

STEP Inside

NEWSLETTER OF THE SOCIETY OF TRUST AND ESTATE PRACTITIONERS (CANADA)

page 9

**Bill C-15: Key Provisions
That Affect 2025 Tax**

page 12

Recent Developments in the Judicial Review
of Discretionary Decisions by Trustees

page 15

Treatment of Family Trusts
Under FATCA and CRS



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

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Editorial

One of the things I value most about *STEP Inside* is that it reflects real practice. Most of us do not spend our days on a single, tidy theme. Instead, we move between interpreting legislation, tax-filing realities, drafting risks, administration challenges, and the human situations that bring people to our work in the first place. This issue of *STEP Inside* embraces that reality. It is a true mixed medley, with practical takeaways for advisors across Canada, and a few reflections on where the broader landscape is heading.

A practical starting point for many readers will be the tax update on Bill C-15 by Matt Sharp. The article canvasses the provisions that will be most relevant in trust and estate work, including changes affecting subsection 164(6) planning for graduated rate estates, non-resident pipeline planning, further changes to the alternative minimum tax regime, and the evolving saga of bare trust reporting. Beyond the specific amendments in Bill C-15, the article underscores a broader point, namely, that uncertainty has real costs, and practitioners and clients need a dependable framework for planning and compliance.

This issue also includes an excellent discussion of trustee discretion by Scott Kerwin, which will be of interest to anyone advising trustees, executors, or beneficiaries. The article reviews recent developments in the judicial review of discretionary decisions and reinforces two familiar but important points: even broad discretion is not immune from supervision, and process matters. Courts continue to emphasize

process over outcome, and Kerwin notes that contemporaneous records of the trustee's decision-making process will be given greater weight than an after-the-fact reconstruction.

On the compliance side, Tony Zhang, Grace Pereira, and Alex Gall provide a timely refresher on how Canadian-resident family trusts are treated under FATCA and the common reporting standard, including who may be considered controlling persons for reporting purposes. As international information exchange regimes continue to mature, classification and self-certification questions are no longer niche. They can become urgent when a trust opens an account, changes its profile, or experiences a change of circumstances.

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This issue also highlights ongoing work within STEP Canada's committees. The Public Policy Committee update summarizes current projects touching digital wills, indexing within the *Income Tax Act*, obstacles to the use of powers of attorney within financial institutions, and contributions to STEP Worldwide work on beneficial ownership registers. The Tax Technical Committee update similarly canvasses initiatives that include a joint STEP/

CRA webinar on the voluntary disclosure program, a submission relating to part VI.1 tax, and consideration of issues affecting private foundations that may face excess corporate holding concerns. Together, these updates are a good reminder of the depth of work being done behind the scenes at STEP to improve clarity and outcomes for members and the profession.

As always, the May issue also celebrates education and emerging professionals. The education report highlights pathways to the TEP designation, including the STEP Canada Diploma and the essay program for experienced professionals, along with newer programming such as the Investment Basics for Fiduciaries cer-

tificate and the Certificate in Estate and Trust Administration program. The issue also recognizes recent student award winners and graduates—a reminder that STEP's strength depends not only on technical excellence, but also on support for the next generation across disciplines.

Our cross-country In the Headlines checkup rounds out the issue with jurisdiction-specific developments that are immediately relevant to daily

practice. British Columbia focuses on capacity, with a reminder of the drafting solicitor's heavy burden when capacity may be compromised. Alberta revisits validation and rectification of wills and the limits of what can be cured when formal requirements are not met. Saskatchewan highlights the importance of clear, contemporaneous documentation in joint ownership and express trust arrangements. Manitoba provides a useful primer on abatement and the order in which gifts are reduced when an estate is insufficient to satisfy its debts and expenses. Ontario considers a practical question about life estates and exclusive possession, while underscoring the risk of ambiguity in low-cost planning. Prince

Edward Island summarizes significant changes to the province's substitute decision-making legislation, which came into force in November 2025. Newfoundland and Labrador considers a significant shift for common-law spouses, following *McCarron v. Bartlett Estate*. To round things out, the international section offers a concise look at selected UK Budget 2025 measures, which will be of interest to advisors with clients who have UK connections.

We look forward to connecting with many of you in Toronto for STEP Canada's 28th National Conference on Monday, June 1 and Tuesday, June 2, 2026 at the Sheraton Centre Toronto Hotel. In-person registration is now full and has closed, and those hoping for

cancellations can join the waiting list by emailing memberservices@step.ca. If you cannot attend in person, you can register for online on-demand access, which will be available starting Monday, June 8. There will be no live streaming on June 1 or 2. On-demand access provides all 19 sessions and up to 22.50 hours of CPD or CE, including the keynote address and the STEP Canada/CRA Roundtable.

Thank you to all authors and contributors for sharing their time and expertise, and to Janis Armstrong and the editorial team for bringing another rich issue together. We hope you enjoy this edition of *STEP Inside*, and we look forward to connecting with you in June.



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PUBLIC POLICY COMMITTEE (PPC)

Mandate: The committee provides thought leadership and direction on national and regional issues relating to tax, estates, wills, trusts, incapacity, and estate planning that are of importance to STEP Canada members and their clients. The PPC also liaises with the STEP Worldwide Public Policy Committee (SWW PPC) to ensure that there is a coordinated approach with the public policy initiatives undertaken by the SWW PPC.

Current PPC Projects & Initiatives

Digital Wills

The PPC is developing a cross-Canada spreadsheet that identifies, for each province, whether electronic wills are recognized for probate and resealing. The analysis includes consideration of conflict-of-laws issues such as direct recognition of electronic wills, the treatment of grants from provinces that do recognize electronic wills, and any indirect routes to recognition (for example, substantial compliance).

Indexing

The PPC is reviewing whether particular amounts set out in the *Income Tax Act* have been indexed to inflation, and is analyzing whether there are patterns/themes across Act provisions. This project will culminate in a submission to the government.

Powers of Attorney

The PPC is studying obstacles to the use of powers of attorney within financial institutions, particularly with respect to inconsistencies in verification requirements among institutions.

Contribution to SWW PPC Committee

The STEP Worldwide Public Policy Committee is currently looking at the issue of legitimate interest in the context of beneficial ownership registers globally. The PPC has contributed information at the provincial and federal levels for inclusion in the STEP Worldwide report.

TAX TECHNICAL COMMITTEE (TTC)

Mandate: The committee monitors tax legislation and case law for developments and outcomes that are relevant to trust and estate practice across Canada, maintains good working relationships with various government or other officials who are influential in STEP Canada’s achieving its noted objectives, and where appropriate makes submissions to the government. The TTC also provides educational updates to STEP Canada members on new tax matters affecting trust and estate professionals and their clients.

Current TTC Projects & Initiatives

Joint STEP-CRA Webinar on the New Voluntary Disclosure Program

The CRA has agreed to jointly present with the TTC on its new voluntary disclosure program on June 18. The new voluntary disclosure program is significantly more lenient and will be useful to many private businesses and trusts/estates across Canada.

Part VI.1 Tax Submission

Part VI.1 tax was introduced around 1987 to curb tax-advantaged financing using preferred shares. Due to the broad drafting of the rule, part VI.1 tax often arises in private business

reorganizations, post mortem planning, and charitable giving situations—contexts unrelated to the financing arrangements that the rule was intended to target. While “self-help” options exist, such as managing dividends to stay under the dividend allowance limit and using specified amount shares, these methods are often not accessible to families and private businesses without highly specialized advisors. The TTC is preparing a submission to the Department of Finance to highlight these concerns and propose that part VI.1 tax not apply to these private family and business scenarios.

Private Foundation Excess Corporate Holding Rules

Rules in the *Income Tax Act* prohibit a private foundation from holding excess shares in a corporation, and these rules could potentially be triggered even before the foundation receives the shares outright if they are a beneficiary of a trust or estate. Non-compliance may have very onerous consequences. The TTC is considering whether a submission on this issue will be worthwhile.

Current PPC & TTC Joint Projects and Initiatives

Life Interest Trust Submission

Life interest trusts (alter ego and joint spousal/common-law partner trusts) are widely used as substitutes for wills, yet their post-death tax treatment is significantly harsher than that of graduated rate estates. STEP Canada believes that there is no policy rationale for this disparity. A comprehensive submission, drawing on practitioner and academic perspectives, is being planned to advocate for alignment and simplification of the *Income Tax Act*.

Education at STEP Canada

The Next Generation of TEPs

STEP Canada's educational programs are more than just career development opportunities; they are an investment in the future of our profession. As a STEP member, you understand the value of specialized knowledge in trusts and estates. By identifying and encouraging skilled colleagues to enrol in STEP Canada's programs, you help strengthen your team, elevate industry standards, and enhance the recognition of the TEP designation.

STEP Canada Diploma in Trusts & Estates: The Leading Pathway to TEP

The **STEP Canada Diploma** is the most common pathway to the TEP designation, with nearly 90 percent of new TEPs choosing this route. Designed

to provide a well-rounded foundation, the program balances self-paced study with engaging live-virtual sessions, case studies, and networking opportunities.

This program is ideal for professionals looking to deepen their knowledge in:

- ✓ trust law
- ✓ taxation of trusts
- ✓ estate administration
- ✓ trust and estate planning

Recognizing Experienced Professionals: The STEP Canada Essay Program

For seasoned professionals with at least five years of recognized post-qualification industry experience, the STEP Canada Essay Program provides an alternative route to earning the TEP designation.

If you work alongside experienced practitioners who could qualify, consider recommending this pathway. The program is designed for those who already demonstrate significant expertise in the field and are ready to showcase their knowledge through a series of academic papers.

Supporting All Facets of the Industry: Excellence in Estate and Trust Administration

The **Certificate in Estate & Trust Administration (CETA)** program serves as the cornerstone of success for roles within the field of estate and trust administration. If you know individuals who would benefit from foundational education in estate administration, encourage them to explore this program, which was designed for estate administrators, trust officers, and paralegal professionals.

The CETA program is now available on-demand.

Who in Your Professional Network Is Ready for the Next Step?

As a member of STEP Canada, you've seen first-hand the impact of our education programs. Now, we encourage you to help identify the next generation of trust and estate professionals. By guiding talented individuals toward the right educational pathway, you contribute to the strength of your team and the broader profession. Connect with us at education@step.ca for more information on any of our educational programs.

NEW CERTIFICATE PROGRAM FOR CURRENT AND ASPIRING TEPs

The new **Investment Basics for Fiduciaries** certificate is now available. This program is delivered online and on-demand for maximum flexibility. The four program elements are designed for trust and estate professionals who would benefit from essential investment knowledge for administering estates and trusts and managing the financial affairs of incapable persons.

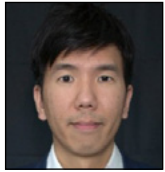
By linking investment fundamentals to real-world fiduciary decision making, this program equips professionals to navigate their responsibilities with confidence and compliance.

- ✓ *Fiduciary roles and responsibilities.* Master the key duties of executors, trustees, and decision-makers for incapable clients.
- ✓ *Investment fundamentals.* Develop a foundation in investment principles tailored to fiduciary management.
- ✓ *Legal and tax considerations.* Understand the legal and tax framework that guides fiduciary investment decisions.
- ✓ *Real-world case studies.* Apply your knowledge to practical fiduciary scenarios for informed, responsible decision making.

Award Winners 2025

Award for Academic Excellence— Law of Trusts

Felix Yee



Felix currently works for Royal Trust as a tax officer within the wealth management team, where his primary focus is on T3 tax preparation and trust compliance. Having worked in the field for the past three years, Felix has seen the importance of having a thorough understanding of trust law in order to safeguard a family's legacy and handle challenging fiduciary duties. This practical experience motivated him to further specialize in the legal frameworks governing trusts, leading to this recognition from STEP Canada. The most fulfilling aspect of his work, in his opinion, is the ongoing chance to develop within the sector and close the gap between the legal nuances of trust administration and technical tax requirements. Felix looks forward to continuing his professional growth within the Canadian trust and estate community.

Award for Academic Excellence— Taxation of Trusts & Estates

Jason Lau



Jason is an accountant with over eight years of experience in corporate and personal tax planning. He earned his bachelor of commerce in accounting (honours) from MacEwan University in 2014, graduating with distinction. Jason obtained his chartered professional accountant designation in 2018 and completed CPA Canada's In-Depth Tax Program in

2021. Currently, Jason is a tax advisor at Moodys Tax Law in Calgary, where he focuses on translating complex tax legislation into solutions for clients.

Award for Academic Excellence— Wills, Trust & Estate Administration

Mallory Arnott

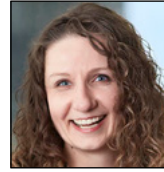


Mallory is an estate and trust consultant with Scotiabank in Nova Scotia, drawing on over a decade of legal experience in estate planning, probate administration, and family law. She prides herself on guiding clients through complex and often emotional matters with clarity, empathy, and practical solutions tailored to each individual's unique circumstances.

Mallory earned her JD from the Schulich School of Law at Dalhousie University in 2014 and graduated from St. Francis Xavier University in 2008, where she received a bachelor of science with an advanced major in biology. Following law school, she articulated with a boutique litigation firm in Toronto and was called to the bar in both Ontario and Nova Scotia in 2015. She is grateful to have returned home to Nova Scotia to build her career, start a family, and serve her community through her extensive volunteer work. She practised primarily family law and wills and estates for almost a decade, with successful appearances at the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal.

Award for Academic Excellence— Trust & Estate Planning

Stephanie D. Boldt



Stephanie is a tax partner with PwC Canada's High Net Worth group. She brings over 15 years of experience working with business owners, their families, and their executives, creating plans and organizational structures for today that support their vision for the future. With a wide range of experience in providing tax advice to private companies with operations in Canada and beyond, she develops detailed tax strategies specific to the needs of each family. Stephanie's areas of specialization include estate and succession planning, acquisitions, divestitures, corporate reorganizations, philanthropy, tax accounting, and compliance matters, as well as dealing with Canadian taxation authorities.

With her roots firmly grounded in the farmlands of Saskatchewan, good work ethic and logic are the foundation to Stephanie's approach to work and life. Although she now calls Edmonton home, Stephanie enjoys getting to travel across Canada working with clients in various provinces and territories. Stephanie is also passionate about giving back to the community and has volunteered on numerous boards over the last 20 years in a variety of roles including treasurer and president.

The Gerald Owen Book Prize

Conner Robert Jolicoeur



Conner is the vice president, finance at The Augusta Group, a Toronto-based single-family office serving a multi-generational ultra high net worth family. In this role, he delivers integrated tax, accounting, and wealth management solutions across a sophisticated structure of investment holding companies, family trusts, and charitable foundations.

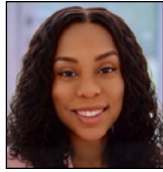
He plays a central role in the family's asset management strategy, estate and succession planning, and the design of corporate structures aligned with long-term wealth preservation and family governance objectives. Conner also oversees the family office's accounting operations, tax compliance, philanthropic planning, and investment reporting functions.

Prior to joining The Augusta Group, Conner was a senior manager in the private enterprise practice at KPMG, where he advised owner-managed and family-operated businesses across diverse industries.

Conner is an active member and volunteer with CPA Ontario's Indigenous Member Network, which is dedicated to mentoring and advancing Indigenous representation within the accounting profession.

The STEP Canada Scholars Award for Best Essay

Luana Carvalho Ribeiro



Luana Carvalho Ribeiro is a trusts and estates practitioner with over a decade of experience advising financial institutions and ultra high net worth families on complex cross-border wealth structuring. She is a dual-qualified attorney admitted in New York and Brazil and holds an LLM from the University of Toronto, with additional post-graduate studies in international business law from Brooklyn Law School.

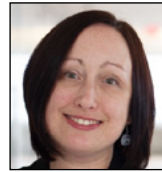
Luana's practice focuses on the structuring, implementation, and governance of trusts established for long-term wealth preservation and generational succession. She advises trustees, fiduciary institutions, and families on discretionary and fixed trust structures, trustee powers and duties, fiduciary decision making, and family governance considerations.

In her work with financial institutions and fiduciary service providers, Luana has led the structuring and implementation of trusts designed to hold diversified family wealth across financial portfolios, private investments, and luxury assets. Her experience includes reviewing and drafting trust deeds, letters of wishes, trustee

resolutions, and related governance documentation, and advising trustees on fiduciary administration and the ongoing management of complex trust structures.

CETA Program Award

Amanda Guthrie



Amanda grew up in Montreal and graduated from McGill University in 2003, but it was only after

moving to Halifax in 2005 that she stepped into the legal field, first as a receptionist and then successively as a foreclosure paralegal and an estates and trusts paralegal. Amanda quickly learned that estate planning and estate administration is where her passion lies. She is a senior estates and trusts paralegal in the Halifax office of McInnes Cooper. She enjoys drafting various estate-planning documents, including inter vivos trusts, documents required for probate, and materials to be filed in connection with applications under the *Adult Capacity and Decision-Making Act*. In recent years, as the assets that people own and their family dynamics have become increasingly complex, Amanda has found that the CETA program has equipped her with a deep body of knowledge that is crucial when navigating these more complicated situations.

CONGRATULATIONS TO OUR 2025 GRADUATES

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Bill C-15: Key Provisions That Affect 2025 Tax

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2025 was a period of difficulty in the Canadian tax community, as certain proposed but not enacted legislation led to significant challenges in both client planning and the completion of tax returns. The now-abandoned changes to the capital gains regime resulted in delayed software releases, delayed income slips from financial institutions, and an overall increase in complexity for taxpayers and their advisors.

Tax planning and compliance for estates and trusts in Canada require legislative certainty. While qualified tax practitioners work within the framework of the law, enacted legislation is required to develop authoritative interpretations and, critically, to comply with them. Much of 2025 and 2026 has therefore been a period of uncertainty for the tax community, as practitioners waited for key legislation to pass.

On March 26, 2026, Bill C-15, the *Budget Implementation Act, 2025, No. 1*, received royal assent, making certain long-awaited tax provisions the law of the land. While passage was welcome, it was still very late in the season given that filings for December trusts with a December year-end would be due only five days later. Certain changes that materially impacted the tax season are discussed herein.

Estate Loss Carryback

Subsection 164(6) of the *Income Tax Act* (RSC 1985, c. 1 (5th Supp.)) (“the

Act”), has historically allowed a net capital loss incurred by a graduated rate estate (GRE) to be carried back and applied against the final personal tax return of the deceased. The legislative intent of this provision is to address situations where assets decline in value after death, such that tax paid on a deemed disposition may exceed the realizable value of the assets.

This provision historically required a high degree of urgency on the part of the personal representatives of a GRE, as only one taxation year was available to identify assets, obtain the authority to manage them, and initiate liquidation. Real estate, private corporation shares, and assets located in foreign jurisdictions are often difficult to liquidate within this timeframe. These challenges are compounded where estates are subject to legal disputes.

Recent amendments to subsection 164(6) extend this period from one taxation year to three taxation years. This aligns with the GRE regime, which allows an estate to access graduated marginal tax rates for up to three years

following the individual’s death. This change is effective for deaths occurring on or after August 12, 2024, and provides welcome relief to estates that remain under administration.

An additional positive development is the Canada Revenue Agency’s indication that a new prescribed form will be introduced to facilitate the subsection 164(6) election. Previously, the election required the filing of an amended final personal tax return along with supporting documentation, further lengthening an already burdensome process.

Estate representatives should remain mindful of the strict reporting requirements associated with subsection 164(6) and should confirm the timing of any resulting tax refunds with their tax and legal advisors. Care must also be taken to preserve GRE status throughout the entire three-year period, because certain transactions—such as contributions of property from persons other than the deceased—can result in the loss of GRE status and the denial of the subsection 164(6) relief.



Non-Resident Pipelines

It is increasingly common for estates to have beneficiaries who are non-residents of Canada. In an increasingly globalized world, testators may not anticipate future changes in the residency of beneficiaries at the time their wills are drafted. As a result, it is often impractical to draft testamentary documents that fully anticipate all potential residency outcomes.

Private corporation shares can further complicate post mortem planning. In many cases, it may be impractical or undesirable to liquidate a corporation under subsection 164(6), particularly where the corporation represents an active business that the next generation wishes to continue.

In these circumstances, the primary alternative to subsection 164(6) has been the post mortem “pipeline.” A pipeline transaction uses the deemed disposition capital gain arising on death as a mechanism to extract corporate surplus. Typically, the estate sells the shares of the operating company to a newly incorporated company in exchange for a promissory note or high paid-up capital shares, allowing corporate surplus to be distributed to the estate with minimal additional tax.

Pipeline transactions are complex and require careful planning and execution. Tax advice should be obtained both before and after implementation, since any deviation from Canada Revenue Agency administrative policy can result in the proceeds being recharacterized as taxable dividends, leading to permanent double taxation. These transactions should not be undertaken lightly.

Prior to Bill C-15, non-resident beneficiaries posed additional challenges for pipeline planning, as a portion of the proceeds distributed to them

could be deemed a dividend under subsection 212.1(1) of the Act. This dividend treatment generally attracts withholding tax of at least 15 percent, potentially reducing a non-resident beneficiary’s inheritance and creating mismatches in foreign tax credit availability in the beneficiary’s country of residence.

Amendments to paragraph 212.1(6)(b) address this issue by exempting GREs from the application of subsection 212.1(1). This change is

It is increasingly common for estates to have beneficiaries who are non-residents of Canada. In an increasingly globalized world, testators may not anticipate future changes in the residency of beneficiaries at the time their wills are drafted.

effective for deaths occurring on or after February 26, 2018. The Canada Revenue Agency has indicated that where withholding tax was paid by a GRE after that date, a refund may be requested, provided that the transaction occurs within the three-year GRE designation period.

While this amendment is welcome, it may not fully address the challenges posed by estate litigation, as three years may still be insufficient to complete a pipeline transaction where disputes arise. Accordingly, it remains best practice to discuss these planning options with clients during their lifetimes to identify potential risks and allow for accelerated post mortem implementation where appropriate.

Alternative Minimum Tax

Bill C-15 also introduces further changes to the alternative minimum

tax (AMT) regime. AMT is intended to ensure that a minimum level of tax is paid by individuals and certain trusts that benefit from preferential tax treatment. Significant AMT changes were introduced for 2024, expanding its application to a broader group of taxpayers. Corporations remain excluded from the federal AMT regime.

Income calculated for AMT purposes differs from ordinary income tax calculations. Key differences include the inclusion of capital gains

at 80 percent (rather than 50 percent) and the limitation of interest expense deductibility to 50 percent where the interest relates to earning investment income. Individuals with income below \$177,882 are generally exempt from AMT, with this threshold indexed annually.

Bill C-15 further limits the deductibility of investment management and administration (IMA) fees to 50 percent for AMT purposes. Given that many investment managers charge fees based on assets under management, this change is expected to significantly expand the number of taxpayers subject to AMT. Capital gains and IMA fees are likely to be among the most common AMT adjustments.

These changes pose particular challenges for inter vivos trusts established for family wealth planning. Trusts do not benefit from the individual AMT

exemption threshold and are therefore subject to AMT analysis annually. Many such trusts are capitalized with prescribed rate loans and incur both interest expense and IMA fees. Historically, these trusts may have paid little or no tax where income was fully allocated to beneficiaries; however, under the revised AMT rules, differences between regular taxable income and AMT income may result in AMT liability.

Trustees may need to assess whether it is preferable to retain income, alter the income mix, or simply pay the AMT. The optimal approach will depend on the specific circumstances of each trust, and no universal solution should be assumed.

AMT paid may be refunded within seven years if the taxpayer's regular tax payable in a subsequent year exceeds the AMT otherwise payable for that year. Proactive and flexible planning is required to ensure that AMT credits do not expire unused, particularly for trusts that may accumulate recurring AMT balances.

Bare Trusts

Bill C-15 also introduces further amendments to the reporting requirements for bare trusts. A T3 trust income tax and information return will generally be required for bare trusts with taxation years ending after December 30, 2026.

The Canada Revenue Agency previously announced administrative relief from bare trust reporting for the 2023 and 2024 taxation years and has indicated that it does not expect bare trust filings for the 2025 taxation year.

In addition to codifying the reporting regime, Bill C-15 introduces further exemptions. Notably, certain bare trusts with only individual trustees and beneficiaries, holding specified

assets with a fair market value below \$250,000 throughout the year, may be exempt from reporting.

Given the history of uncertainty surrounding bare trust reporting, it is reasonable to expect continued complexity and confusion throughout 2026. Many taxpayers may inadvertently create bare trusts without realizing it, and advisors should proactively discuss the updated requirements with their clients.

Underused Housing Tax

The underused housing tax (UHT) has been proposed to be eliminated for the 2025 taxation year. The UHT previously imposed a 1 percent tax on the fair market value of certain residential properties owned or controlled by non-Canadian citizens and non-permanent residents. Given the complexity of both the legislation and the prescribed forms, the proposed elimination of the UHT has been welcomed by the tax community.

While the tax is proposed to be eliminated for 2025, it remains in effect for the 2022, 2023, and 2024 taxation years. Taxpayers must still file the required returns for those years, where applicable, and pay any outstanding tax and penalties.

More Complexity to Come: Dividend Refund Suspension

The Department of Finance has released draft legislation that would significantly alter the dividend refund regime. The proposed rules, effective for taxation years beginning on or after November 4, 2025, would suspend corporate dividend refunds in situations involving staggered corporate year-ends.

Dividend refunds arise where a corporation pays certain types of

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dividends, typically resulting in a refund of part IV tax. Under the proposed legislation, dividend refunds would be restricted in cases where the payer and recipient corporations have different year-ends, subject to limited exceptions such as bona fide corporate reorganizations, acquisitions of control, or dividends paid to non-affiliated corporations.

These changes are complex and may affect common commercial structures involving corporations with differing year-ends. Additional challenges arise where trusts are shareholders, since trusts are deemed to allocate dividends on the last day of their taxation year, potentially creating timing mismatches irrespective of the actual dividend payment date or trustee resolutions.

Recent Developments in the Judicial Review of Discretionary Decisions by Trustees

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The use of “discretionary trusts,” or broad discretionary powers in wills and trust instruments, is ubiquitous in estate planning across Canada. It is not uncommon for trustees to be given “absolute” and “unfettered” discretion in relation to both dispositive and administrative powers. Such terms provide flexibility for future unforeseen events, and other benefits such as possible protection against matrimonial claims, addressing the situation of spendthrift beneficiaries, and mitigating tax liabilities.²

This article will highlight the challenges for trustees when exercising these discretionary powers (and properly documenting them) and review the developing law on when a court can interfere with a trustee’s exercise of discretion.

Scope of Discretionary Powers

The scope of a trustee’s discretionary power is derived from the trust instrument. The starting point of this analysis is the language of the trust instrument itself.³ The settlor of a discretionary trust

may provide criteria or guidelines in the trust instrument in regard to the exercise of discretion, or provide a non-binding letter of wishes to the trustees.⁴

Judicial Interference with Exercise of Trustee Discretion

It is well settled that, despite broad language in a trust instrument, a trustee’s “absolute” discretion can never oust the supervision of the courts.⁵ At the same time, the courts have always followed a general rule of non-interference. If the trustee has acted in good faith and within the bounds of his or her authority, a court will rarely interfere with the exercise of a trustee’s discretion, and will not replace the trustee’s judgment with its own pronouncement even if the court would have exercised the power differently.⁶

Over time, Canadian law has developed a number of factors that the courts will consider when reviewing a trustee’s exercise of discretion, which may be summarized as follows:

- the decision was motivated by bad faith or other improper purposes;
- the trustee failed to take relevant circumstances into account;
- the trustee took irrelevant circumstances into account;

- the trustee was motivated by matters against public policy;⁷
- the trustee seeks to achieve some “improper purpose” (a pursuit foreign to that for which the power was conferred);
- the trustee failed to turn his mind to the exercise of the discretion; and
- the trustee’s decision was arbitrary, as opposed to reasoned.⁸

In their text on the law of trusts in Canada, Waters, Gillen, and Smith summarized the overarching principles for judicial interference with a trustee’s discretionary decision as follows:

[T]he court will not intervene simply because the beneficiaries or any other complainants do not agree with the decision of the trustees in the exercise of their discretion. Nor will it intervene merely because it would not have come to the same decision itself. *The court will intervene, however, if ... the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision.*⁹

1 With editing by Eric Hoffstein of Fogler, Rubinoff LLP, Toronto.

2 Donovan Waters, “Using Discretionary Trusts in Estate Planning” (2012) 19:3 *Journal of International Trust and Corporate Planning* 161, at 161-62.

3 *Walters v. Walters*, 2022 ONCA 38, at paragraph 65; and *Pirani v. Pirani*, 2022 BCCA 65. On the importance of the settlor’s intention, see also *Saunders v. Halom* (1986), 8 BCLR (2d) 117 (CA).

4 Waters, “Using Discretionary Trusts,” supra note 1, at 174.

5 *Boe v. Alexander* (1987), 15 BCLR (2d) 106, 1987 CanLII 2596, at paragraph 20 (CA); aff’d (1985), 21 ETR 246, [1985] BCJ No. 160 (QL), at paragraphs 80-83 (SC) (cases omitted).

6 *Edell v. Sitzler* (2001), 55 OR (3d) 198, 2001 CanLII 27989, at paragraph 158 (Sup. Ct. J.); aff’d (2004), 187 OAC 189, 2004 CanLII 654 (CA); leave to appeal to SCC refused, [2004] SCCA No. 372 (QL).

7 See *Fox v. Fox Estate et al.* (1996), 28 OR (3d) 496, 1996 CanLII 779 (CA).

8 A comprehensive discussion can be found in *Walters v. Walters*, supra note 2, at paragraph 48.

9 Donovan W.M. Waters, Mark R. Gillen, and Lionel D. Smith, *Walters’ Law of Trusts in Canada*, 5th ed. (Thomson Reuters, online), at 18.IV (emphasis added).



Key Cases

Two leading cases in Canada involving private family trusts were written by Mr. Justice Cullity: *Banton v. Banton*¹⁰ and *Edell v. Sitzer*.¹¹

A subsequent Ontario case, *Martin v. Banting*,¹² is also a helpful illustration of these principles. The plaintiff (an object of two discretionary trusts) brought an action against the trustees (his uncle and mother) on the basis that insufficient provision had been made for him when the trusts were wound up and distributed. The trustees had considered issues such as the plaintiff's work ethic, integrity, and business practices when making their decisions. The court granted an application by the trustees to summarily dismiss the action. The court found that the trust documents gave a discretionary power of appointment to the trustees. There were no limiting criteria in the documents, and the considerations taken into account by the trustees were not irrelevant. The court further noted:

Whether the trustees' opinions of the plaintiff's character and conduct were objectively well

founded or not is not the issue in the action and is not an issue to be tried. The trustees, in exercising their discretion do not do so in a quasi judicial capacity and the court does not sit as a court of appeal upon the trustees' reasons for exercising their discretion the way that they did. The trustees have no obligation to give reasons in the first instance, and where no *mala fides* is shown, the court

It is not uncommon for trustees to be given "absolute" and "unfettered" discretion in relation to both dispositive and administrative powers. Such terms provide flexibility for future unforeseen events, and other benefits such as possible protection against matrimonial claims, addressing the situation of spendthrift beneficiaries, and mitigating tax liabilities.

will not interfere. Here, where the evidence is uncontradicted that the trustees held opinions as to matters which are not irrelevant to the discretion given its scope

under the terms of the trust, it matters not whether the opinions were objectively accurate.¹³

The leading decision in Canada on the issue of trustee discretion is now that of the Ontario Court of Appeal in *Walters v. Walters*.¹⁴ This decision contains a comprehensive discussion of the principles discussed above on the ability of courts to interfere with an exercise of trustee discretion.

The *Walters* case involved a common example of the exercise of a discretionary dispositive power by a trustee: whether to encroach upon the capital of the trust for the benefit of the income beneficiary.

Olive Walters established a testamentary trust in her will and named her husband, Gerald, as the income beneficiary. Her adult children were appointed as the trustees and remainder beneficiaries. The terms of the

trust provided the trustees with the "absolute" discretion to encroach on the capital for the benefit of Gerald to ensure his "comfort and well-being." The will-maker also expressed her

10 *Banton v. Banton* (1998), 164 DLR (4th) 176, 1998 CanLII 14926 (Ont. Sup. Ct. J.).

11 *Edell v. Sitzer*, supra note 5 (Sup. Ct. J.).

12 *Martin v. Banting* (2001), 37 ETR (2d) 270, [2001] OJ No. 510 (QL) (Sup. Ct. J.); aff'd (2002), 46 ETR (2d) 93, 2002 CanLII 13032 (Ont. CA).

13 *Ibid.* (Sup. Ct. J.), at paragraph 33; see also paras 25-26 and 29-32 for relevant commentary.

14 *Supra* note 2; varying 2021 ONSC 2695.



wish that Gerald's comfort and welfare would be the "first consideration" and that the trustees encroach on the capital to ensure Gerald's comfort and welfare.

Litigation arose due to the trustees' refusal to make such an encroachment on capital despite requests by Gerald. The trustees doubted whether their father needed such funds, as they understood that he had a net worth over \$1 million, and requested financial information from him to corroborate his claimed expenses. There was also peculiar evidence of a recording of "pocket dial" call, received by one of the trustees, in which Gerald is overheard telling the proprietor of a retirement home business that he would "sucker" his children into giving him more money, and being encouraged by the proprietor in quite vulgar language.

Gerald was successful in the first instance. He filed an affidavit stating that his net worth was only \$40,000 and that he was in need of the funds. The chambers judge held that the trustees had abused their discretion and taken

into account irrelevant factors such as their mistrust and dislike of their father. Further, the trustees could not demand that Gerald exhaust his own resources before any encroachment was made. The chambers judge ordered that there be a retroactive payment of approximately \$100,000 as well as a monthly allowance.

The Ontario Court of Appeal varied this order. It was held that the chambers judge erred in finding that trustees' distrust of Gerald and the retirement home proprietor was "irrelevant." The trustees needed to know that the capital encroachment would be applied for the proper purpose of Gerald's comfort and well-being. The relevance of Gerald's financial situation was more complicated. There is mixed case law on whether trustees can inquire into the financial circumstances of an income beneficiary in order to properly consider an encroachment, and the degree of such inquiries. Every case is fact-specific. The court held that the trustees could not be criticized for inquiring into this issue:

The starting point is that effect must be given to the testator's intentions as ascertained from the language of the will and surrounding circumstances. Trustees must therefore carefully examine the wording of the will or trust instrument. "The duty to consider all relevant matters has as its obvious corollary, a duty to make all necessary inquiries so that the trustee is adequately equipped to make a decision": Cullity, *Judicial Control of Trustees' Discretions*, at p. 116. Absent other direction in the will, I fail to see how a trustee can satisfy itself that payment of capital to the income beneficiary is necessary or advisable without considering the beneficiary's financial circumstances.¹⁵

In light of the "pocket dial" evidence, and other concerns about the retirement home proprietor, the trustees were justified in asking whether the capital encroachment would go toward the proper purpose of Gerald's comfort and well-being or would go toward "the improper purpose of lining the proprietor's pockets."¹⁶

In the end, the appeal turned on the evidentiary record. The undisputed evidence was that Gerald had a net worth of only \$40,000 and would be in dire financial need. It was therefore open to the chambers judge to infer that the refusal to encroach on capital was based on the trustees' dislike of their father. No reasonable trustee would refuse to exercise their discretion for an encroachment in such a situation.¹⁷

The Court of Appeal varied the order to reduce the retroactive arrears by half. It should be noted that the court

15 Ibid. (CA), at paragraph 65.

16 Ibid. (CA), at paragraph 72.

17 Ibid. (CA), at paragraph 76.

did not send this matter back to the trustees for consideration but (contrary to the principles stated above) effectively exercised its discretion in place of that of the trustees.

Trustees should be careful to properly record and document both the discretionary decision being made and the process that led to it. Although a trustee, at first instance, is not required to provide reasons for a discretionary decision, such reasons may become central to litigation brought by beneficiaries for breach of trust or breach of fiduciary duty. Contemporaneous records of the trustee's decision-making process will be given greater weight than an after-the-fact reconstruction.

Remedies for Beneficiaries

In contrast to trustee decisions that fall outside the scope of their powers (*ultra vires*), which are *void*, discretionary decisions that fall within the scope of the powers but are flawed for one of the reasons discussed above are *voidable* at the court's discretion. There may be equitable defences at play that must be considered.¹⁸

The general rule is that the exercise of discretion must be made by the trustee, as intended by the settlor, rather than by the court. This is consistent with the general principle found in estates cases that such responsibility cannot be shifted onto the court.¹⁹

If the court concludes that the trustee acted in breach of trust, the proper remedy is not for the court to substitute its own decision, but to refer the matter back to the trustees (or new trustees) with directions. These principles are discussed at length by the

Manitoba Court of Appeal in *Dinney v. Great-West Life Assurance Co.*²⁰

Judicial interference with the discretionary decisions of trustees may also lead to the outright removal of the trustee or executor. In *Clayton v. Clayton*,²¹ an Ontario court removed the trustees of a discretionary trust on

the basis of the principles discussed above (that is, making a decision that no reasonable trustee could make).

A trustee may also be liable in damages for an improper exercise of discretion. In the British Columbia case of *Wevill Estate*,²² the court focused on whether the trustee had met the requisite standard of care of a reasonably prudent person when making a discretionary decision. The standard includes consideration of whether prudent steps had been taken to gather the necessary information before making the decision, rather than whether the decision was voidable.

Taken together, these cases reflect several broader developments highlighted in recent decisions. First, courts continue to emphasize process over outcome: trustees are not judged on whether the court would have acted differently, but on whether the decision was made within the scope, purpose, and fiduciary framework of the discretion. Second, the concept of

"absolute discretion" is increasingly understood as a signal of deference, not immunity from review. Third, trustees are expected to actively turn their minds to relevant factors and to be able to demonstrate that they have done so.

The overarching lesson for trustees is clear: discretionary powers must be

If the court concludes that the trustee acted in breach of trust, the proper remedy is not for the court to substitute its own decision, but to refer the matter back to the trustees (or new trustees) with directions.

exercised deliberately, transparently, and with close attention to the terms and purposes of the trust. For beneficiaries, these cases confirm that while judicial oversight remains available, intervention will be exceptional and fact-driven rather than routine.

18 *Pitt v. Holt*, 2013 UKSC 26.

19 For example, *Davidson Estate v. Davidson*, 2021 BCSC 2631, at paragraph 9, citing *Re Fulford* (1913), 29 OLR 375, 1913 CanLII 515 (HC).

20 *Dinney v. Great-West Life Assurance Co.*, 2009 MBCA 29, at paragraphs 85-95.

21 *Clayton v. Clayton*, 2021 ONSC 5811.

22 *Nichols v. Central Guaranty Trust Co.* (sub nom. *Wevill Estate*) (1995), 13 BCLR (3d) 137, 1995 CanLII 259 (SC).

Treatment of Family Trusts Under FATCA and CRS

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The global landscape with respect to tax reporting and information exchanges between countries has greatly evolved, and this evolution has had an impact on entities in Canada, including those organized as trusts.

Trustees and their advisors should be aware of the obligations that trusts may have under part XVIII of the *Income Tax Act*¹ (“the Act”), which implements Canada’s international tax-sharing obligations (referred to herein as “FATCA”), and part XIX of the Act, which implements the common reporting standard (CRS).

When a trust has dealings with a Canadian financial institution (such as opening a bank account or investment account with a dealer or subscribing for units of an investment fund), the trust may be required under FATCA and CRS to provide the financial institution with certain information, and details about the trust and its financial account may also be reported to the Canada Revenue Agency (CRA).

This article will discuss the classification of Canadian-resident family trusts under FATCA and CRS, and it will also help the reader understand who the “controlling persons” of a family trust are under FATCA and CRS (including what obligations exist with respect to these controlling persons).

Background

What Is FATCA?

The United States is the only developed nation that taxes its citizens regardless of their residency. To combat perceived non-compliance with its tax laws, in 2010, the US government introduced the *Foreign Account Tax Compliance Act*.² The aim of the *Foreign Account Tax Compliance Act* was to compel non-US financial entities (such as Canadian banks, investment advisors, and investment funds) to identify financial accounts maintained directly or indirectly by “specified U.S. persons” as that term is defined for FATCA purposes, and report financial information related to those accounts to the Internal Revenue Service (IRS).

Under the *Foreign Account Tax Compliance Act*, these non-US financial entities would have been subject to a 30 percent withholding tax on US-source income such as interest, dividends, and gross proceeds if they failed to comply with these IRS reporting requirements. To address the US law’s extraterritorial reach and to avoid having Canadian financial institutions

enter into agreements directly with the IRS to provide the required information,³ Canada and the United States signed the *Intergovernmental Agreement for the Enhanced Exchange of Tax Information Under the Canada-US Tax Convention* (IGA) on February 5, 2014. After signing the IGA, Canada enacted its FATCA obligations in part XVIII of the Act, which generally imposes information-gathering obligations on Canadian financial institutions in respect of the financial accounts that they maintain (including consequences for non-compliance).⁴

What Is CRS?

On July 15, 2014, the Organisation for Economic Co-operation and Development (OECD) released the CRS, which draws heavily from the FATCA regime. The aim of the CRS is to help countries reduce tax evasion and improve tax compliance through mutual cooperation. Each country that is a party to the CRS imposes obligations under its domestic law requiring domestic financial institutions to identify and report financial accounts that have ties to a non-resident. The taxing authority of each signatory country receives returns filed by domestic financial institutions regarding such accounts and shares this information with the taxing authority of the non-resident. This allows the taxing authority of the non-resident to verify that the non-resident correctly reported their offshore income.

1 *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), as amended.

2 The law was enacted as chapter 4 of subtitle A to the US *Internal Revenue Code*, but the details of the FATCA regime were enacted as US Treasury regulations (sections 1471 through 1474).

3 Section 1471(1) of the *Internal Revenue Code*.

4 The *Agreement Between the Government of Canada and the Government of the United States of America to Improve International Tax Compliance Through Enhanced Exchange of Information Under the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital* was implemented by the *Canada-United States Enhanced Tax Information Agreement Implementation Act*, SC 2014, c. 20, section 99, and came into force on June 27, 2014.

On June 2, 2015, Canada signed the *Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information* and became a party to the CRS.⁵ As it did when it signed the IGA and enacted its FATCA obligations in part XVIII of the Act, Canada enacted its CRS obligations in part XIX of the Act in order to directly impose obligations on Canadian financial institutions with respect to the financial accounts that they maintain (and impose penalties for non-compliance).

The CRA issues guidance to help Canadian financial institutions, their advisors, and CRA officials understand the due diligence and reporting obligations relating to FATCA and CRS (“FATCA guidance” and “CRS guidance,” respectively; collectively, “CRA guidance”).⁶ Generally, the legislation and the CRA guidance for the two regimes are similar; however, there are instances where the FATCA and CRS regimes diverge.⁷

Classification of Family Trusts for FATCA/CRS Purposes

Unlike other international jurisdictions that have implemented FATCA and CRS regimes, Canada has adopted a narrower definition of what it means to be a financial institution that would

be subject to these due diligence and reporting obligations. More specifically, this narrower definition of a “listed financial institution” is contained in subsection 263(1) of the Act.⁸ The definition does not encompass a family trust. As noted in the CRA guidance, if an individual establishes a trust resident in Canada as a vehicle to hold financial assets for family estate-planning purposes in Canada, and the trust is settled with capital provided by that individual and it is not represented or promoted to the public, that trust is not a “listed financial institution” and therefore it is also not a Canadian financial institution with due diligence and reporting obligations under FATCA or CRS. Instead, a family trust is generally expected to be classified as a passive non-financial foreign entity (NFFE) for FATCA purposes and a passive non-financial entity (NFE) for CRS purposes.

Since family trusts are likely to be classified as passive NFE/NFFEs,⁹ when dealing with a financial institution,

they will generally be required to provide a self-certification in the form of an RC519 or similar document.

Controlling Persons of a Family Trust

For advisors of family trusts that are passive NFE/NFFEs, it is critical to know who the controlling persons of the family trust are. This information has to be reported to any financial institution that maintains an account for the family trust, and the financial institution then must make a determination using this information as to whether the account needs to be reported to the CRA.

The controlling persons of an entity are defined as the natural persons who exercise direct or indirect control over the entity.¹⁰ In the case of trusts, the CRA guidance interprets the controlling persons of a trust to include the settlors, trustees, protectors (if any), beneficiaries, and any other natural persons exercising ultimate effective control over the trust.¹¹ As noted in the

The global landscape with respect to tax reporting and information exchanges between countries has greatly evolved, and this evolution has had an impact on entities in Canada, including those organized as trusts.

⁵ Canada implemented the CRS regime through the addition of part XIX of the Act, which came into force on July 1, 2017.

⁶ Canada Revenue Agency, “Guidance on the Canada-U.S. Enhanced Tax Information Exchange Agreement” (<https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/enhanced-financial-account-information-reporting/reporting-sharing-financial-account-information-united-states/guidance-on-canada-s-enhanced-tax-information-exchange-agreement.html>) (“FATCA guidance”); and Canada Revenue Agency, “Guidance on the Common Reporting Standard” (<https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/enhanced-financial-account-information-reporting/reporting-sharing-financial-account-information-other-jurisdictions/guidance-on-common-reporting-standard-part-income-tax-act.html>) (“CRS guidance”).

⁷ Notably, on November 4, 2025, as part of the 2025 federal budget, the Department of Finance released a notice of ways and means motion to introduce a bill entitled *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on November 4, 2025*, which contains various legislative changes to the CRS. We anticipate that these changes will become effective January 1, 2027. Additionally, on December 19, 2025, the CRA revised the CRS guidance while the FATCA guidance has remain unchanged since April 2024.

⁸ The listed financial institution requirement is unique to Canada. In accordance with the OECD’s standard, family trusts created outside Canada are usually classified as financial institutions with due diligence and reporting obligations. See Organisation for Economic Co-operation and Development, *Standard for Automatic Exchange of Financial Information in Tax Matters: Implementation Handbook*, 2d ed. (Paris: OECD, 2018).

⁹ A family trust may also be an active NFE/NFFE. The term “active NFE” (for CRS purposes) is defined in subsection 270(1) of the Act, while subsection 263(5) of the Act provides that the term “active NFFE” (for FATCA purposes) has the meaning that is defined in, or assigned by, the IGA.

¹⁰ Subsection 270(1) of the Act, definition of “controlling persons.”

¹¹ CRS guidance, at paragraph 9.54. See also FATCA guidance, at paragraph 9.77.



CRA guidance, the term “controlling persons” is interpreted in a manner consistent with the Financial Action Task Force (FATF) recommendations¹² and how beneficial owners are identified in the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*¹³ (PCMLTFA), in particular, the ownership thresholds set by Canadian financial regulatory authorities.

When the original contributor to the trust (that is, the settlor under trust law) makes a contribution to the trust on its creation, they will be a controlling person of the trust in perpetuity. However, the CRA has taken the administrative position that, for CRS purposes, a natural person who makes an additional contribution to a trust after its creation could also be considered a controlling person of the trust, even though that person is not the settlor under trust law.¹⁴ The CRA relies on this position because the statutory definition of “controlling persons” for CRS purposes is non-exhaustive. Whether a subsequent contributor to a trust will be considered a controlling

person for CRS purposes is a question of law that needs to be considered in light of the facts of the particular trust. If the subsequent contributor makes a sizable contribution to the trust such that they could exercise “ultimate effective control over the trust,” they would be considered a controlling person for CRS purposes.¹⁵

A controlling person is a reportable person if they are a natural individual who is either a US citizen or a resident of the United States for FATCA purposes or a tax resident of a jurisdiction other than Canada for CRS purposes.¹⁶ According to the CRA guidance, a reportable person shall be treated as being a beneficiary of a trust if such person (1) has a right to receive or receives, directly or indirectly, a mandatory distribution from the trust; or (2) receives, directly or indirectly, a discretionary distribution from the trust (“discretionary beneficiary”).¹⁷ A contingent beneficiary will be treated similarly.

Since a discretionary beneficiary is considered a beneficiary of the trust for FATCA/CRS purposes only

in the calendar year in which a distribution has been paid or has been made payable to the discretionary beneficiary,¹⁸ financial institutions are required to do one of two things:

1. seek annual refreshment of the self-certification, which requires a family trust to recertify whether any members of the class of beneficiaries who have received distributions since the previous certification are discretionary or contingent; or
2. require the family trust, as a condition of holding the account and on an as-needed and timely basis, to provide a new certification when the trust has paid or made payable a distribution to a discretionary or contingent beneficiary.

Where a Family Trust Controls a Passive NFE/NFFE

If a controlling person of a passive NFE/NFFE is an entity such as a family trust, then, for the purposes of determining the passive NFE/NFFE’s controlling persons, the financial institution has to look through the chain of control or ownership of any such entity to identify the natural persons who are controlling persons of the entity. A common example of this would be a holding corporation that is a passive NFE/NFFE where control or ownership of the corporation lies with a family trust—that is, the family trust directly or indirectly owns or controls 25 percent or more of the holding corporation. In such circumstances, the financial institution

¹² According to the FATF, the recommendations are an international standard that set out a comprehensive and consistent framework of measures that countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction. See Financial Action Task Force, *The FATF Recommendations* (<https://www.fatf-gafi.org/en/topics/fatf-recommendations.html>).

¹³ *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c. 17.

¹⁴ CRA document no. 2023-097036117, “Interpretation of the ‘Controlling Persons’ Definition,” June 10, 2025. See also Yves Moreno and Stéphane Prud’Homme, “Canada Revenue Agency Round Table,” in *Report of Proceedings of the Seventy-Fourth Tax Conference, 2022 Conference Report* (Toronto: Canadian Tax Foundation, 2023), 4:1-30, question 10, at 4:17-21.

¹⁵ *Ibid.*

¹⁶ Subsection 270(1), definition of “controlling persons.” For FATCA, see articles 1(1)(ee) and (ff) of the IGA.

¹⁷ CRS guidance, at paragraph 9.54. See also FATCA guidance, at paragraph 9.76.

¹⁸ *Ibid.*

would require similar controlling person information on the family trust in order to identify reportable persons.

Change of Circumstances

Unlike IRS W-forms that are used for US withholding tax purposes, there is no expiry date on a FATCA/CRS self-certification. A self-certification remains valid until there is a change of circumstances that causes the financial institution to know or have reason to know that the original self-certification is incorrect or unreliable. An example of a change in circumstance is where the controlling persons of a trust change—for example, if a discretionary beneficiary ceases to be a controlling person because a distribution was not paid or made payable to it in the current year as compared to the previous year.

Penalties Associated with Non-Compliance

Financial institutions that are subject to Canadian FATCA/CRS should not open up any accounts without obtaining a valid self-certification. Any non-compliance with this requirement will subject the financial institution to an aggregate \$5,000 penalty per account (\$2,500 per regime). Financial institutions with reportable accounts are required to file returns with the CRA before May 2 following the calendar year to which the information return applies. Information returns that are late-filed or not filed are subject to further penalties, and any financial institution that fails to provide any information required on an information return is liable to a penalty of \$100 for each such failure under subsection 162(5) of the Act, unless the financial

institution made reasonable efforts to obtain the information from the account holder.

Family trusts that fail to provide a self-certification when requested at account opening or upon a change in circumstance should be aware that one of the manners in which the CRA will exercise its discretion not to impose such penalties on the financial institutions is where the institutions have taken timely “effective measures” to obtain the missing information. To date, the only examples of such measures provided in the CRA guidance are the closure or freezing of accounts. Although such effective measures have not been common, they could become more usual with the uptick in CRA audit activity. Trustees are therefore cautioned to not ignore requests in relation to FATCA/CRS compliance.



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DOCUMENTING POTENTIALLY COMPROMISED CAPACITY: A HEAVY BURDEN

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Testamentary capacity does not require a particularly high level of mental acuity compared to the mental capacity required to complete many other tasks. The “testator must have a baseline level of mental acuity sufficient to appreciate judicially delineated components of the nature and effect of the testamentary act” (*Laszlo v. Lawton*, 2013 BCSC 305). However, the testator need not necessarily be capable of managing their finances or person, and someone who has been diagnosed with impairment of cognitive functioning may nevertheless be capable of making a will.

Conversely, the bar that estate planners must aim to meet in assessing and documenting evidence of testamentary capacity is particularly high, as was highlighted by the Honourable Madam Justice Francis in *Lavictoire v. Schwarz* (2025 BCSC 2565). While the

outcome of *Lavictoire* may not surprise estate planners, the Justice Francis’s comments are a jolting reminder of the heavy burden that estate planners bear. *Lavictoire* centred on the will (“the 2012 will”) of Ms. Zofia Rymgaillo, which

1. was created with the involvement of Ms. Rymgaillo’s niece, Krystyna Huitema, who was one of Ms. Rymgaillo’s beneficiaries;
2. was created in 2012 after Ms. Rymgaillo was diagnosed with dementia and shortly after her granddaughter commenced a committee ship petition seeking control of Ms. Rymgaillo’s person and finances; and
3. resulted in a significant departure from the distribution that would follow from her previous will (“the 2006 will”).

Ms. Rymgaillo’s 2006 will left the entirety of her estate to her two sons. Her two sons predeceased her, and the 2006 will did not contemplate who would benefit as a result. Therefore, the 2006 will would result in her estate being divided equally between her granddaughters pursuant to the rules of intestacy.

However, shortly after Ms. Rymgaillo’s granddaughter commenced the committee ship application, Ms. Huitema contacted a solicitor to arrange an appointment for Ms. Rymgaillo to update her 2006 will. Ms. Huitema informed the solicitor that Ms. Rymgaillo’s main asset was her home, and Ms. Huitema acted as an interpreter during the meeting. The solicitor deposed that he reviewed Ms. Rymgaillo’s family tree with her and confirmed that she could name beneficiaries, identify living family members, and verify assets. He also completed a “master information sheet” as a record of that meeting, which included a four-point checklist entitled “Testamentary Capacity Assessment.” The solicitor prepared a draft of the 2012 will that distributed Ms. Rymgaillo’s estate in six equal shares among her sister, nieces, and granddaughters. He then arranged for his colleague to meet with Ms. Rymgaillo to review that draft in her native language. Ms. Rymgaillo executed the 2012 will only after this colleague read the entire 2012 will to her, stopping after each paragraph to ask whether she understood what he had read.

Despite these steps and the fact that the solicitor’s colleague was comfortable that the deceased understood and confirmed the terms of the 2012 will, the court was critical of the solicitor’s interactions with Ms. Rymgaillo and his record of their interactions. The court criticized the fact that the solicitor did not have a record of Ms. Rymgaillo’s assets other than her home. The court also criticized his reliance on questions that could be answered with a “yes” or “no,” noting the importance of open-ended questions to demonstrate testamentary capacity. The court stated that the four-point checklist entitled “Testamentary Capacity Assessment” did not correspond to the common-law test for testamentary capacity. The court expressed concern that Ms. Rymgaillo did not ask any questions when the 2012 will was read to her, and neither the solicitor nor his colleague asked Ms. Rymgaillo to explain the terms of the 2012 will back to them. Despite being aware of the 2006 will, the solicitor did not discuss it with Ms. Rymgaillo and so could not assess whether she appreciated the consequences of replacing it with the 2012 will. Furthermore, the solicitor could not be certain that the instructions regarding disposition of Ms. Rymgaillo’s estate originated from Ms. Rymgaillo or if they originated from Ms. Huitema and were merely confirmed by Ms. Rymgaillo in the presence of Ms. Huitema.

The court’s decision included a reminder that “[a] solicitor cannot discharge his duty by asking perfunctory questions, getting apparently rational answers, and then simply recording in legal form the words expressed by the

client” (*Friesen v. Friesen Estate* (1985), 33 Man. R. (2d) 98). A drafting solicitor bears a heavy burden, and this case serves as a reminder that, especially when capacity may be compromised, maintaining comprehensive notes to record how a will-maker’s understanding was explored can be crucial in proving the validity of their will.

REVISITING THE VALIDATION AND RECTIFICATION OF WILLS

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In 2025, the Alberta Court of King’s Bench in *Smith Estate (Re)*¹ had an opportunity to review and confirm the law in Alberta on the validation or rectification of wills that do not comply with the formal requirements for validity set out in the *Wills and Succession Act*² (WSA). While the decision does not depart from previous case law, it reminds the reader that there are significant differences between the laws of Alberta and the laws of the other provinces on this subject, and it invites comparison to the relatively new dispensing provisions now in force in Ontario.

In *Smith Estate*, Justice D.A. Labrenz was presented with nine successive purported wills of the deceased Mr. Smith and asked to exercise the court’s powers of validation and/or rectification under sections 37 and 39 of the WSA, respectively, to cure various deficiencies in the execution of the purported wills. The first five purported wills were signed by Mr. Smith

...it reminds the reader that there are significant differences between the laws of Alberta and the laws of the other provinces on this subject.

in the presence of a single witness. Those wills therefore failed to meet the requirement under section 15 of the WSA that a testator must make or acknowledge his or her signature on a will in the presence of two witnesses, both of whom must be present at the same time and must sign the will in the testator’s presence. The sixth and seventh purported wills were actually copies of the fifth, with various handwritten changes noted; neither was re-signed by Mr. Smith. The eighth and ninth purported wills were new documents, but again neither was signed by Mr. Smith. Accordingly, in addition to lacking the necessary witnesses, purported wills six through nine were also deficient under section 14 of the WSA, which stipulates that a valid will must be made in writing, “must contain a signature of the testator that makes it apparent on the face of the document that the testator intended, by signing, to give effect to the writing in the document as the testator’s will,” and must comply with the additional formalities required by section 15, 16, or 17 of the WSA or be validated by the court under section 37 of the WSA.³

Justice Labrenz confirmed that purported wills one through five could be validated under section 37 of the

1 *Smith Estate (Re)*, 2025 ABKB 4.

2 *Wills and Succession Act*, SA 2010, c. W-12.2.

3 One of the applicants argued that the sixth and seventh purported wills met the requirement of being signed by the testator based on the presence of Mr. Smith’s photocopied signature from his earlier execution of the fifth purported will. This argument was rejected by Justice Labrenz, who found that there was no apparent reason why Mr. Smith could not have re-signed these purported wills when he made the handwritten changes.

WSA, which permits the validation of a will that does not meet the requirements of sections 15 to 17 of the WSA “if the Court is satisfied on clear and convincing evidence that the writing sets out the testamentary intentions of the testator and was intended by the testator to be his or her will.” However, purported wills six through nine could not be validated because they were not signed by Mr. Smith as required under section 14 of the WSA, which section 37 does not reference and therefore cannot cure. Justice Labrenz also concluded that those purported wills could not be rectified under section 39 of the WSA because section 39(2) states that the court’s rectification power “applies to the omission of the testator’s signature only if the Court is satisfied on clear and convincing evidence that the testator (a) intended to sign the document but omitted to do so by pure mistake or inadvertence, and (b) intended to give effect to the writing in the document as the testator’s will.” In this case, there was no evidence that Mr. Smith intended to sign any of the unsigned wills and that his failure to do so was inadvertent. As a result, the fifth purported will, as validated by the court, was held to be Mr. Smith’s last will.

In reviewing the leading cases on the extent of the court’s validation and rectification powers under the WSA,⁴ Justice Labrenz reiterated that Alberta’s legislative scheme differs from those of other provinces, noting that the dispensing power granted to the courts of British Columbia is “much broader.”⁵ Alberta’s legislative approach represents “a middle position between jurisdictions like Manitoba, which permit a

writing to be recognized as a will notwithstanding the lack of the deceased’s signature, and jurisdictions like Prince Edward Island that require a signature in all cases.”⁶ While not discussed in the *Smith Estate* decision, it is noteworthy that a significant amendment to Ontario’s *Succession Law Reform Act*⁷ (SLRA) created a new validation power in 2022. Previously, the SLRA required strict compliance with the required formalities for wills (that is, the court could not validate a non-compliant will in any circumstances). Under new section 21.1 of the SLRA, the court can now validate as a will “a document or writing that was not properly executed or made under [the SLRA]” if it is satisfied that such document or writing “sets out the testamentary intentions of a deceased.” It will be interesting to see whether these aspects of the WSA will similarly become more permissive in the future. Unless and until that happens, the interpretation of Alberta’s existing legislation appears to be clearly settled.

CLARIFYING EXPRESS TRUST FORMATION IN JOINT TENANCY ARRANGEMENTS: AN ANALYSIS OF *BOIRE V. BOIRE*

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Using joint tenancy as an estate-planning tool in Saskatchewan has traditionally carried significant risk. Under the Torrens land registry system, Saskatchewan courts have held that

the presumption of resulting trust does not apply to gratuitous land transfers. Once an owner transfers title, the transfer is generally final unless all registered owners agree otherwise. A recent decision from the Saskatchewan Court of King’s Bench confirms that a properly documented express trust can override this limitation by establishing the transferor’s continuing beneficial ownership.

Previous Case Law in Saskatchewan

In *Dunnison Estate v. Dunnison* (2017 SKCA 40), the Saskatchewan Court of Appeal held that the presumption of resulting trust is consistent with *The Land Titles Act, 2000* (SS 2000, c. L-5.1) (LTA). The LTA provides that a transfer is an absolute transfer of all rights and interests without limitation unless a contrary intention is expressed or words of limitation are used, and a certificate of title is conclusive evidence of ownership. As a result, gratuitous land transfers were typically viewed as irrevocable.

This was further confirmed by the Saskatchewan Court of Queen’s Bench in *Stubbings v. Stubbings* (2018 SKQB 8), where a father who had added his son to title later attempted to reverse the arrangement but was barred by section 156 of the LTA and was ultimately forced to sell the property and pay his son half of its value.

Boire v. Boire

In *Boire v. Boire* (2025 SKKB 150), the Saskatchewan Court of King’s Bench was asked to consider whether an adult child had the right to prevent the sale of a property where he was one of the

⁴ See *Woods Estate (Re)*, 2014 ABQB 614; *Edmunds Estate*, 2017 ABQB 754, aff’d 2019 ABCA 34; and *McCarthy Estate (Re)*, 2021 ABCA 403.

⁵ *Smith Estate*, supra note 1, at paragraph 28.

⁶ *Ibid.*, at paragraph 29, citing *Woods Estate*, supra note 4, at paragraph 22.

⁷ *Succession Law Reform Act*, RSO 1990, c. S.26.

registered owners. In *Boire*, the parents had placed their family home into joint tenancy with their three adult children for estate-planning purposes. At the time of the transfer, there was a written agreement that stated that the parents retained full control and were entitled to all income and sale proceeds during their lifetimes, and that the children would not obtain beneficial ownership until both parents had died. Following the death of the mother, the father decided to sell the home. Two of the three adult children were cooperative and in agreement with the sale, but the third child refused, asserting an immediate beneficial interest in the property.

The court reviewed the written agreement and the circumstances of the transfer, and determined that even though the original agreement did not use the word “trust,” it clearly established an express trust under which the interests of the adult children were held for the benefit of the parents during the lifetime of the parents. As a result, the adult child had no right to prevent the sale.

There are a few key takeaways from this decision:

1. A formal trust does not need to use the term “trust” to constitute an express trust, so long as the agreement clearly indicates (a) an intention to create a trust, (b) certainty of subject matter, and (c) certainty of beneficiaries.
2. Adding children to title for estate-planning purposes does not automatically also transfer beneficial interest. Whether there is a transfer depends on the written documentation defining the relationship.

3. The refusal by one of the registered title holders to consent to a sale of the property is not necessarily fatal. It is possible for the court to conclude that one of the registered owners is holding the interest in trust for another owner and therefore has no power to interfere with the sale. Essentially, the terms of the “express trust” can take precedence over the title registration.
4. Clear and comprehensive written documentation played a crucial role in this case. It serves as a reminder of the importance of written documentation that is contemporaneous with the transaction. It is also important to remember that the parties need to follow through with the intention set out in the written documentation.

Conclusion

The *Boire* decision reshapes the landscape for Saskatchewan estate planning by confirming that a clearly documented express trust can override joint registered title. This allows for recognition that a transferor maintained beneficial ownership despite transferring title under the Torrens registration system. It also allows for a mechanism to correct or clarify gratuitous transfers that previously could not be undone without unanimous consent.

AN INTRODUCTION TO ABATEMENT

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In estate administration, it is commonly understood that all of the debts owed by an estate must be paid before any payments or transfers can be made to the beneficiaries listed in the will or, if the deceased individual died intestate, to the next of kin entitled to receive a share of the estate, in accordance with the relevant intestate estate legislation. But what happens when there is not enough money in the estate to pay all of the debts and fulfill all of the gifts set out in the will? The answer lies in the rule of abatement.

What Is Abatement in Estate Administration?

The rule of abatement is the pro rata reduction or exhaustion of the amounts or quantities of testamentary gifts when the estate assets are insufficient to satisfy the deceased’s debts, liabilities, funeral expenses, and estate administration expenses and to make all of the gifts set out in the will.¹

The Order of Abatement

Abatement is applied in a specific order. That is, certain classes of gifts are reduced or eliminated before other classes of gifts. The classes and order of abatement are as follows:

1. residuary personal and real property;
2. general legacies (for example, a gift of cash);
3. demonstrative legacies (for example, a gift of cash from a specific account);

¹ Albert H. Oosterhoff et al., *Oosterhoff on Wills*, 9th ed. (Toronto: Thomson Reuters, 2021), at 575.

4. specific gifts of personal property (for example, a gift of a vehicle to a specific beneficiary); and
5. specific devises of real property (for example, a life estate to a surviving spouse or common-law partner).²

The residue of the estate is typically affected first, while specific gifts are affected only once the residue of the estate has been exhausted. If two or more gifts are in the same class, the gifts are abated rateably.

The order of abatement and proportion in which a class of gifts must be exhausted can only be altered if there is a contrary intention set out in a testator’s will.³

Wills legislation in most provinces provides that, unless the will shows a contrary intention, a debt charged on property must be paid at the expense of that property. A general direction in the will for the payment of debts or all of the debts of a testator is not

...all of the debts owed by an estate must be paid before any payments or transfers can be made to the beneficiaries listed in the will...what happens when there is not enough money in the estate to pay all of the debts and fulfill all of the gifts set out in the will?

a contrary intention, and the assets of the testator should not be used to satisfy a mortgage debt unless the property itself is insufficient to satisfy the debt.

Practical Implications for Personal Representatives and Beneficiaries

It is important for both personal representatives and beneficiaries to understand the impact of the rule of abatement on an estate. It is the responsibility of the personal representative to determine whether the wording of the will displaces the default order of abatement. Abatement determines:

- which assets will bear the burden of an estate shortfall; and
- which assets a personal representative needs to liquidate and the order in which to reduce or exhaust such assets.

If there are gifts within the same class of assets that must be sold in order to satisfy the liabilities of the estate, the assets of that class abate rateably.

If there are insufficient assets to pay all of the gifts set out in the will, it is the duty of the personal representative to determine what parts of the estate abate and the order in which gifts to beneficiaries are affected.

Practical Implications for Drafting

In the drafting of testamentary documents, the rule of abatement must be considered, and its application and priority should be discussed with the testator. A drafter should consider including an alternative application of abatement in the testator’s will.

For example, if the estate assets are insufficient to satisfy all of the debts and/or gifts, it may not be the testator’s intention that the testator’s home go to a specific person, or a specific amount of cash get paid to a charity, leaving the residuary beneficiaries with nothing. A drafter should make detailed notes to file about these discussions and the testator’s intentions regarding potential abatement.

Conclusion

It is important for anyone drafting wills to understand the rule of abatement and to ensure that they are discussing the rule and its application with the testator. Making detailed notes about this discussion, and ensuring that the will is drafted in such a way that it considers the rule of abatement, will provide protection to both the drafter and the beneficiaries. Understanding the order of abatement helps personal representatives and beneficiaries anticipate which gifts may be affected and ensures that testamentary intentions are respected as much as possible. Careful drafting and clear communication with testators can help avoid unintended consequences.

WHEN IS A RIGHT OF POSSESSION EXCLUSIVE?

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In *Tyndall v. Noyes* (2025 ONSC 1512), the Ontario Superior Court of Justice considered the nature of a life estate in a testamentary gift of real property, and the extent to which the “bundle

² Ibid.
³ Ibid., at 576.

of rights” that comprise a life estate can be separated. Apart from the legal issues, the case is also a cautionary tale on the potential pitfalls of using will kits.

The deceased, Gail Hill, had been in a common-law relationship for 24 years with Gerry Tyndall when she died. She was also survived by four children from a prior relationship, Patti, Doug, Cathy, and Jackie. The deceased used a will kit to make a will on March 16, 2015. In the will, she appointed her daughter Patti as the estate trustee. The will also included the following provision in favour of Gerry:

Gerry Tyndall can remain living in my house until his death. At that time, the house will be sold and divided between my four children. My Estate will pay the taxes.

Following her mother’s death, the estate trustee transferred title to the home to the deceased’s four children as joint tenants. The children are the residuary beneficiaries of the estate. The children then refinanced the home, using some of the funds to pay for maintenance costs, such as a new roof and furnace, and distributed the balance of the funds to themselves.

In addition, the deceased’s son, Doug, moved into the home and paid monthly rent to the estate trustee. Doug lived on the main floor because he was assisting with some renovations to the home at the time, while Gerry lived in the basement. Gerry had understood that, once the renovations were complete, he would resume living on the main floor and Doug would move to the basement level. Over time, Doug became disruptive and Gerry asked the estate trustee to evict Doug from the property. The estate trustee refused, asserting that the estate had

the exclusive right to lease the property, on its terms, and to collect the related rents.

In the proceeding, Gerry argued that he held a life estate in the home, which includes a right of exclusive possession and the right to collect rents if the property is leased. Interestingly, the estate trustee conceded that Gerry had a life estate in the home, but argued that Gerry was not granted the “full panoply of rights and entitlements” that are ordinarily part of a life estate, such as the right of exclusive possession and the right to collect rents. As the court summarized her position, the estate trustee asserted that “Mr. Tyndall has something more than a mere ‘licence’ but something less than a full ‘life estate.’”

In its analysis, the court referred to fundamental principles of will interpretation. These principles provide that a will must be interpreted to give effect to the testator’s intention, a will must be read in its entirety and interpreted as a whole in light of surrounding circumstances, the testator is presumed to have intended the words used in the will to carry their ordinary meaning, and extrinsic evidence may sometimes be used to determine the testator’s intention.

In applying these principles, the court noted that the will made no

reference to any person other than Gerry having a right to reside in the home. Although the will gave the estate trustee the power to lease the property, the court relied on the principle that the will must be read as a whole to conclude that it would be “absurd to read the will as granting a right to lease the property outright as that would have the practical effect of impeding Mr. Tyndall’s right to live at the home for the duration of his life.”

The court also examined surrounding circumstances to ascertain the testator’s intention. Although family members, including Doug, had occasionally stayed at the home while the deceased was alive, this amounted to only a few months over many years. Moreover, the home was a single-family dwelling, as opposed to a cottage where the deceased may have contemplated her children having the use of the property. Although there was a bedroom in the basement, it was not a self-contained apartment, there being only one shared kitchen in the home.

Taking all of these factors into consideration, the court concluded that there was nothing in either the terms of the will or the surrounding circumstances to suggest that the deceased intended anyone other than Gerry to have a right to live in the home. In the result, the court held that Gerry had a

...a will must be interpreted to give effect to the testator’s intention, a will must be read in its entirety and interpreted as a whole in light of surrounding circumstances, the testator is presumed to have intended the words used in the will to carry their ordinary meaning, and extrinsic evidence may sometimes be used to determine the testator’s intention.

life estate in the home, which included a right of exclusive possession and a right to collect the rents should the property be leased.

Although the court did not expressly state it, implicit in the reasons is the view that it is possible for a testator to grant a life estate to a beneficiary, but not a right of *exclusive* possession or the right to collect the rents should the property be leased, in whole or in part. The court did acknowledge that it can be difficult to draw the line between a life estate with restricted rights and a licence.

As noted at the outset, the *Tyndall* case is also an example of the limitations of will kits. A typical residence trust in a will addresses the issues that were at the heart of this case—whether a right of occupation is exclusive, who is responsible for expenses, the terms on which a property can be leased, and how the rents are to be treated. If those issues had been clearly addressed in the will, the litigation may have been avoided.

MCCARRON V. BARTLETT: A SHIFT IN THE LANDSCAPE FOR COMMON-LAW SPOUSES IN NEWFOUNDLAND AND LABRADOR

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Common-law spouses in Newfoundland and Labrador now have the right to seek dependant support against the estate of a deceased partner. In *McCarron v. Bartlett* (2025 NLSC 73) (“*Bartlett Estate*”), the applicant common-law spouse brought an application for

dependant support against the estate of her late partner on the basis that she was inadequately provided for by his will. The facts included that the applicant-partner and the deceased had been in a relationship for nearly a decade and had been operating a business together.

The issue for the applicant was that the legislation providing for dependant support, the *Family Relief Act*¹ (FRA), was interpreted by the executor of the estate to exclude common-law spouses. At the time, the term “dependant” was defined in the FRA as “widow [or] widower ... of the deceased.”² In the face of the executor’s position, the applicant brought an application for an interpretation of the legislation seeking a declaration that “widow” included a common-law spouse and, alternatively, if the court disagreed that the definition could be so extended, that the FRA violated section 15 of the *Canadian Charter of Rights and Freedoms*.³

The position of the applicant was similar to that raised before the Supreme Court of Nova Scotia in *LeBlanc v. Cushing Estate*.⁴ The only material distinction between the two positions and facts was that Nova Scotia allowed for the registration of a domestic partnership under Nova Scotia’s *Vital Statistics Act*.⁵ Newfoundland and Labrador had (and has) no such regime. This was the determinative factor in *Cushing* on the constitutional challenge, which was ultimately unsuccessful.

In *Bartlett Estate*, the court ultimately disagreed with the applicant’s position that “widow” could be read

to include a surviving common-law partner. However, the court agreed that the section 15 Charter infringement existed and could not be saved by section 1.

The result of this decision is a new statutory right for surviving common-law spouses in Newfoundland and Labrador where the court finds that the

Common-law spouses in Newfoundland and Labrador now have the right to seek dependant support against the estate of a deceased partner.

provisions of a deceased partner’s will or the laws of intestacy provide inadequately for the claiming partner. As always, entitlement is a discretionary matter and will engage an analysis of all relevant facts, which include those statutorily mandated and any others the court may deem relevant. The usual factors in these cases include: the character and conduct of the dependant; whether the dependant will have another source of support; the nature of the relationship between the dependant and the deceased, including the length of the relationship; the needs and means of the surviving spouse; the nature and extent of the estate assets; the nature of the financial arrangements during the relationship; and the existence of any other claims, including for support, existing against the estate.⁶

1 *Family Relief Act*, RSNL 1990, c. F-3.

2 Other relations are expressly included as in other jurisdictions, including children.

3 *Canadian Charter of Rights and Freedoms*, part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

4 *LeBlanc v. Cushing Estate*, 2019 NSSC 360.

5 *Vital Statistics Act*, RSNS 1989, c. 494.

6 Section 5(1) of the FRA enumerates factors but the list is non-exhaustive.

Across the Atlantic provinces, the law is clear in all but Prince Edward Island that common-law spouses (subject to certain requirements) may apply as “dependants” under the relevant legislation. In Prince Edward Island, the definition of “dependant” is the same as the definition that existed in Newfoundland and Labrador prior to the court’s decision in *Bartlett Estate* and the legislative amendments that flowed from the court’s decision.⁷

It is essential that estate and trust advisors advising couples in estate planning and those advising on estate administration from either the beneficiary or the executor perspective

the remaining assets are insufficient to satisfy a successful claim. Such delays can understandably cause frustration for other beneficiaries, including with respect to the timing of their distributions and the costs incurred by the estate in dealing with a dependant support claim.

Dependant support claims are currently underutilized in Newfoundland and Labrador with no reported cases dealing with entitlement and/or quantum. It will be interesting to see whether these claims become more common in light of the statutory amendments flowing from this case. Given the very limited rights of

Barring a court order...once an estate is served with a claim, an executor is prohibited from making any distributions out of the estate and may be exposed to personal liability if distributions are made and the remaining assets are insufficient to satisfy a successful claim.

understand the mechanics of these claims. Key considerations include understanding the limitation period for commencing a claim; notably, the period is fairly short in all jurisdictions and can be just six months from the granting of probate.⁸

An appreciation for the litigation that can stem from these types of claims is also important. Barring a court order (or, in some jurisdictions, unanimous consent of all beneficiaries), once an estate is served with a claim, an executor is prohibited from making any distributions out of the estate and may be exposed to personal liability if distributions are made and

common-law spouses to a division of property, including their exclusion under the *Intestate Succession Act*⁹ on the death of a spouse, the legislation provides a useful remedy in appropriate cases where previously a surviving spouse had only equitable claims available to them.

SIGNIFICANT AMENDMENTS TO SUBSTITUTE DECISION-MAKING LEGISLATION IN PEI: POWERS OF ATTORNEY AND PERSONAL DIRECTIVES ACT

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What Is It?

Substitute decision-making legislation has not been materially updated in many decades in PEI. With an aging population and a general need for more modernized and flexible substitute decision-making relationships, the legislative amendments outlined below are important for individuals.

The *Powers of Attorney and Personal Directives Act* (SPEI 2023, c. 24) (“the PAPD Act”) received royal assent on November 29, 2023 and came into force on November 1, 2025, and the *Powers of Attorney Act* (RSPEI 1988, c. P-16) was repealed on the same date.

Why Is It Important?

Previously, an individual (“the principal”) could name an attorney to manage their *financial* affairs in a power of attorney (POA) document, but could not appoint an individual to make *personal* decisions (about nutrition, accommodations, socialization, and other matters). The expanded PAPD Act now permits an individual to appoint someone to make personal decisions as well as financial decisions. Importantly, the appointment to make personal care decisions is effective only where the principal lacks capacity to make personal care decisions, and does not cover health care or

⁷ Interestingly, the attorney general for Newfoundland and Labrador actively opposed the Charter relief sought, yet legislative amendments reflecting the applicant’s position were made and received royal assent just days after the hearing but before the judge’s decision was released.

⁸ The judge does have discretion to extend the period.

⁹ *Intestate Succession Act*, RSNL 1990, c. I-21.

treatment as set out in the *Consent to Treatment and Health Care Directives Act* (RSPEI 1988, c. C-17.2).

In addition, there are many new features of the PAPD Act that are helpful to, or provide protection for, individuals:

- a more robust definition of capacity;
- an express list of when an attorney can alter the designated beneficiary of a plan for the principal;
- the ability to name a person or persons who can compel (or who are not entitled to) an accounting by the attorney;
- a curing provision for documents not executed in accordance with the PAPD Act;
- a list of individuals who are not eligible to act as an attorney for a principal (an undischarged bankrupt; a person employed at a facility where the principal resides or receives personal services or health care; a person convicted of a criminal offence within the last 10 years, with some exceptions; or a person who provides personal services or health care to the principal for compensation);
- a list of individuals who are not eligible to act as an agent for personal care (a person employed at a facility where the principal resides or receives personal services or health care; a person convicted of a criminal offence within the last 10 years, with some exceptions; or a person who provides personal services or health care to the principal for compensation, except a family member who resides with the principal);
- a detailed list of duties of an attorney, including a duty to engage the principal in decision making to the extent possible;
- the ability to specify compensation for the attorney (however, no com-

pensation is permitted for an agent for personal services);

- specific instances in which a POA or personal directive terminates;
- the requirement for a principal to notify an attorney or an agent that their authority has been revoked by the principal (for example, where the principal executes a new POA appointing another individual);
- the ability for an immediate family member to require an accounting by the attorney if a person has not been named for this purpose in the POA;
- a mechanism for a court to order a service provider to take instruction from an attorney;
- the ability to authorize the attorney to get a copy of the principal's will; and, notably,
- *a provision preventing individuals from contracting out of the Act!*

Any Go-Forward Action Required?

The good news is that a power of attorney executed in accordance with the old legislation is deemed to be a valid power of attorney under the new legislation, so no panic should ensue.

However, the changes outlined above might prompt some individuals to want to revisit their existing powers of attorney and create a new personal directive (which previously was not possible).

Substitute decision-making legislation has not been materially updated in many decades in PEI.

UK BUDGET 2025

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On November 26, 2025, the Chancellor of the Exchequer announced the UK government's budget. Reviewing some of the tax measures introduced in the budget is always an interesting exercise for tax practitioners. It is an opportunity to advise their clients of recent changes, and also affords a preview of tax measures that may make their way to Canada.

The following are some details that may be of interest to some Canadian taxpayers and practitioners.

Freeze on Personal Tax Threshold

How do you increase taxes without increasing the tax rate? Simply by freezing the personal tax threshold. The UK budget extends for another three years (until 2031) the freeze on the personal tax threshold. As a result, some taxpayers will pay higher taxes because the personal tax threshold will not increase with inflation.

UK Mansion Tax

In the 2025 budget, the United Kingdom joined the trend of many European countries by introducing a new "high value council tax surcharge" (HVCTS), commonly referred as a "mansion tax." The HVCTS will apply to properties valued at £2 million or more.

The HVCTS will affect owners and prospective purchasers of residential property in England. The new annual charge applies on top of the stamp duty land tax (SDLT). Foreign investors considering purchasing, holding, or restructuring ownership of high-value English residential property will

need to consider this annual surcharge as part of their plan.

The HVCTS will apply to residential properties valued at £2 million or more and is divided into four bands (tax brackets). Properties worth

This is particularly relevant to Canadians who may own a UK property (received by way of inheritance, as an example) or invested in a rental property with a value exceeding £2 million. The HVCTS combined with

or 47 percent, depending on the applicable tax band for rental income.

How do you increase taxes without increasing the tax rate? Simply by freezing the personal tax threshold. The UK budget extends for another three years (until 2031) the freeze on the personal tax threshold. As a result, some taxpayers will pay higher taxes because the personal tax threshold will not increase with inflation.

- between £2.0 million and £2.5 million will incur an annual surcharge of £2,500,
- between £2.5 million and £3.5 million will incur an annual surcharge of £3,500,
- between £3.5 million and £5.0 million will incur an annual surcharge of £5,000, and
- over £5 million will incur an annual surcharge of £7,500.

These amounts will increase annually in line with the consumer price index, and property values will be reassessed every five years by the Valuation Office.

Rental Properties, HVCTS, and Tax Rate on Rental Income

Since HVCTS liability rests with the property owner, property investors who buy in order to rent need to appreciate that the HVCTS is the landlord's responsibility, and the surcharge will affect the net rental return (or, in Canadian terms, the "net rental income").

the SDLT, which is charged primarily on the purchase price and can be significantly higher for foreign investors, will add complexities to the decision to purchase a residential property in England.

The HVCTS will not take effect until April 2028. The UK government wants to allocate time for consultation. Nonetheless, Canadians who own UK residential property should seek professional advice on valuations and review the potential annual tax implications of the HVCTS; although the surcharge is "modest," it represents the UK government's willingness to change its approach to the taxation of high-value homes.

Speaking of rental properties, the budget announced that rates of income tax on property rental income will increase by 2 percent starting in April 2027 (for rental income above £1,000 per annum). With the increase in the income tax rates on property rental income, landlords will now pay a tax rate of either 22 percent, 42 percent,

Pay-Per-Mile Tax

To compensate for the shortfall in receipts from petrol and diesel fuel tax, the UK government introduced a new "pay-per-mile" tax. Starting in 2028, this new tax initiative will charge drivers of electric and hybrid vehicles a small fee per mile driven annually (and the rate will go up each year with inflation).

Although this initiative will not affect Canadians, one may wonder when such an initiative will make its way to Canada.

Conclusion

Sometimes reviewing a foreign government's budget and the newly introduced tax measures provides a glimpse of what the Canadian Department of Finance may consider in the future. Canadians with links to the United Kingdom should learn of potential tax measures impacting their affairs, and for tax practitioners, it is an opportunity to consider what may be coming.



CHAIR'S MESSAGE



**RICHARD NIEDERMAYER,
KC, TEP**

Welcome to spring! With each passing day, the winds are getting warmer and the sun is shining longer, and the **sold-out** national conference is only a few weeks away!

It's an exciting time to be a member of STEP. In just the last few weeks, well over 85 percent of our members completed their membership renewal, STEP Worldwide approved the development of a new Vancouver Island chapter (the official launch will take place on September 14 in Victoria), local branch and chapter boards are busy preparing for their annual branch meetings (some with elections) and their program plans for the 2026-27 seminar season, and we celebrate the 2025 education program graduates and award winners in this issue of *STEP Inside*.

Warm thanks are owed to the record 48 organizations generously sponsoring this year's 28th national conference, taking place June 1-2 in Toronto. Their support allows STEP Canada to improve the conference experience for delegates and deliver exceptional value. The conference program committee has done an excellent job of assembling an outstanding collection of sessions that will be packed with timely and topical education and delivered by a lineup of sought-after speakers. It is going to be another fantastic event! In-person registration sold out earlier than ever, but the online on-demand registration remains open. Both in-person and online on-demand delegates will have access to the session recordings at their leisure until December 31, 2026. Thank you to the program committee, chaired by Rhonda Johnson, for all your time and effort!

Please take the time to review the education report included in this issue. It summarizes STEP Canada's education programs for emerging trust and estate professionals and chronicles an impressive list of 2025 education program graduates, featuring the 2025 award winners. Congratulations to all on your notable accomplishments!

In the next few weeks, the branch and chapter programming for the 2025-26 season will come to a close with annual meetings and the last few seminars. Thank you to all the local volunteers who serve on branch and chapter boards and/or committees for ensuring that members in your region have rich and meaningful opportunities to engage with one another, network, and continue their professional development by attending these essential seminars. Information about the 2026-27 program season will be promoted at the national conference and throughout August.

I'm pleased to note that the Public Policy Committee (PPC) and the Tax Technical Committee (TTC) are including a regular feature in *STEP Inside* that summarizes all of the impressive initiatives they are working on, on behalf of STEP members. Please see their report on page 5. All submissions and eNews documents can be found on step.ca.

The virtual STEP Canada AGM will be held on Thursday, May 28. At this meeting, the terms of three of our branch chairs, who, by virtue of their office, serve on the national board, will come to an end. I'd like to thank and acknowledge the contributions of the STEP Atlantic chair, Jessica Lyle; the STEP Montreal chair, Shlomi Steve Levy; and the STEP Ottawa chair, Samantha Lauzon. They will move into the past chair position on their branch boards to provide advisory support, if needed, to their successors, Benjamin Carver, François Desmarais, and Dayna Charlebois.

On April 22, STEP Canada acknowledged the importance of National Volunteer Week with a post on our LinkedIn page (quoted below). I want to make sure that those who volunteer or have volunteered hear our thanks loudly and repeatedly, and that all members are keenly aware that it is the combined efforts of all the volunteers that make STEP Canada tick!

This National Volunteer Week, STEP Canada proudly recognizes the dedicated individuals who give their time, expertise, and leadership to strengthen our community.

Across the country, our volunteers support education, shape thought leadership, and foster meaningful connections within the trust and estate profession. Their contributions reflect the spirit of this year's theme, which highlights the power of volunteering to create stronger, more connected communities.

At STEP Canada, volunteers play an essential role in advancing our mission. From branch and chapter leadership to committee work and event support, their commitment helps us deliver high-quality programming, uphold professional standards, and support the continued growth of our members.

We extend our sincere thanks to every volunteer who contributes their time and talent. Your efforts make a lasting impact on our organization and the profession as a whole.

Sincere thanks are also due to the STEP Canada Executive Committee, Brian Cohen, Aileen Batty, Corina Weigl, Paul Taylor, and Rachel Blumenfeld, as well as to STEP Canada's senior staff, Janis Armstrong, Michael Dodick, and Amanda Tattoli, for their continued support as I fulfill my duties as chair of this amazing organization.