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Wealth Matters

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In Memoriam: John D. Phillips, Q.C.

The Partners and staff of Miller Thomson LLP were greatly saddened to announce the sudden and tragic passing of colleague and long-time friend of the firm, John D. Phillips, Q.C., in Calgary on March 5, 2008.

As a senior member of Miller Thomson's Private Client Services and Charities and Not-for-Profit Groups, John was a dedicated and widely-admired lawyer. He held himself to the highest professional standards of practice, and brought a genuine interest and unwavering concern for the clients and business associates with whom he felt honoured to work. John was a delight to work with, always smiling and eager to help anyone with anything. He was one of the best and most respected lawyers in the field of private client services in Alberta. Many foundations and charities also knew John to be a committed champion of their interests and of many others within his much-loved community of Calgary.

John's passing will be keenly felt by all who were fortunate enough to know him. In life and in business, he was a true gentleman, kind, compassionate and always giving of his time and energy whenever called upon.

The 2008 Federal Budget

The 2008 Federal Budget was released on February 26, 2008. While this year's Budget did not contain much in the way of tax cuts, there were a number of proposals of interest to personal tax planning, including the introduction of the "Tax-Free Savings Account." For more information, please see Miller Thomson's February 26 2008 edition of Tax Notes at http://www.millerthomson.com/index.cfm?cm=MTNewsletter&ce=details&primaryKey=16785.

In the following, we highlight one proposed change that will affect reporting for trusts and estates with non-resident beneficiaries.

2008 Budget Proposes Changes to Non-Resident Beneficiary Reporting

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The 2008 Federal Budget appears to provide some assistance to trustees of Canadian estates and trusts and their non-resident beneficiaries in respect of the increasingly troublesome requirement to request a section 116 certificate whenever a distribution of capital is made to the non-resident beneficiary.

Where the trustees of an estate (or a majority of them) are resident in Canada, the estate is generally considered to be a trust resident in Canada. A beneficiary under an estate, regardless of his or her country of residence, has a "capital interest" in a trust, which is considered "taxable Canadian

property" for purposes of the *Income Tax Act* (Canada) (the "Act"). A beneficiary is considered to have disposed of this capital interest when he or she receives his or her capital entitlement under the estate.

Currently, whenever a non-resident of Canada disposes of taxable Canadian property, he or she must apply for a clearance certificate under section 116 of the Act and file a Canadian tax return in the year of the disposition. These reporting and filing obligations apply to non-resident beneficiaries of estates resident in Canada even where no tax is payable. Pursuant to section 116 of the Act, trustees are required to withhold 25% of the gift to the non-resident beneficiary until the clearance certificate is received.

Compliance with the filing and withholding requirements of section 116 of the Act is particularly frustrating in the estates context, firstly, because there is rarely any tax owing by the non-resident beneficiary, and secondly, even where a gain has arisen, the gain is often exempt under a tax treaty between Canada and the non-resident's home jurisdiction. In this situation, no Canadian tax is payable although the non-resident must still comply with the reporting and filing obligations. Moreover, in recent months, the Canada Revenue Agency ("CRA") has required the non-resident beneficiary to obtain an International Tax Identification Number, further delaying the receipt of the clearance certificate.

Budget 2008 introduced three changes to the section 116 withholding regime to simplify the rules that apply to the disposition of taxable Canadian property by a non-resident:

(i) Treaty-protected property will be exempt from the withholding requirement under section 116 of the Act. A capital interest in a Canadian-resident estate will generally be treaty-protected where the estate does not derive more than 50% of its value from real property located in Canada.

(ii) No withholding will be required if:

  (a) the trustee concludes after "reasonable inquiry" that the beneficiary is resident in a treaty country;

  (b) the property would be treaty-protected property (as discussed above) of the beneficiary; and

  (c) the trustee sends to the CRA, within 30 days, a notice setting out certain information about the transaction and the beneficiary.

(iii) A non-resident will be exempt from filing a Canadian income tax return with respect to the disposition of taxable Canadian property where:

  (a) no Canadian tax is payable for the relevant taxation year or any previous taxation year; and

  (b) the taxable Canadian property disposed of by the non-resident is either treaty-protected property or property for which the CRA has issued a section 116 certificate.

These changes to the section 116 withholding procedures under the Act will be welcomed by Canadian trustees and non-resident beneficiaries of Canadian estates. It is proposed that the changes will apply beginning in 2009.

"Eco-burials" in British Columbia

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From land conveyances to labour negotiations, environmental laws have penetrated almost every aspect of people's lives. Therefore, it should come as no surprise that many think environmental laws should apply to people — even after they die. There has been a recent demand, especially in Britain and the United States, for cemeteries to offer environmentally friendly burials.

Traditional burial practices are now being scrutinized in Canada as being environmentally unfriendly. One reason for the scrutiny is the use of exotic and endangered woods in the construction of caskets. The use of such wood is not the only environmentally unfriendly aspect of traditional burial.

According to Wikipedia, last year the United States used an estimated 90,272 tons of steel and 2,700 tons of copper and bronze for the construction of caskets. This, along with the use of 827,060 gallons of chemical embalming fluids, has given many a reason to question traditional burial practices and their compatibility with the environment.

Even cremation, the most common form of burial in British Columbia, has been criticized for being environmentally unfriendly. In 2006, British Columbia's Interior Health Authority recommended against placing a crematorium in a residential Kamloops neighbourhood. In an article in the Vancouver *Sun* in 2006, Dan Ferguson, the Assistant Director of Health Protection at Interior Health was reported to empathize with the decision. According to Ferguson, there are no environmental or health standards governing the level of emissions associated with cremating bodies. "We just don't believe it is a wise place to locate these things (near residential neighbourhoods). From a public health perspective, we believe that crematoria and residential neighbourhoods are conflicting land issues." One apparent solution to environmentally unfriendly burial practices is a new concept called eco-cemeteries. Also known as "green burial grounds" or natural burial preserves, eco-cemeteries are cemeteries which favour the use of natural decomposition over traditional embalming and casket practices. Natural decomposition has been heralded as an environmentally sustainable alternative to existing funeral practices.

In eco-cemeteries, the body is prepared without chemical preservatives and is buried in a simple shroud or biodegradable casket. A natural burial preserve often uses grave markers that are less intrusive on the landscape. Such markers are usually trees and shrubs, or sometimes a flat indigenous stone which can be engraved. The landscapes in eco-cemeteries are typically covered with wild flowers and natural ground cover. Park maintenance is also performed in an environmentally friendly manner, with no reliance on pesticides or sprinkler systems. In order to prevent confusion in regards to the exact location of grave sites, careful records are kept of the exact location of each interment. Some eco-cemeteries even employ modern survey techniques such as GIS to ensure that all grave sites can be found easily.

According to the Centre for Natural Burial, Canada's first eco-cemetery will open in Victoria, British Columbia in autumn of 2008. The cemetery known as Royal Oak Burial Park already offers traditional burial practices, but has designated roughly 1/3 of an acre to be used as an eco-cemetery. The Victoria cemetery has also committed to making sure that any future developments in their park will abide by natural burial principles.

According to Royal Oak Burial Park's website, the eco-cemetery will ensure that:

- Remains buried in the cemetery will not be embalmed.
- Remains will be placed directly in the ground so long as they are enclosed in a biodegradable shroud, or they can be placed into the grave in a biodegradable container or casket.
- Families will be permitted to plant indigenous plants or trees on their gravesites.
- An inscription of names on a common memorial cairn, made of local stone, at the entrance to the site will replace individual memorial markers at each grave.
- Outer liners will not be used and caskets made of non-sustainable or non-biodegradable materials will not be permitted.

Whether the new phenomenon of eco-cemeteries catches on across Canada remains to be seen. Given the growing popularity of green burials in Britain and the United States, it would come as no surprise if further eco-cemeteries are established outside of the project at Royal Oak Burial Park in Victoria.

PLANIFICATION POST-MORTEM ET SUCCESSORALE POUR UN ACTIONNAIRE D'UNE SOCIÉTÉ DE GESTION

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Lors du décès d'un actionnaire d'une société de gestion, ce dernier est présumé disposer à la juste valeur marchande immédiatement avant son décès des actions de cette société. Il y a donc imposition de la plus value des actifs de la société qui se reflète dans la valeur des actions.

La succession ou les bénéficiaires de la succession qui désirent verser des dividendes ou liquider la société de gestion verront imposer de nouveau la plus value des actifs de la société au moment où ces actifs seront distribués dans leurs mains. Il en résulte une double imposition de cette plus value. Il faut donc faire appel à différentes planifications dans le but d'éviter cette double imposition.

Une première technique appelée "technique du pipeline" permet d'éviter la double imposition en procédant à la vente des actions par l'héritier à une nouvelle société.

Une deuxième technique permet d'éviter la double imposition et en plus de minimiser les impôts payables sur la plus value de certains biens de la société de gestion par la majoration du coût des biens non amortissables d'un montant égal à leur plus value.

Il est préférable de procéder par voie de liquidation plutôt que par le versement de dividendes inter corporatifs lorsque la société de gestion possède plusieurs biens non amortissables et que ces biens ont une plus value accumulée.

Il existe une autre technique qui permet d'éviter la double imposition dans le cas d'une succession et c'est par l'utilisation d'une disposition qui permet de reporter une perte en capital encourue par la succession dans sa première année d'imposition contre le gain en capital de la personne décédée dans l'année d'imposition du décès. Au moyen de cette technique, la succession sera imposée sur un dividende présumé et la disposition de ces actions résultera en une perte en capital pour la succession. Cette technique a pour effet d'annuler le gain en capital et d'imposer la succession sur un dividende. L'impôt payable sur un dividende est supérieur à celui payable sur un gain en capital.

Toutefois, dans la mesure où la société de gestion possède un compte de dividende en capital, il serait possible de faire le choix que les dividendes proviennent de son compte de dividendes en capital et ne soient pas imposables jusqu'à concurrence du montant de ce compte.

Dans ce cas, cette technique d'éviter la double imposition est très attrayante puisqu'elle supprime aussi l'imposition du dividende.

Nos lois fiscales prévoient cependant certaines limites à la perte en capital de la succession.

Le choix d'une technique plus qu'une autre peut dépendre de plusieurs facteurs, soit que l'on soit dans un contexte avec détention d'assurance-vie ou non et si les actions sont léguées à son conjoint ou à une fiducie créée au profit du conjoint ou non.

Comme vous pouvez le constater à la lecture de ce qui précède, les éléments à considérer dans le cadre d'une planification successorale sont de plus en plus sophistiqués et complexes et ne doivent pas être considérés ni la documentation rédigée en vase clos, mais bien au contraire de manière à ce que l'ensemble de la planification successorale forme un tout.

Pour de plus amples informations, n'hésitez pas à consulter les personnes dont le nom figure dans cette publication.

THE REVERSIONARY TRUST RULE CONTAINED IN THE *INCOME TAX ACT* (CANADA) - OPERATION OF THE RULE AND GUIDANCE PROVIDED BY RECENT JURISPRUDENCE

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(*This article was originally published* in the STEP Journal.)

Subsection 75(2) of the *Income Tax Act* (Canada) (the "ITA") contains an anti-avoidance, attribution rule which is generally referred to as the "reversionary trust rule," which can have far-reaching consequences.

The text of subsection. 75(2) reads as follows:

Where, by a trust created in any manner whatever since 1934, property is held on condition

(a) that it or property substituted therefor may

  (i) revert to the person from whom the property or property for which it was substituted was directly or indirectly received (in this subsection referred to as "the person"), or

  (ii) pass to persons to be determined by the person at a time subsequent to the creation of the trust, or

(b) that, during the existence of the person, the property shall not be disposed of except with the person's consent or in accordance with the person's direction,

any income or loss from the property or from property substituted for the property, and any taxable capital gain or allowable gain or allowable capital loss from the disposition of the property or of property substituted for the property, shall during the existence of the person while the person is resident in Canada, be deemed to be income or a loss, as the case may be, or a taxable capital gain or allowable capital loss, as the case may be, or a taxable capital gain or allowable capital loss, as the case may be, of the person.

The first effect of the application of the reversionary trust rule is that, generally, income or losses and capital gains or capital losses arising from trust property that may absolutely or contingently revert to the person from whom the property was received (the "Contributor"), or from trust property over which the Contributor may exercise control with respect to distributions or dispositions, will be attributed to the Contributor.

The reversionary trust rule also has a second adverse effect. If the rule has been applicable to a trust at any time, subsection 107(4.1) of the ITA substantially denies the tax deferred roll-out of property from a trust to a capital beneficiary that may ordinarily be utilized pursuant to subsection. 107(2) of the ITA. If subsection 107(4.1) applies, a trust may only transfer property on a tax-deferred basis for so long as the Contributor is alive to either the Contributor or the spouse of the Contributor.

Analysis of the Reversionary Trust Rule

The reversionary trust rule is much broader in potential scope than other attribution rules because it is not restricted in its application to spouses, common law partners, specified minors or other non arm's length persons.

There are two different aspects of the reversionary trust rule, either one of which may cause the rule to be applicable to a trust. The first part of the rule provides that it is applicable where property is held on condition that it or property substituted for it may revert to the person from whom the property was received. The Canada Revenue Agency (the "CRA") has stated that the word "may" implies that the subsection applies even though there is only a possibility that the property reverts to the transferor. The condition found in subsection 75(2) does not refer to the notion of control or certainty in order to be met. The word "received" is also very broad and subsection 75(2) does not qualify the word "received" by reference to the phrase "for inadequate consideration" or any

similar phrase. It is therefore possible that the reversionary trust rule may apply where the Contributor has a right to reacquire the property for fair market value consideration. As well, the rule applies whether property was transferred to the trust as a gift or by way of sale for fair market value consideration.

The second part of the rule expands the scope of application beyond possible reversion to the Contributor. Subsection 75(2) may apply in circumstances where the property may not ever revert to the Contributor but the Contributor is entitled to determine to whom the property will ultimately pass, or the property cannot be disposed of without the Contributor's consent or in accordance with the Contributor's direction.

The CRA is of the view that subsection 75(2) may apply where the Contributor has the ability to select beneficiaries, including beneficiaries among a predetermined class to whom property will pass, or where the Contributor has retained the right to veto distributions of trust property to beneficiaries. Consequently, to avoid subsection 75(2), the Contributor should not be the sole trustee, but rather one of three or more trustees who must make a decision by a majority vote rather than by unanimous consent. The Contributor should not be given a veto.

Impact of CRA Technical Interpretations

Notwithstanding that there is significant uncertainty with respect to the application and scope of the reversionary trust rule, there has been virtually no jurisprudence that has contained a significant discussion of the rule. Rather, most interpretations of subsection 75(2) are found in published technical interpretations of the CRA. The 2006 Tax Court decision in *Howson* (2006 TCC 644) is an exception.

Loans to a Trust — Recent Jurisprudence

Regarding the application of the reversionary trust rule in respect of loans to trusts, the CRA has stated that "a genuine loan to a trust would not by itself be considered to result in the application of s.75(2) if the loan is outside and independent of the trust's terms".

The CRA has, in its past published interpretations, taken a strict view of what constitutes a "genuine loan" and has listed the characteristics of a genuine loan to include: (1) a written and signed acknowledgment of the loan by the borrower and an agreement to repay it within a reasonable period of time; (2) evidence that the borrower gave security for the loans; (3) evidence that interest on the loan was paid; and (4) evidence that actual repayment was made.

The recent Tax Court of Canada decision in *Howson* (2006 TCC 644) considers the application of subsection 75(2) to a loan made to a trust. The taxpayer was a South African who planned to move to Canada with her husband and children. As part of their departure planning, a trust was settled by a friend of the taxpayer in order to establish a trust intended to qualify for the 60 month tax exemption for new Canadian immigrant beneficiaries. The beneficiaries of the trust were the taxpayer, her husband and their children. In June 1994, the taxpayer loaned funds to the trust. The loan was not documented at the time it was made but it was reflected in the trust's financial statements. In July 1994, the taxpayer became a resident of Canada for Canadian income tax purposes. In June 1997, the taxpayer and the trust documented the loan in writing. The Minister of National Revenue reassessed the 1996 to 1998 taxation years of the taxpayer to include in her income the income that was earned by the trust and that was attributable to the loan, using subsection 75(2) to do so.

While the Crown conceded that a genuine loan was not caught by the reversionary trust rule, the Crown argued that the loan was not genuine but rather a contribution to the trust capital and could therefore revert to the taxpayer in her capacity as a capital beneficiary.

The Court considered the oral testimony of the taxpayer and her husband, the written agreement, the trust's financial statements and the lack of any evidence suggesting the loan was not a loan in finding that the evidence supported the taxpayer's position. The Court stated that a finding that a loan existed did not require that interest be charged and, that the provision of security by the trust, would make little commercial sense because the security would be provided by the trust to the same persons who are beneficiaries of the trust.

This decision confirms that subsection 75(2) does not necessarily apply to loans to trusts and stands for the proposition that proving the existence of a loan does not require the taxpayer meet the CRA's stringent administrative standards. At a roundtable meeting held at the Society of Trust & Estate Practitioners Canada annual conference in June 2007, the CRA confirmed that the Agency would abide by the decision in the *Howson* case.

The Howson case is a welcome addition to the law relating to the interpretation of the reversionary trust rule. There are however still many circumstances where the interpretation of the rule is largely made up of technical interpretations of the Canada Revenue Agency.

WHAT'S HAPPENING AROUND MILLER THOMSON

Wendi Crowe gave an estate planning seminar at Allen Gray Continuing Care Centre in January, 2008 and again at Knox Metropolitan United Church in March.

Sandra Enticknap spoke at a Federated Press course in Calgary on February 4, 2008 called "Planning for the Wealthy Family" on "the Use of Trusts in Estate Planning: Planning vs. Litigation."

Martin Rochwerg presented a paper on February 8, 2008 on "Will and Trust Substitutes" at the International Academy of Estate and Trust Law in Cape Town. **Leela Hemmings** was a co-author, and it will be published in the next volume of the *Estates, Trusts and Pensions Journal*.

Sandra Enticknap has been appointed to the Editorial Board for the Probate Practice Manual published by Continuing Legal Education. They are currently preparing and reviewing the 2008 Manual. It is the most widely subscribed manual produced by CLE in B.C.

Rachel Blumenfeld presented on "Pitfalls in Wills and Trusts" on February 5 at the Etobicoke C.A. programme. She spoke on Estate Planning at the BAYT Synagogue Sisterhood program entitled "Dollars and Sense for Women" on February 17.

On March 3rd **Jim Hutchinson** and **Martin Rochwerg** shared a presentation to the OBA on "Taxation of Variations of Trusts" at its Taxation of Trusts seminar.

Rachel Blumenfeld spoke on March 20, 2008 at the CAGP Toronto Roundtable breakfast on "Issues of capacity: What the gift planner should know". On March 26, 2008, Rachel presented on Powers of Attorney to clients of the QFS-Wealth Strategies Group.

On March 27, 2008, **James Hutchinson** and **Rachel Blumenfeld** presented at Miller Thomson's York Region Executive Seminar Series on Business Succession for the Entrepreneur.

On April 3rd, 2008, Miller Thomson presented a half-day seminar on "Tax Issues for Charities," including presentations by **Donald Carr**, **Arthur Drache**, **Susan Manwaring**, **Kate Lazier** and **Rachel Blumenfeld**.

Amanda Stacey spoke at Brainchild on April 12, 2008 on disability-related tax and trust issues.

Dragana Sanchez Glowicki spoke at TD Canada Trust Private Client Services on April 15, 2008 on estate planning.

Sandra Enticknap, **Susan Manwaring, Amanda Stacey** and **Alan Hobkirk**, spoke at the 15th Annual CAGP National Conference at the end of April: Amanda and Alan spoke on Trustee Review and Account Challenges; and Sandra and Susan spoke on "Protecting Charitable Assets."

Amanda Stacey spoke on May 3, 2008 at the Pencer Brain Centre at Princess Margaret Hospital on Wills and Powers of Attorney.

Dragana Sanchez Glowicki spoke on May 6, 2008 at the Legal Education Society of Alberta 41st Annual Refresher Conference, and presenting a paper entitled "The Role of the Personal

Representative in Litigation."

On September 12, 2008, **Martin Rochwerg** will be speaking on "Tax Planning for Wealthy Families" for the Federated Press.

On September 23, 2008, **Martin Rochwerg** will present on "Will Substitutes" for the OBA at its Trusts and Trustees seminar.

Martin Rochwerg is on the steering committee for the national Senior Estates and Trusts Lawyers Forum, planned for October, 2008 in Cambridge.

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