates
    - As Prosecutors
    - As Witnesses
    - As Mediators
    - And the Administration of Justice
    - And Public Office
    - And Outside Interests
    - And Public Appearances

Final Thoughts:

- Call the LSS for Help with Ethical Dilemmas:
  - You might also find your answer in the following, which are all available on the LSS website:
    - *Code of Professional Conduct;*
    - Ethics Rulings;
    - Disciplinary Decisions; and
    - Conduct Rulings.
- You can contact a Practice Advisor for assistance with practice management issues **at no cost to you**.
- You can always call SLIA if you have concerns/if you think you've made a mistake and you don't know what to do next.

Law Society
of Saskatchewan

TAB 6A: Conduct Reviews and Ethics Rulings

Law Society of Saskatchewan Discipline Conduct Review Database

Category	Conflict of Interest | Joint Retainers | Responsibility to Lawyers and Others | Communications
Practice Area	Wills and Estates
Code	3.4-5 | 7.2-4
E-cite	2019 SKLSCR 3
Date	June 27, 2019

Summary

There were two main issues that needed to be discussed with Member X:
1. That Member X placed themselves in a conflict of interest when after being released by one member of a joint retainer later represented the other member of that joint retainer in the same matter.
2. Member X's tone in a number of emails and letters was inappropriate.
Upon review of the file, Member X made it clear that they could have handled matters differently with respect to the conflict of interest resulting from the continued representation of one party of a joint retainer. Member X recognized that they should have waited for 24 hours before getting involved in a dispute between their former clients as the next day Member X knew that they had placed themselves in a bad situation. It was disconcerting that although Member X knew they were in error, their awareness of the code provisions concerning joint retainers was vague. The Conduct Review Committee ("CRC") strongly advised Member X to review the Code regularly in order to avoid similar situations in the future.
Member X still wanted credit or acknowledgement that their involvement resolved the file: they did not get any credit and the CRC made it clear that the results were irrelevant to the Member placing themselves in a conflict of interest. The Member accepted the CRC's position.
The CRC further discussed with Member X how their emotions played a factor in their bad decision making, which the Member acknowledged. Member X is a person who is often driven by emotions and loyalty. The CRC had a very full and lengthy discussion about trying to prevent those emotions from taking precedence over their professional obligations. Member X demonstrated appropriate insight.
Regarding their inappropriate communication, Member X is nearly email and text illiterate. However, that does not excuse the Member's muddled and angry emails. It was suggested to Member X that there are online CPD programs that can help bring them up to date and help them achieve more professional electronic communications. Although Member X made no commitment to undertake such training, they clearly acknowledged that their skills need to be upgraded.
Overall, we are of the view that Member X showed appropriate insight, has learned from this complaint, and that it will not be repeated in the future.

Category Conflicts of Interest | Joint Retainers

Practice Area Estates

Code 3.4-5

E-cite 2019 SKLSCR 4

Date May 15, 2019

Summary

A complaint was initiated by one of two joint executors who had initially retained Member A to assist with the administration of their Father's estate. After contentious issues arose between the two clients, one of the joint executors retained their own counsel and advised Member A accordingly. Member A continued to represent the other joint executor instead of referring them to their own counsel, and in so doing, preferred that client's interest over those of the complainant contrary to the Rules surrounding joint retainers.

The Conduct Review Committee ("CRC") reviewed the circumstances surrounding Member A's decision to continue to act when it was clear that one of the parties who had previously agreed to a joint-retainership had become dissatisfied. Member A understood and acknowledged that they ought to have been more careful in continuing to act after one of the joint executors retained separate counsel.

Although Member A pointed out that their continued representation of both parties was based upon prior written instructions and approval, Member A accepted that given the dissatisfaction of one of the parties the Member should have sought further clarification regarding whether and how their role might have changed. The CRC is aware that Member A has since withdrawn from the file.

The CRC is satisfied that given similar circumstances in the future, Member A will exercise more caution. It is concluded that Member A has taken responsibility in this matter and this Conduct Review has achieved its purpose.

Category Failure to Provide Notice | Fees | Lawyer Acting as Executor

Practice Area Wills & Estates |
Trusts

Code

E-cite 2013 SKLSCR 2

Date June 12, 2013

Summary

Testator died testate, leaving her estate to two minor grandchildren. The Member acted as Executor and solicitor for the Estate. Prior to obtaining Probate, the Member provided appropriate notice of the minor children's interest to the Public Guardian and Trustee ("the PGT").

Probate was subsequently obtained. Shortly thereafter, the PGT notified the Member that their Children's Unit would be monitoring the Estate, pursuant to section 42 of The Public Guardian and Trustee Act, and would be requiring a full accounting of the minor grandchildren's interests.

Approximately two weeks later, the Member's law firm rendered a Statement of Account for Probate and Administration, totalling approximately $20,000. The Statement of Account indicated

this amount was paid from trust but it appeared to have been paid two days after the issuance of the Statement of Account, from a bank account in the name of the Estate. On the same date the Statement of Account was issued, the Member changed her standing with the Law Society of Saskatchewan to “inactive”.

Almost two years later, the Member advised the PGT that the Estate’s accounts would be passed prior to the 2 year date of Probate unless directed by the Court to do otherwise. The PGT responded, raising concerns about the Member’s account and separation of Executor and lawyer activities, and asking that they be served with the material when the accounts were to be passed. Several months later, the Member filed an ex parte application to pass the accounts. The materials were not served on or shared with the PGT. Two weeks later, the PGT received correspondence from the Member indicating the accounts had been passed.

The PGT considered the failure of the Member to provide notice of the application for the passing of accounts to be a deliberate act. The Member suggested that she needed only to follow The Queen’s Bench Rules, even though she had been advised that the PGT expected service of the application.

The Conduct Investigation Committee concluded that the Member’s conduct in this case cannot be excused on the basis that Member was acting as executor and not as a lawyer when the Member ignored the request of the PGT to be notified of the application for passing of accounts, and instead deliberately made the application ex parte. The request by the PGT was made to the member-as-estate lawyer, and this knowledge, as a matter of common sense, must be imputed to the member-as-executor. As a result, the Committee directs that a Conduct Review Committee be appointed to meet with the Member review the matter.

During the Conduct Review, the Member recognized that she erred in not providing notice of her Application for Passing of Accounts to the PGT. The Conduct Review Committee emphasized:

»1. Giving notice of applications to potentially opposing parties;

»2. Providing full and frank disclosure to the Court if an ex parte application is made (see the Rules of Court, the requirement to indicate to the presiding judge whether there are other interested parties, and the common-law rule of full and frank disclosure); and

»3. Separating duties as lawyer and executor.

The Member is no longer practicing law, as such, and there is nothing that the Member can presently implement in terms of recommendations given to her. However, the Member indicated that this matter was a learning experience and that she understands the importance of giving notice of applications to all interested parties in future proceedings.

Law Society of Saskatchewan Ethics Rulings

Code Chapter: 2.03 (1), 2.03 (4)
Code Heading: Confidentiality
Practice Area: Wills and Powers of Attorney
Classification: Confidentiality; Confidential Information – Section 2.03(1); Permitted Disclosure – Section 2.03(4)
Ruling Date: November 10, 2015
Citation: 2015 SKLSPC 11

Facts: Client A was in hospital in critical condition. Client A's spouse, Client B contacted Lawyer X's office to find out who Client A's Power of Attorney was and where Client A's Will was located. Client B advised that Client A was in intensive care, and was unable to speak due to a medical condition. Lawyer X's staff initially said that Client A did not have a Will at that office. This was ultimately an error, as the Will was filed under Client A's full legal name. The assistant did, however, disclose that the office had a will for Client A's late aunt.

After Client A was adamant that Lawyer X did have a will at the office, Client B called the office again to inquire and asked to speak directly to Lawyer X. Lawyer X advised that Client B was Client A's Power of Attorney, but could not provide the other information without Client A's instruction. Lawyer X advised Client B to retain counsel to obtain the necessary authorization to request a copy of Client A's will.

Client B retained Lawyer Z, who had Client A execute a letter of instruction and obtained a copy of Client A's Will from Lawyer X. Lawyer Z made the requested changes to Client A's Will. Client B was named as executor and beneficiary in both versions of Client A's wills.

Client A passed away. Shortly thereafter, Person C, Client A's estranged child, contacted Client B. Person C had contacted Lawyer X's office who in turn advised that Client A had an old Will, which was sent to Lawyer Z and that in that Will, Person C was named as alternate executor and a beneficiary.

Ruling: The Ethics Committee considered the disclosure made by Lawyer X's office, regarding Client A's late aunt's Will. The Ethics Committee found that this was a clear breach of confidentiality. However, the Committee agreed that Lawyer X, upon learning of this breach, acted appropriately and accepted responsibility for this breach of confidentiality. Lawyer X discussed with the staff that confidentiality should always take precedence over "being helpful."

The Ethics Committee also considered whether Lawyer X should have disclosed to Client B, as Client A's Power of Attorney, the existence and location of Client A's Will, prior to Client A's death. The Ethics Committee noted that Lawyer X might have been more justified in withholding this information, if the Power of Attorney were contingent. The Ethics Committee determined that Lawyer X should have disclosed the existence and location of the Will to Client B, provided that the Power of Attorney was not contingent.

The Ethics Committee further considered whether Lawyer X breached his duty of confidentiality by disclosing the existence and location of Client A's Will to Person C and directing her to contact Lawyer Z. The Ethics Committee noted that when a lawyer receives an inquiry about a deceased

person's Will, the lawyer should disclose the minimum amount of information required to point the person in the correct direction. In this situation, the minimum information would have been to acknowledge that Lawyer X had drafted a Will and direct Person C to Lawyer Z for further information. Given that Person C was only the alternate executor, Person C was not, as far as Lawyer X was aware, the directing mind of the estate and therefore was not entitled to further information (such as that Person C was the alternate executor and beneficiary.)

Code Chapter: 2.04

Code Heading: Joint Representation, Section 2.04 (5)-(8), Preferring the interests of one client over another

Practice Area: Estates

Classification: Joint Representation

Ruling Date: September 26, 2013

Citation: 2013 SKLSPC 5

Facts: Lawyer X was retained to provide legal services in relation to the administration of an estate. Two Co-Executors, being two children of the deceased, had been named in the Will. The Will indicated that all of the estate was to pass to the deceased's surviving spouse.

Lawyer X met with both Co-Executors to discuss the Estate and sign authorizations to various financial and government institutions. He also met with them to sign the documentation for Application for Letters Probate. Upon issuance of Letters Probate, he met with the Co-Executors to sign off on the transfer of land to the sole beneficiary.

Subsequently, Co-Executor A became aware that certain documents had been submitted with only the signature of Co-Executor B. Co-Executor A made several attempts to determine why this was occurring, and when no adequate response was received from Lawyer X, Co-Executor A sought separate legal counsel. When Lawyer X was again asked about the single signature, he responded that actions were taken in relation to the Estate without Co-Executor A's signature because Co-Executor A had refused to co-operate, and the best interests of the Estate were at risk.

Ruling: The Ethics Committee considered the explanation provided by Lawyer X that Co-Executor A was excluded from certain aspects of the Estate administration because of a refusal to co-operate.

The Ethics Committee concluded that even if one of the Co-Executors was being uncooperative, Lawyer X was not entitled to take instruction from one Co-Executor while ignoring or excluding the other. The "client" in an estate matter is the Estate itself, not the Executor(s). The Executors are the "instructors" on behalf of the Estate client. If a conflict or disagreement arises between Co-Executors which cannot be resolved, the appropriate course of action would be for one or both of the Co-Executors to commence an action to have the other removed as Co-Executor. It was not appropriate to simply stop involving the other Co-Executor.

Code Chapter: V

Code Heading: Impartiality and Conflict of Interest Between Clients

Classification: Acting Against a Former Client

Ruling Date: January 1995

Citation: 1995 SKLSPC 2

Facts: Two sisters approached the ABC firm regarding the administration of their late brother's estate. Lawyer A prepared the documents and submitted them to the court but they were rejected. Lawyer A then left the firm and Lawyer B took over the file for resubmission of the documents to the court. Difficulties were encountered in obtaining the signature of one of the sisters. Finally, the remaining sister instructed Lawyer B to proceed with an application with her as sole administratrix. The uncooperative sister than complained that this was contrary to her wishes and that Lawyer B was now acting against her. Lawyer B disagreed and wished to continue to act.

Ruling: The Ethics Committee was of the view that by continuing to act for the remaining sister against the wishes of the uncooperative sister, a former client, Lawyer B was in conflict of interest. Chapter V, Commentary 8, of The Code of Professional Conduct specifically deals with the issue of acting against a former client in the same matter. The Committee recognized that the difficulties in dealing with the uncooperative sister led the remaining sister to instruct Lawyer B to proceed in the current manner, however, the Committee could not see that that should lessen the impact of The Code.

Code Chapter Considered: Code of Professional Conduct, 1991, c. V, Commentary 8