STEP Canada
ADVISING FAMILIES ACROSS GENERATIONS

Connection
Toronto Branch Newsletter

November 2020 - Vol. 8 No. 3

Message from the Chair, STEP Toronto

Hello everyone and welcome to STEP Toronto's November newsletter. I hope everyone is safe and well as we continue to navigate the challenges wrought by COVID-19.

The STEP 2020 Speakers' Series is well underway; feedback to date suggests the sessions have been very well received. Quick reminder that if you were unable to attend on the original broadcast date (or want to revisit a session) archived recordings of the broadcasts, along with chat room transcripts, are available in the Speakers' Series App from the chat room post-broadcast date.

This newsletter and our, now virtual, STEPping out to Lunch (renamed TEP Talks) sessions have allowed us to stay in touch and engage with our members. My thanks to Paul Keul and the newsletter committee for their time and dedication in producing an informative and timely publication. Thanks also to the authors who allow us to share their expertise and to the sponsors whose generosity supports the production of this quality product. Please note, the next edition will be published in January.

Our virtual TEP Talks sessions have been a huge success. Attendance is always maxed-out, so we encourage you to register early. Thanks to Harris Jones for moderating the October session which was very well received. This month's lunch was held on November 18th, and the next one will be December 16th at noon.

The branch/chapter Chairs and Program Committee Chairs have been working with STEP Canada to develop programs for the new year. Complete details will be available in the near future, but in the meantime, I can share a few particulars. There will be four sessions for the January – May 2021 period. Two branch/chapter-led sessions will bookend two national-led sessions.

Toronto's January webcast session will be a case study on family business succession planning. The session will illustrate the need for a multi-disciplinary team to strategize and plan for the effective transfer of ownership and management of a family enterprise. We are fortunate to have speakers with different expertise and perspectives to speak to us on this important topic.

Our May webcast session will focus on insurance. Details are being worked out, but we intend to start with a primer on the different types of insurance available, followed by a discussion of the strategic use of insurance and an update on tax-related insurance matters.

Thanks very much to Joan Jung and the Program Committee for their hard work developing these sessions. Details and registration particulars will be available shortly.

Please stay safe and thanks for reading.

Elaine Blades, J.D., TEP, Toronto Branch Chair

In this Newsletter

STEP Toronto Executive

Erratum

In our October edition of the STEP Toronto Connection, we re-printed an article by Malcolm Burrows on the topic of donations of Cultural Property. Between the time that article was originally written and the publication of our newsletter, the law was changed, and the comments in that article are no longer relevant. A follow up article will be published in our January edition clarifying the changes.

We apologize for any confusion caused by this error.

Overview of Speakers' Series Session 7, Tuesday, September 29th: A New Age of Transparency: Will Anything be Private?

Prepared by: Kyle McDonell, TEP: RBC Royal Trust

Moderator: Eric Hoffstein, LLB, TEP, Toronto: Fogler Rubinoff LLP

Panelists: Mark Brender, LLB, BCL, TEP, Montreal: Osler Hoskin & Harcourt LLP

Alison Oxtoby, LLP, TEP, Kelowna: Balmains Law Corporation

Barbara Novek, LLL, TEP, Montreal: Sweibel Novek LLP

The Paradise Papers and the Panama Papers have increased public, media and taxing jurisdictions' scrutiny of the wealthy and the vehicles (trusts and corporations) that are used to hold and transfer wealth all around the world. The panelists discussed the current state of the law – which provides for an increase in the transparency of trusts – and certain obligations of executors, trustees and directors with respect to disclosure.

Presented by Alison Oxtoby:

Trustee duty to disclose a beneficiary's interest in a trust

- Historically, beneficiaries had a right to see all trust documents due to their interest in the trust (proprietary approach).
- Courts later held that more remote beneficiaries may not be entitled in all circumstances to all trust documents, but that trustees should nevertheless respond to any specific questions posed by beneficiaries.
- Courts may be required to decide who may be entitled to information if an application is made for directions.
- *Valard vs Bird* case (2018) – SCC held that Bird (general contractor) had a duty to disclose the existence of a payment bond held between Bird and a subcontractor (who went bankrupt) to anyone who would be at a disadvantage by not knowing about its existence, as Bird essentially held the bond as a trustee and had a duty to disclose.

***Uniform Trustee Act* per Uniform Law Conference of Canada, 2012 (still in mostly proposal stage – only New Brunswick adopted)**

- Proposals purport to assist trustees with general provisions when trust deed is silent.
- Expands Common Law duty of trustee to disclose: trustees should report annually to beneficiaries and allow inspection of trust documents, but provides exceptions when disclosing would be prejudicial to any others; includes allowance to draft out of notice provisions.
- It was noted that collection of private data has become more intrusive.

video link

Presented by Barbara Novek

New Trust Reporting Rules – effective trust year end of Dec. 31, 2021

- New / extended filing requirement – all resident & deemed trusts or express trusts must now file T3s, even if they will be reporting no income
- Narrow exception examples (some) per ss.150(1.2) (a)-(n)
  - new trusts - less than 3 months old on Dec 31st;
  - if specified asset valued is less than $50,000;
  - non-profit or registered charity trusts, registered plan trusts, QDTs;
  - lawyer or notary trust accounts; and
  - non-resident trusts with non-Canadian income.
- Expanded information to be reported under new rules:
  - Personal information to be reported on trustees, beneficiaries, settlors, lenders and/or transferors into the trust, or other persons of influence vis-à-vis the trust;
  - Identify beneficiaries who are known at the time of filing the return;
  - Name, address, date of birth, jurisdiction of residence and taxpayer ID numbers for the settlor, trustees, beneficiaries, and other individuals who might have control over the trust.
- Additional concerns were noted with the new rules:
  - Privacy concern – trustee must follow laws but confidential information is being requested by these rules.
  - There are strict penalties for non-compliance with these new rules.
  - Planning tips were reviewed. Trustees were advised to plan for these new requirements by advising beneficiaries now. It was also suggested that trustees consider closing dormant/non-active trusts by the end of 2020. Future planning considerations included consider who is appointed as trustee in the future.

video link

Common Reporting Standard

- Part XIX of *Income Tax Act* requires enhanced financial filings. It is part of a global OECD initiative to increase tax transparency, which Canada signed onto in 2015 with an effective date of July 1, 2017.
- Updated CRA Guidance was issued in July 2020: CRS/FATCA forms must be collected at time of account opening. A $2,500 fine is levied if the form is missing.
- Requirements for financial institutions: it is more difficult to open accounts now, given the onerous reporting requirements.
- Trusts must list personal details of individual controlling persons on CRS form (settlors, trustees, beneficiaries, protectors).

Quebec Disclosure Initiatives

- QC 2019 Budget sets out an initiative to strengthen disclosure mechanisms for tax-related transactions.
- Introduced rules for mandatory disclosure of nominee agreements, prescribed transactions, and sham transactions. Penalties for sham transactions & late or non-disclosure are also set out.
- QC 2020 Budget added disclosure of beneficial owners to Registraire des entreprises du Quebec.
- Penalties for non-disclosure may apply to taxpayer and advisor (e.g. 100% of advisor fees on prescribed transactions/shams); taxpayers will be ineligible for public contracts in QC.

Presented by Mark Brender

Quebec GAAR

- Impact on both Quebec taxpayers and those outside Quebec.
- Penalties for tax avoidance increased from 25% of tax benefit to 50%.
- "Promoters" could be fined too; it was questioned whether lawyers would be included).
- Can re-assess six years instead of three years prior to audit.

 video link

Tax Audits – Best Practices

- Manage information sources - get all parties involved in the transaction to ensure accurate information is shared (tax, accounting, business owners, legal advisors).Taking these steps may minimize the risk of divulging inaccurate, incomplete, conflicting, and/or privileged information.
- Provide requested documents electronically if possible and keep track of what was provided to know strengths and weaknesses in case of litigation. It was suggested to negotiate to see if all requested information is really needed.
- Circulate post-discussion summaries to government and all parties who were present when decisions were made. Be aware of disclosure, confidentiality and privacy obligations; consider redacting if appropriate.

- There have been cases of Revenue Quebec setting out demands for additonal documentation beyond what was previously submitted.
- Transparency is a two-way street. It was suggested that making demands of CRA for, for example, copies of referrals to CRA HQ, internal committees, and decision documents, would be appropriate.

STEP Presents...

This year, our "STEP Toronto presents..." summary is going to look a little different as we highlight the upcoming programs available from both STEP Toronto and STEP Canada.

November 17, 2020 – Life Insurance Transitions: How to Deal with Corporate, Charitable or Multi Life Transitions

Summary: Modifications to a life insurance policy can create undesirable and unintended consequences if done incorrectly. Our panelists will explore the implications of modifying the owners, beneficiaries, or insured lives under a policy of insurance, the dangers of policy transfers or conversions, and the steps necessary to mitigate unwanted tax consequences. A case study is used to highlight some of the more common situations encountered in restructuring. Topics include:

- Section 85 transactions involving mature life insurance policies;
- Joint last-to-die policies when a couple divorces;
- Protecting family assets from business liabilities; and
- Charitable gifting of mature life insurance policies.

Moderator: **Susan St. Amand**, CFP, CLU, FEA, ICD.D, TEP, Ottawa: Sirius Financial Services

Speakers: **Hemal Balsara**, CPA, CA, CFP, TEP, Toronto: Assistant Vice President, Regional Tax, Retirement and Estate Planning Services, Manulife Financial

Diane Everett, LLB, CLU, TEP, FEA, Toronto: Vice-President, Planning Services, PPI Advisory

Brenda McEachern, LLB, TEP, Vancouver: RBC Wealth Management Financial Services Inc.

Registration: http://www.cvent.com/events/step-2020-speakers-series

Time: 12:00PM – 1:15PM

Venue: Webcast only

This program is part of the STEP Canada 2020 Speakers' Series. The live broadcast will air on the date above. Archived recordings of each broadcast are available with registration.

November 19, 2020 – Update on Cross-Border Tax Planning

Summary: Finding the most advantageous solution under Canadian and US tax rules for cross-border tax planning can be difficult. Our panelists will address the tax issues arising in the context of cross-border tax planning, including:

- Planning involving non-resident beneficiaries;
- Planning for the 21-year deemed disposition; and
- The impact of new subsection 212.1(6) on pipeline planning.

Moderator: **Rachel Blumenfeld**, LLB, TEP, Toronto: Aird & Berlis LLP; Deputy Chair, STEP Canada

Speakers: **Stuart Bollefer**, LLB, TEP, Toronto: Aird & Berlis LLP
Carol Fitzsimmons, JD, TEP, Buffalo: Hodgson Russ LLP
Paul Gibney, LLB, TEP, Toronto: Thorsteinssons LLP

Registration: http://www.cvent.com/events/step-2020-speakers-series

Time: 12:00PM – 1:15PM

Venue: Webcast only

This program is part of the STEP Canada 2020 Speakers' Series. The live broadcast will air on the date above. Archived recordings of each broadcast are available with registration.

November 24, 2020 – The New ABCs of Philanthropy: Alternative Charitable Gifts, B-Corps, and Charities' Investment Policies

Summary: Our expert panel composed of legal, tax, philanthropy, and investment experts, examines the latest trends in charitable giving, including:

- Taxation, valuation and practical considerations of making alternative gifts to charity, including gifts of wine, art, land and cultural property;
- The latest developments in the fields of B-corporations, social finance and social enterprise; and
- The expanding investment spectrum for charities.

Moderator: **Robbie Brown**, CPA, CA, CFP, TEP, Halifax: BMO Private Wealth

Speakers: **Adam Jagelewski**, Toronto, Executive Lead, MaRS Centre for Impact Investing
Susan Manwaring, LLB, TEP, Toronto: Miller Thomson LLP
Hayley Maschek, LLB, Surrey: MNP LLP

Registration: http://www.cvent.com/events/step-2020-speakers-series

Time: 12:00PM – 1:15PM

Venue: Webcast only

This program is part of the STEP Canada 2020 Speakers' Series. The live broadcast will air on the date above. Archived recordings of each broadcast are available with registration.

November 26, 2020 – STEP Canada – Canada Revenue Agency Round Table

Summary: Senior representatives from the CRA answer questions prepared by trust and estate practitioners about cases and issues of concern to both practitioners and their clients.

Moderator: **Christine Van Cauwenberghe**, LLB, CFP, RRC, TEP, Winnipeg: IG Wealth Management

Speakers: **Michael Cadesky**, FCPA, FCA, FTIHK, CTA, TEP, Toronto: Cadesky Tax

Kim G.C. Moody, FCPA, FCA, TEP, Calgary: Moodys Tax Law LLP

Steve Fron, CPA, CA, TEP, Oshawa: Manager, Trust Section II, Income Tax Rulings Directorate, Canada Revenue Agency

Phil Kohnen, CPA, CMA, TEP, Ottawa: Technical Advisor, Financial Industries and Trusts Division, Income Tax Rulings Directorate, Canada Revenue Agency

Registration: http://www.cvent.com/events/step-2020-speakers-series

Time: 12:00PM – 1:45PM (105 minutes)

Venue: Webcast only

This program is part of the STEP Canada 2020 Speakers' Series. The live broadcast will air on the date above. Archived recordings of each broadcast are available with registration.

December 16, 2020 – TEP Talk (formerly STEPping out to Lunch)

Summary: Join your TEP colleagues over Zoom to discuss hot topics, current cases and irksome situations while having lunch (at a distance). The meeting is virtual but the connections are real!

Registration: https://web.cvent.com/event/2d615786-2fae-4eb9-98d9-599da0852d8e/

Event: 12:00PM – 1:00PM

Venue: Online or dial-in only via Zoom

Article: The Ever-Evolving Role of Section 3 Counsel

By Kimberly A. Whaley, CS, TEP, LLM

On October 26, 2020, I co-chaired an Ontario Bar Association program on Section 3 Counsel appointed under the *Substitute Decisions Act (the "SDA"),*[1] with Alexander Procope.[2] The program was a full-day event which addressed various aspects of the role of section 3 counsel appointed under the *SDA*.

STEP members will inevitably have met circumstances within their various practice areas, where the capacity of the client is "*at issue"* within their retainer. The OBA program in the overview addressed the following:

- When capacity is in issue in a proceeding;
- Navigating client management and professionalism challenges;
- How to present the allegedly incapable client's position;
- The What, When, Who, Why and How of capacity assessments;
- What is the role of the Public Guardian and Trustee;
- Avoiding negligence claims and personal costs claims;
- Bringing a Habeas Corpus application;
- Exploring the role of amicus curiae; and
- Concluding your role as section 3 counsel.

I recommend the OBA materials to you in the event that you have the occasion to consider a section 3 counsel appointment.[3] For those readers unfamiliar with the provisions under the *SDA*, section 3 of the *SDA* provides that in cases where an individual whose capacity is in issue in proceedings under this legislation does not have counsel, the Ontario Public Guardian and Trustee (the "PGT") may be directed by the court to arrange legal representation for that person. The unedited provision reads as follows:[4]

Counsel for person whose capacity is in issue

3 *(1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,*

(a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and

(b) the person shall be deemed to have capacity to retain and instruct counsel. 1992, c.30, s.3 (1).

1 *Substitute Decisions Act*, 1992, S.O. 1992, c.30 [***SDA***].
2 Alexander Procope, Partner, Perez Bryan Procope LLP
3 OBA, Your Comprehensive Guide to Section 3 Counsel under the *SDA*
4 *SDA* s.3.

Responsibility for legal fees

> *(2) If legal representation is provided for a person in accordance with clause (1) (a) and no certificate is issued under the Legal Aid Services Act, 1998* in connection *with the proceeding, the person is responsible for the legal fees. 1992, c.30, s.3 (2); 1998, c. 26, s. 108.*
>
> *Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 3 (2) of the Act is amended by striking out "and no certificate is issued under the Legal Aid Services Act, 1998" and substituting "and the person is not eligible to receive comparable legal aid services under the Legal Aid Services Act, 2020". (See: 2020, c. 11, Sched. 15, s. 59)*

Same

> *(3) Nothing in subsection (2) affects any right of the person to an assessment of a solicitor's bill under the Solicitors Act* or other review of the legal fees and, if it is determined that the person is incapable of managing property, the assessment or other review may be sought on behalf of the person by,
>
> *(a) the person's guardian of property; or*
>
> *(b) the person's attorney under a continuing power of attorney for property.*

It is clear from this obvious brief provision, that there is very little guidance for counsel appointed pursuant to section 3 of the *SDA* ("s.3 counsel").

Some time ago now, when I co-authored a paper, published in The Advocates' Quarterly,[5] it was anticipated that the interpretation of the nature and extent of the role of s.3 counsel would expand and evolve over time as more precedent developed at common law. It is expected that the interpretation of certain issues that arise and which are unique to each individual case may be learned over time in what appears to be a consistently expanding role for s.3 counsel. Indeed, another instructive look at the history of s.3 counsel, can be learned from the paper more recently authored by Alex Procope.[6] Certain questions ought to be posed from the outset of any s.3 counsel appointment, particularly given more recent case law, including:

1. At what stage of the proceedings should the appointment of s.3 counsel be sought?
2. Can/should any court relief be granted before s.3 counsel is appointed; and,
3. Are there circumstances where s.3 counsel ought not to be appointed, despite the fact that capacity is in issue?

At what stage of the proceedings should a s.3 appointment order be sought?

In many circumstances, the answer to the question is – it depends.

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5 Between a Rock and a Hard Place: The Complex Role and Duties of Counsel Appointed Under Section 3 of the *Substitute Decisions Act*, 1992, The Advocates Quarterly, Vol. 40, 2012, co-authored Kimberly Whaley & Ameena Sultan: https://welpartners.com/resources/WEL_2012_40_Adv_Q_408.pdf.

6 The Ongoing History of Section 3 Council: Origins of the Role and a Path Forward: http://pbplawyers.com/wp-content/uploads/2020/10/Procope-The-Ongoing-History-of-Section-3-Counsel.pdf

In any proceedings commenced under the *SDA*, the individual subject matter whose capacity is in issue in the proceeding, is entitled to counsel, whether counsel retained of one's own initiative, retained with the assistance of another, or, s.3 counsel when and where appropriate.

The determination of the appropriateness of s.3 counsel may not be obvious in that the individual, possibly has not responded to having been served with the notice of application, in which case, it may be appropriate that s.3 counsel be appointed to ascertain the instructions of the individual subject matter of the proceedings, if any, and to assist with the response to the court proceeding given the very serious circumstances which can result in capacity proceedings. If we accept for the moment, that circumstances of the appointment are dependent on unique facts, we should always endeavor to canvas whether or not a s.3 appointment is advisable.

In most instances, the circumstances of the individual subject matter are largely unknown at the outset of a proceeding.

In some situations, the individual may retain counsel, and, yet later in the proceedings, that counsel retained, may seek a s.3 appointment of either themselves, or another lawyer.

Can/should any relief be granted before s.3 counsel is appointed?

Following on from the contemplation of the stage of the proceeding wherein an appointment ought to be made or considered, is the question of whether in a proceeding already commenced, it is appropriate to ask the court to grant relief before counsel is appointed for the individual subject matter of the proceeding, including whether such appointment is appropriate.

The answer to this question also, in large measure, depends on the unique circumstances of the proceeding.

If it is contemplated from the outset that s.3 counsel be appointed either at the first hearing, or, at a subsequent hearing because the relief has been specifically requested in the application itself, then best practices might be to have no relief ordered unless and until the s.3 appointment is in place, since there is serious risk that the individual may be unduly restricted, limited, or prejudiced by an initial court order having been granted without the benefit of legal advice is important to avoid.

Of course, it is possible to think of circumstances where certain orders ought to issue even if only on an interim basis, particularly where the individual is at immediate risk, whether in respect of care, property management, or both.

If we were to use the example of relief often typically sought in a guardianship application, for example, which would include an order for a capacity assessment, or an order for a declaration of incapacity, it is hoped that the obvious answer to whether or not an order should issue is, no, because the individual is entitled to rights advice, to refuse an assessment, and to receive legal advice on this serious question affecting their rights and autonomy.

Are there circumstances where s.3 counsel ought not to be appointed, despite the fact that capacity is in issue?

Considering the purposes of s.3 of the *SDA*, which are primarily to provide legislative protection for vulnerable individuals whose capacity is at issue during the course of legal proceeding, the importance of the court being permitted to make a s.3 counsel appointment, cannot be underscored enough, since it is intended to give vulnerable parties an autonomous voice in litigation that may adversely impact their interests.

Importantly, s.3 of the *SDA* does not make the appointment of legal representation mandatory, and the court must therefore assess the specific facts and legal issues in contention when deciding whether such appointment is appropriate.

Notably, legal representation may be ordered even where there has already been a capacity assessment, or a court order declaring a person to be incapable with respect to making a particular decision.

The role of s.3 counsel, in part, is to provide legal advice and to advance the interests of the individual whose capacity is in issue, and in certain circumstances, to convey instructions, wishes and interests to the court.

Legal representation is an important safeguard to protect the dignity, privacy, and legal rights of persons alleged to be incapable.[7]

In *Kwok,*[8] the court held that the appointment of legal representation under s.3 was not appropriate, nor necessary. The PGT sought the appointment of s.3 counsel in respect of a person, who had been declared incapable of managing property and person, and in circumstances where the son had been originally appointed his guardian, but a change in guardian was sought. The PGT argued that s.3 counsel should be appointed since the subject matter's condition might have improved, and since a more limited guardianship appointment might be appropriate. The appointment was opposed on the basis of the potential cost consequences. The court held in this case, that the appointment of s.3 counsel was not in the incapable person's best interests and was a waste of resources. In so finding, the court considered the following:

1. The lack of dispute as to who should act as the incapable person's guardian;
2. The lack of an evidentiary basis to question the continued validity of the assessment declaring the person incapable;
3. The evidence of a doctor that the person's condition had not improved;
4. The court judgment declaring the person incapable, and maintenance of that status quo; and,
5. The incapable person's own stated wishes in support of the appointment of his wife as guardian.

Historically, there have been several cases where an individual had been assessed as incapable, yet, the court either decided to exercise its discretion and appoint s.3 counsel, or, even in one case, not to terminate the appointment of s.3 counsel, stating that s.3 counsel had a role to convey to the court and to put forward the views and wishes of an incapable adult.

Notwithstanding historical treatment, recent case law from 2018 onwards seems to indicate the shaping of a more measured approach to the appointment. In summary, these cases seem to stem from circumstances where the court has determined that the appointment of s.3 counsel is inappropriate on the facts before it. The scrutiny and lack of appropriateness of the appointment were determined on the unique situation before the court with the results as follows: where there exist reasonable grounds to believe that the individual whose capacity is in issue, is incapable of entering into a solicitor/client relationship; where the appointment is considered to be a waste of resources and expense; where the PGT is the statutory guardian of an incapable person, thus, the appointment would place the PGT in a potential position of conflict, no appointment was made. The analysis of each of these outcomes was case specific.

In *Miziolek v Miziolek,*[9] the court was tasked with determining whether it was appropriate in the circumstances to order that counsel be appointed for a vulnerable adult under s.3 of the *SDA*.

It was accepted that the woman was incapable of managing property, making personal care decisions, providing counsel with realistic insight into her wishes, and instructing counsel in any meaningful manner. Two daughters were fighting over the powers of attorney, both for property and personal care that had been granted to one daughter, citing reasons of invalidity and breach of fiduciary duty. The court ultimately held that in light of the factual findings regarding capacity, that there was no beneficial role that s.3 counsel could advance. The court held that while an assessment of incapacity does not foreclose the appointment of s.3 counsel, and, indeed such counsel may constitute a means by which the perspective and feelings of an incapable person may be conveyed to the court, given the discreet issues at play, the appointment of s.3

7 *Kwok v. Kwok*, 2019 ONSC 3549 [*Kwok*].
8 *Ibid.*
9 *Miziolek v Miziolek*, 2018 ONSC 4372 [*Miziolek*].

counsel would be ineffective, and would be a waste of resources and an expense which would not assist in advancing or resolving the litigation.[10]

The applicant in this case argued that there is an important role for s.3 counsel even where an incapable person is not capable of giving instructions or stating wishes. That role is to present the client's wishes whether from the client or other sources and, even where there are no instructions, the role of counsel is to ensure that legal, procedural and evidentiary requirements are met in the proceeding.

Justice Goodman noted the potential contradiction s.3 counsel might encounter: tasked with acting for an allegedly incapable client who is "deemed" to have the capacity, yet, also not acting if the person's capacity to give instructions is lacking. In resolving the apparent contradiction, and arriving at its decision that s.3 counsel not be appointed in this case, the court found that there were more than reasonable grounds to believe that the mother is incapable of entering into a solicitor/client relationship, which she would have to pay and contract for, and, that given the medical report of Dr. Sadavoy, concluded it to be probable that doing so would cost the mother significant emotional distress, if forced into dealing with an unfamiliar counsel.[11]

Importantly, *Miziolek* reinforced the view that s.3 of the *SDA* is to be applied by the court in a flexible and permissive manner.

In *Sylvester v Britton,*[12] the court refused to terminate the appointment of s.3 counsel and Justice Raikes provided reasons as to why this case is distinguishable from *Miziolek*.[13] The court had to consider a motion brought by the applicant calling into to question the capacity of the mother to instruct counsel arranged for by the PGT under a court order, as well as, the removal of s.3 counsel since the person was deemed incapable of providing instructions.

The applicant brought an application seeking to be appointed as guardian of property and the person for her mother, Marjorie. Marjorie had previously appointed 2 of her sons as her attorneys for both property and personal care.

On consent of all parties, the PGT arranged to have a lawyer act for Marjorie on the application in accordance with s.3 of the *SDA*. The court deemed Marjorie to have the capacity to give instructions.

The applicant contested the presumption of capacity and brought a motion seeking, a declaration that the mother is incapable of managing her person and property, a declaration that the mother was not capable of instructing counsel, an order for the removal of s.3 counsel, and an order that she undergo a comprehensive assessment, including, but not limited to, her capacity to manage her property, her person, and to instruct counsel. In 2015, Marjorie was assessed by a capacity assessor with the finding that she was incapable of managing her property and her person. In 2016, Marjorie was assessed again, this time to determine if she had the requisite capacity to make decisions with respect to admission to a long-term care facility. It was determined that she did not have the requisite capacity, and her sons acting on her behalf pursuant to the power of attorney documents were the substitute decision makers.

Based on the evidence and the assessment reports, the court determined that Marjorie was incapable of making decisions related to her property and her person. In respect of whether she had the capacity to instruct counsel, the court reviewed the challenges and limitations that s.3 counsel encounters from the deemed capacity provisions, together with the *Rules of Professional Conduct*, and the legal and legislative framework.

Justice Raikes provided a list of the duties of s.3 counsel:

1. seek instructions from Marjorie and act on those instructions;
2. keep confidential all communications with Marjorie and all information that he obtains from her or on her behalf;
3. diligently and ethically advance her interests in accordance with her instructions;
4. ensure that legal, procedural and evidentiary requirements are tested;
5. make Marjorie's position or wishes known to the court; and,

10 *Ibid*.
11 *Ibid at* paras 17-23.
12 *Sylvester v. Britton*, 2018 ONSC 6620 [*Sylvester*].
13 *Miziolek, supra* note 9.

6. if Marjorie lacks capacity to provide instructions at any point in the litigation, promptly take steps for the appointment of a litigation guardian.[14]

The applicant took the position that a finding of incapacity to manage property and the person was sufficient to establish a lack of capacity to instruct counsel, since it requires a higher level of understanding of financial legal issues. Notably, I am of the view that higher or lower levels of understanding are respectfully, not an appropriate analysis, but rather the appropriate analysis is demonstrated by applying the determining standards or criteria to the requisite decision or task to be assessed.[15] That said however, Justice Raikes concluded that the fact that the mother was suffering from dementia, did not necessarily preclude her from instructing her legal counsel and making her wishes known. The court stated:

> *I do not agree that because there has been a finding of incapacity to manage property and finances, a party is necessarily incapable of providing instructions to counsel on all matters in issue in litigation. A person may be capable for one task yet incapable for another. The nature of the issues in the litigation will vary in complexity. A person with dementia may have very strong views as to where he or she wishes to live and which of his or her children or family members he or she wants to make decisions for them. Such determinations are based on a lifetime of experience and interactions which may be unaffected by the disease.*
>
> *Dementia is an insidious and terrible disease. It does not, however, follow a uniform timetable or pattern for every person. In my view, it is inappropriate to apply a blanket rule that if a person is incapable of managing their property and finances, they are incapable of instructing counsel regardless of the nature of the issue. The determination of capacity to instruct is best made by counsel cognizant of the matters in issue and his or her responsibilities to the client and court.*[16]

Another important consideration that Justice Raikes addressed, was an evidentiary one. Justice Raikes stated that requiring s.3 counsel to provide evidence to explain why counsel is of the opinion that Marjorie had the capacity to instruct him, would intrude upon his duty of confidentiality to his client and the solicitor/client privilege that attaches to such communications. A court should only intrude on that determination by counsel with great reluctance and where evidence demonstrates a strong likelihood that counsel has strayed from his obligations to the party and the integrity of the court process. This is in contrast notably to the position taken by Justice Hoy (as she then was) in *Salzman v Salzman,*[17] where the court ruled that the evidence of the solicitor/client meeting could be admitted on the basis that it was relevant to the issue of capacity. This decision was not appealed, had it been, I believe the outcome may well have been different. The applicant relied on the decision of Goodman J., in *Miziolek,*[18] where the application to appoint s.3 counsel was dismissed. Yet, notably, Justice Raikes stated that the cases are distinguishable as follows:

1. the issue in *Miziolek* concerned whether s.3 counsel should be appointed at all. That determination has already been made in this case; and,

2. an assessment was done shortly before the application to appoint s.3 counsel, which clearly and unequivocally indicated that the patient was incapable of providing counsel with realistic insight into her wishes or instructing counsel in any meaningful manner.

Justice Raikes also relied on *Righter v Righter*[19] to conclude that even if the assessment requested by the applicant was granted, it would not mean that s.3 counsel would cease involvement, that there was still a role for counsel where a party has no capacity.

Ultimately, Justice Raikes was not satisfied with the evidence that Marjorie was incapable of providing instructions to her s.3 counsel and declined the applicant's motion to remove s.3 counsel.

Revisiting *Kwok*[20] for a moment, Jiefu was involved in 2 motor vehicle accidents in 2011 causing traumatic brain injury. A capacity assessment was conducted in 2014, revealing that he was incapable of taking care of himself and incapable of managing his property.

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14 *Sylvester*, *supra* note 12 at para 64.
15 The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective, The Advocates Quarterly, Vol.45, Number 4, 2016.
16 *Sylvester*, *supra* note 12 at paras 71-72.
17 *Saltzman v Saltzman*, 2011 CarswellOnt 15786 (ON SC).
18 *Miziolek, supra* note 9.
19 *Righter v. Righter* (Nov. 5, 2008), Doc. 03-20/18 (Ont. S.C.J.) at para. 1.
20 *Kwok, supra* note 7.

In 2015, his son was appointed as his guardian for property and person but later filed an application to be released, and instead asking his mother, who brought her own application to be appointed.

The PGT took the position that s.3 counsel should be appointed. The court considered the arguments of the PGT and the applicants, and noted the following about the role of s.3 counsel:

> *Section 3 of the SDA does not make the appointment of legal representation mandatory, and the Court must assess the specific facts and legal issues in deciding whether such appointment is appropriate in a specific case*
>
> *I accept the position of the Public Guardian and Trustee that the appointment of legal representation in such cases is an important safeguard to protect the dignity, privacy and legal rights of persons alleged to be incapable: see Abrams v. Abrams, 2008 CanLII 67884 (ON SC), at paras. 48 and 49.*
>
> *I also accept the position of the Public Guardian and Trustee that the court has the authority to appoint legal representation even in cases in which there has already been a capacity assessment or a court order declaring a person to be incapable.*[21]

The court concluded that the appointment of s.3 counsel would not be in the person's best interests and would be waste of resources.

In *Willis v Burgie,*[22] the court held the individual subject matter was incapable of managing her property and personal care and that while the appointment of s.3 counsel would be a good idea, the order unopposed, that it was however premature to make the order because the court did not know how counsel would be paid, and, as such, the appointment was left to a further appointment. This decision also speaks to one of the questions raised at the outset to whether and what orders are appropriate to be made at the outset of an application.

In *Dawson v Dawson,*[23] the court had to determine whether a litigation guardian should be appointed for the individual subject matter, and whether his wife was an appropriate person to be appointed. The wife sought to be appointed as the litigation guardian for the subject matter, suffering from dementia and found to be incapable of managing his property and of instruction legal counsel. The PGT argued that appointing a litigation guardian was unnecessary and inappropriate and that no litigation guardian should be appointed for a person when the person's capacity is at issue in a proceeding, particularly in light of the court's power to direct that counsel be arranged for the person pursuant to s.3 of the *SDA*.

The wife argued that a litigation guardian is a foregone conclusion, and that rule 7.02(1)[24] does not apply since the subject matter's current capacity was not in issue. Previously, the subject matter had been assessed and lacked the requisite capacity to manage property, execute a Will, to instruct counsel, and that the rule was not meant to address a situation where the primary issue is not whether a guardian is necessary, but rather who that guardian should be.

The court rejected both parties' views by explaining the interplay between rule 7.01[25] of the *Ontario Rules of Civil Procedure* and Sec.3 of the *SDA*. The judge explained that rule 7.01 gives the court the discretion to determine that an appointment of a litigation guardian is unnecessary or inappropriate, particularly in cases where a party's capacity is the subject of the proceeding:

> *[13] Rule 7.01(1) provides that:*
>
> *Unless a court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian.*
>
> *The opening words of r. 7.01(1) explicitly give the court discretion to deviate from the general rule.*
>
> *[14] Rule 7.01(2) furthermore carves out an exception to the general rule requiring a litigation guardian applicable to guardianship proceedings under the Act. It provides that:*

21 *Ibid*.
22 *Willis v. Burgie*, 2018 ONSC 6266.
23 *Dawson v. Dawson*, 2020 ONSC 6724 [*Dawson*].
24 *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 7.02(1).
25 *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 7.01.

Despite subrule (1), an application under the Substitute Decisions Act, 1992 to appoint a guardian of property or a guardian of the person may be commenced, continued and defended without the appointment of a litigation guardian for the respondent in respect of whom the application is made, unless the court orders otherwise.

[15]This subrule is again phrased in such a way as to give the court discretion. An application under the Act may be commenced or defended without a litigation guardian being appointed for the person who is the subject of the application. The court may however order that a litigation guardian be appointed.[26]

The judge concluded that pursuant to rule 7.01, the court has the discretion to appoint a litigation guardian for the subject matter, or instead, to decline to do so.

In response to the PGT's argument, the judge stated that: "*guardianship proceedings are often contentious,* and, *although everyone involved in a guardianship proceeding may have the highest motives, in some cases, a litigation guardian must be appointed to ensure that the interest of the vulnerable party is fully protected.*"

Importantly, the court went on to conclude that: "*both a litigation guardian and s.3 counsel are responsible for protecting the interests of a vulnerable litigant, but they do so in significantly different ways,*" and explained the distinct roles' as follows:

[28] This argument is premised on s.3 counsel having a role that they do not and cannot have. A lawyer appointed to assist a vulnerable person under the Act has the same obligations as any other litigation counsel. Their job is to advise their client of his or her rights and to act on their instructions. If a client has capacity issues, ascertaining their wishes and preferences may be difficult or even impossible. Every lawyer, however, is limited by their understanding of their client's wishes. If the client's instructions cannot be ascertained, no lawyer — including a lawyer appointed under s.3 — can take a position in a proceeding on the assumption that their client would have agreed with it or that it is in their best interest.

[29] Many lawyers appointed pursuant to s.3 do commendable work in difficult circumstances. They make a tremendous effort to discern their client's wishes and often provide the court with very helpful insight as a result. If they are unable to understand what a client wants, however, a s.3 lawyer cannot make decisions on that person's behalf.

[30] By contrast, a litigation guardian stands in the shoes of someone under disability. As the PGT acknowledges in its submissions, a litigation guardian "does not take instructions from [persons under disability] but makes substitute decisions in their best interests". The powers and duties of a litigation guardian are spelled out in r. 7.05:

***7.05** (1) Where a party is under disability, anything that a party in a proceeding is required or authorized to do may be done by the party's litigation guardian.*

(2) A litigation guardian shall diligently attend to the interests of the person under disability and take all steps necessary for the protection of those interests, including the commencement and conduct of a counterclaim, crossclaim or third-party claim.

(3) A litigation guardian other than the Children's Lawyer or the Public Guardian and Trustee shall be represented by a lawyer and shall instruct the lawyer in the conduct of the proceeding.

[31] A litigation guardian therefore does precisely what s.3 counsel cannot do, that is, make decisions on behalf of a vulnerable person. As stated succinctly by Justice Goodman in rejecting the appointment of s.3 counsel in Miziolek v. Miziolek, 2018 ONSC 2841, at para. 13:

The role of a Section 3 Counsel is to obtain instructions from the person whose capacity is in issue and absent instructions, counsel is not to act. Section 3 Counsel is not to take on the role of a Litigation Guardian.

26 *Dawson*, *supra* note 22 at paras 13-15.

[32] The complementary nature of these two roles is underscored by r. 7.05(3), which requires that a litigation guardian be represented by a lawyer.[27]

The judge in the end, concluded that it may be appropriate in a proceeding like this to appoint a litigation guardian for a vulnerable person.

Notably, in an older decision from 2010, *Bon Hillier v Milojevic,*[28] on appeal of a finding of the Consent and Capacity Board, where the subject matter was found incapable of managing property, the court held that the appeal was a proceeding under the *SDA* in which capacity was in issue. The PGT submitted that s.3 should not be used by the court because of the appearance of a possible conflict of interest by the PGT. The court held that although it was a proceeding in which capacity was in issue, s.3 is permissive in nature, giving the court the discretion to request the PGT to arrange legal representation. The court in this instance, held that the argument by the PGT as to why the discretion ought not to be exercised in this instance, was a sound one, and accordingly did not direct the PGT to arrange for legal representation. However, the court did order the appointment of *amicus curiae* (a similar but not identical appointment) pursuant to the following provision:

Counsel for incapable person

81 *(1) If a person who is or may be incapable with respect to a treatment, managing property, admission to a care facility or a personal assistance service is a party to a proceeding before the Board and does not have legal representation,*

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 81 (1) of the Act is amended by striking out "admission to a care facility" in the portion before clause (a) and substituting "admission to or confining in a care facility". (See: 2017, c.25, Sched. 5, s.62)

(a) the Board may direct Legal Aid Ontario to arrange for legal representation to be provided for the person; and

(b) the person shall be deemed to have capacity to retain and instruct counsel.[29]

In this case, the PGT were acting as the statutory guardian of property and Justice Brown took the argument into account in noting that s.3 of the *SDA* is not directive and again, simply gives the court discretion to order representation:

Nevertheless, section 3(1) of the SDA is permissive in nature, giving the court the discretion to request the PGT to arrange legal representation for Mr. Bon Hillier. An argument advanced by the PGT as to why I should not exercise that discretion in this case strikes me as a sound one. Although it was not a party to Mr. Bon Hillier's appeal, the PGT submitted that in a sense it stood in a position of conflict of interest because it was acting as his statutory guardian of property by reason of the finding of incapacity that was in issue in the appeal. The PGT argued that Mr. Bon Hillier might lack confidence in any counsel it chose for him since Mr. Bon Hillier has one simple goal on his appeal – to remove the PGT from his life. I think the point made by the PGT is a sensible one, and in the circumstances of this case I conclude that it would not be appropriate for me to direct the PGT to arrange for legal representation of Mr. Bon Hillier.[30]

Consequently, these recent decisions have, when analyzed together, set out several circumstances wherein, it may well be determined by a court, that the appointment of s.3 counsel is not appropriate. These are notable and important considerations to evaluate when confronted with opposition to such an appointment.

It is unclear whether these considerations will have the effect of a more measured approach to future appointments, or, indeed, whether simply as a natural consequence of the expanding considerations and circumstances wherein s.3 counsel are, or are not appointed, remains a work in progress.

27 *Ibid,* at paras 28-32.
28 *Bon Hillier v. Milojevic*, 2010 ONSC 4354 [*Milojevic*].
29 *Health Care Consent Act*, 1996, S.O. 1996, c.2, Sched.A, sec.81.
30 *Milojevic*, *supra* note 27.

Article: Mandel v. 1909975 Ontario Inc.: Tax Planning for 21st Anniversary of a Trust Goes Awry


By Brian Nichols and Kelsey Horning, Goldman Sloan Nash & Haber LLP

The Canada Revenue Agency ("CRA") gave each of Robert Mandel and his business partner, Ellen Pike, a very nasty surprise. It reassessed each of them and added $15,000,000 to each of their taxable incomes. The CRA did not like the tax planning they had done in anticipation of the 21st anniversary of their trusts. Not surprisingly, Mandel and Pike retained lawyers. Part of their story is explained in the recent decision of the Ontario Superior Court of Justice in *Robert Mandel et al. v. 1909975 Ontario Inc. et al.* 2020 ONSC 5343. The tax community may wonder why the taxpayers sought relief in the Ontario Superior Court of Justice (the "**OSCJ**") rather than the Tax Court of Canada.

The judge who decided the application was not experienced in tax matters. Unfortunately, the judge's decision does not clearly state the tax issues. Accordingly, it is necessary for us to go on a journey and to make some assumptions in order to figure out what was going on and what we can learn from it.

Introduction to 21st Anniversary Tax Planning

We can begin our journey by reviewing some of the issues facing a taxpayer who used a trust to effect an estate freeze in 1990 and who had to do 21st anniversary tax planning in 2010 (before the expansion of the Tax On Split Income ("TOSI") rules).

Mr. Mandel and Ms. Pike carried out their tax planning for the 21st anniversry of the settlement of their trusts before the TOSI rules were expanded. In 2020, tax planning for the 21st anniversary of the settlement of a trust would include consideration of the expanded TOSI rules in addition to consideration of the issues discussed below.

First, we will consider a hypothetical situation.

Suppose that in November 1990, Mr. A owned all of the shares of a corporation ("**Profitco**") which carried on a successful business. At that time, Mr. A had three young children, Sandra, David, and Michael. Mr. A effected a "Plain Jane" estate freeze in which he exchanged his existing shares of Profitco for freeze shares and "thin" or "skinny" voting shares (typically not entitled to dividends, non-participating and redeemable and therefore having no or nominal value). A discretionary trust subscribed for new common shares of Profitco. Mr. A's three children were the discretionary beneficiaries of the family trust.

At all times, each of Mr. A and his three children were Canadian residents. They are not residents of any other jurisdiction. They were not US citizens or holders of green cards.

Mr. A and his tax advisor ("**Tax Advisor**") had the following discussion early in 2010:

Mr. A: You asked me to speak to you about my trust. Is anything wrong?

Tax Advisor: You settled the trust in November 1990. Unless we take some steps, in November 2011, the trust will be deemed to have disposed of each of its assets for an amount equal to its fair market value. If shares of Profitco held by the trust have appreciated, the trust may face a significant tax bill.

Mr. A: What can I do?

Tax Advisor: The standard planning is to cause the trust to distribute all of its assets to one or more of the beneficiaries before the 21st anniversary of the settlement of the trust. Have you thought about how you might want to allocate the shares of Profitco among your three children?

Mr. A: David and Michael have shown no interest in the business. Sandra is showing signs of interest, but has not yet made up her mind. For the time being, I would like to distribute an equal number of shares to each of the three children. However, I am concerned that would not be fair to Sandra if she eventually takes over the business. She should not be doing all of the work

while David and Michael, who do no work, receive two thirds of the growth in value of Profitco. What can I do about that?

Tax Advisor: We could set up a second estate freeze. The three children could receive freeze shares of Profitco, and the trust could acquire new common shares of Profitco.

Mr. A: Is there any downside in that approach?

Tax Advisor: The CRA requires that the holder of freeze shares be able to require Profitco to redeem the freeze shares at any time for an amount equal to the fair market value of the freeze shares at the time of the freeze. If one or more of your children exercises that right, Profitco might not survive.

Mr. A: That will not do. What can we do about this?

Tax Advisor: We could incorporate a new corporation which I will call Newco. We could ask your children to transfer the freeze shares of Profitco into Newco in exchange for non-voting common shares of Newco. You would control Newco by holding non-participating voting shares of Newco. We could re-enforce your control of Newco with a shareholders' agreement which would be signed by your children and yourself. This would give you a great deal of protection. However, there is a risk that if one of your children becomes alienated, he or she could seek relief by seeking an oppression remedy in the courts.

Mr. A: Sandra has a husband, Barry. I do not feel comfortable with Barry. I would like to protect Sandra's interest in Profitco from Barry. What should I do?

Tax Advisor: Let's set up a meeting with a family law lawyer to discuss this.

Back to the Court's Decision

We do not know what advice was given to Mr. Mandel and Ms. Pike. However, their actions were consistent with the advice given by Tax Advisor to Mr. A in our hypothetical situation. Unlike Mr. A in our hypothetical situation, Mr. Mandel and Ms. Pike were prepared to allocate the shares equally among their children and did not require the second estate freeze. However, Mr. Mandel and Ms. Pike took steps to protect their children from marital difficulties. Unfortunately, in doing so, they got into serious trouble with the CRA.

Mr. Mandel and Ms. Pike each had a 25% interest in a corporation named Welded Tube of Canada through holding companies (the "**Initial Holding Companies**"). The shares of the holding companies were in turn held by family trusts. As the 21-year deemed disposition for the trusts was approaching both the Mandel and Pike families decided to transfer those interests to a series of new corporations (the "**New Holding Companies**"), one for each of Mr. Mandel's and Ms. Pike's children. In each case, the trust distributed the shares in the Initial Holding Company to the child who transferred them to their New Holding Company in exchange for 100 non-voting common shares of the New Holding Company. Mr. Mandel or Ms. Pike subscribed for Class A voting shares of each of the New Holding Companies for an aggregate subscription price of $10 per company. The respective parent then subscribed for 100,000 Class B convertible shares in each of the New Holding Companies for an aggregate subscription price of $100 per company.

The applications judge described the effects of the subscription for the 100,000 Class B voting shares as follows at paragraph 17 of the decision:

> One of the effects of this restructuring was to give Mr. Mandel or Ms. Pike control of each of the Child Corporations. In addition, the reorganization was intended to ensure that, in the event of a marriage breakdown of any child, the former spouse of such child would not share in the assets formerly held by the Family trusts. This was achieved by giving Mr. Mandel or Ms. Pike 100,000 Class B Convertible Shares in the Child Corporation of each of their respective children and giving the child only 100 shares. In a marriage breakdown, the child's former spouse could claim up to 50 of the 100 shares which would be overwhelmed by the 100,000 shares of Mr. Mandel or Ms. Pike.

Unfortunately, the decision does not clearly describe the facts or the basis of the CRA's assessment. It is reasonable to assume that the Class A voting shares were thin or skinny voting shares. At one time, the CRA indicated that it might attach a value to thin voting shares. However, the CRA has backed off from that

position. Yet, the Class A voting shares likely gave the parents *de jure* control of the New Holding Companies. The Class B convertible shares are somewhat mysterious. We do not know whether they are voting shares. We do know that the subscription price was only $100 per company but the Class B convertible shares could overwhelm 50 of the non-voting common shares which might potentially be held by an estranged spouse of one of the children. Perhaps, each of the 100,000 Class B convertible shares could be exchanged for a non-voting common share. If so, the aggregate fair market value of the 100,000 Class B convertible shares was substantially in excess of the subscription price of $100. This suggests that the CRA may have assessed Mr. Mandel and Ms. Pike pursuant to section 15 of the *Income Tax Act*. The application judge indicated that this appeared to be the case but provided no explanation. We are left making assumptions.

Throughout the decision, the court refers to Mr. Mandel and Ms. Pike acquiring controlling shares. It is not clear what the court meant by "controlling shares". It is possible that the court regarded the Class B convertible shares as controlling shares.

The OSCJ addressed three issues in its reasons. The first was whether the court should assume jurisdiction. The court found that it should not because the real issue was a tax assessment that is within the ambit of the Tax Court of Canada. The requested relief involved an argument that the shares underlying the tax assessment (presumably the Class A voting shares and/or the Class B convertible shares) were not validly issued under provincial law because Mr. Mandel and Ms. Pike did not pay for them. While the Tax Court does not have jurisdiction to rectify corporate records, it can interpret provincial legislation when needed to resolve a tax dispute. In this case, the Tax Court could determine the impact of the alleged lack of payment for the shares and the impact of the provincial corporate law requirement that shares be paid before they are issued. The Tax Court was also identified as better equipped to make findings of fact in relation to whether there was payment, and why the applicants recorded matters the way they did. As a result, the OSCJ declined jurisdiction.

The decision of the Supreme Court of Canada (the "**SCC**") in *Canada v. Fairmont Hotels* 2016 SCC 5 ("***Fairmont***") clearly indicates that the Superior Courts of the provinces have jurisdiction to make rectifications which have tax consequences. In numerous situations, the Superior Courts of the provinces have done so. There have been a few situations where the Superior Courts have declined jurisdiction. In most of these cases, a hearing in the Tax Court of Canada was imminent when the court was considering the rectification application. This situation can be avoided if the taxpayer's lawyers ask the CRA to hold the notice of objection in abeyance or ask the Department of Justice (the "DOJ") to stay proceedings in Tax Court pending the resolution of a rectification application. Our experience has been that the CRA and the DOJ are often co-operative.

Despite declining jurisdiction, the OSCJ did address the second and third issues relating to the relief sought. The second issue was a request for a declaration that Mr. Mandel and Ms. Pike had never been controlling shareholders under section 97 of the *Courts of Justice Act* which allows for binding declarations of right, "whether or not any consequential relief is or could be claimed". The court declined to make this declaration. Mr. Mandel and Ms. Pike argued that they had not paid for the shares and the issuance of the shares was void because subsection 23(3) of the *Business Corporations Act* of Ontario requires payment before shares can be issued. The court noted that the application of subsection 23(3) is not simple in this situation. In this case the evidence was conflicting, and the corporate records indicated Mr. Mandel and Ms. Pike had paid for the shares. For instance, they had both signed director's resolutions saying that they had paid. They had both signed shareholders' agreements indicating that they were shareholders. The court also noted that there was no need to intervene from a justice perspective because there was no dispute within the corporations or inability to conduct their affairs. Furthermore, Mr. Mandel and Ms. Pike could still raise the issue of lack of payment before the Tax Court.

The third issue was the issue of rectification. Mr. Mandel and Ms. Pike sought an order rectifying the corporate records under section 250 of the OBCA. They also argued that this was distinct from equitable rectification. The court rejected that distinction, noting that no authority was given for the proposition and that a remedy may be incorporated in a statue without changing its nature or the relevant principles for its application. The court then turned to the SCC's judgement in *Fairmont*. The court noted that allowing parties to change the transaction into something different than originally intended would allow them to engage in impermissible retroactive tax planning. The court found that rectification was not available in this case because the corporate records did reflect what the parties intended and agreed at the time.

The four requirements for rectification from *Fairmont* are set out in paragraph 38 of the SCC reasons. They are that

(1) There was a prior agreement whose terms are definite and ascertainable,

(2) That agreement was still in effect at the time the instrument was executed,

(3) The instrument failed to accurately record the agreement, and

(4) That instrument, if rectified, would carry out the parties' prior agreement.

The court did not address these requirements explicitly. However, the reasons do indicate that the applicants were not able to establish that the legal documents failed to accurately record their agreements. The court found that the original agreements were that Mr. Mandel and Ms. Pike would acquire the Class B convertible shares. That is what the documents reflected.

There have been successful rectification applications since the *Fairmont* decision; however, this was not one of them. In order to succeed, it is necessary for the applicant to be able to show that all four elements of the test are met. Rectification corrects the instrument, not the agreement itself.

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