STEP Canada
ADVISING FAMILIES ACROSS GENERATIONS

Connection
Toronto Branch Newsletter

January 2019 - Vol. 6 No. 4

Message from the Chair, STEP Toronto

Thank You!!

Your board is working hard all year to deliver great programming and services to members – but you knew that already. What you may not know is that we are seeing tangible results in two key areas, membership and attendance. Those two areas best reflect member satisfaction with program and services. This year (to early December) we are at 99 new members compared to 76 at the same time last year. Similarly, our attendance for the three programs so far is up by 25% (320 to 399). We couldn't be more pleased because we know that new members and increased attendance come directly from members talking about STEP and the quality of the programs. So, thank you – please keep talking about STEP Toronto!

In addition to new members, we are also actively looking for enthusiastic volunteers who would like to be more involved with STEP. The route to our board runs through the committees of the various "portfolios." Please let me know if you would like to be involved and I will help get you placed on a committee of interest.

A Reminder

A reminder that students may attend in person complementary at any of the three satellite locations (Mississauga (S+C Partners), Markham (Wilson Vukelich), or downtown (BLG)). This is a great way to pick up education credits and meet fellow members. Be sure to register.

As well, we encourage all members to bring up to two guests per year – complementary again – to our program. A "guest" is a non member who has not been to a program event in the past. Please register if you are a student or are bringing a guest.

Finally

Best wishes to members and families for a wonderful holiday. It's a great time to take a breath, enjoy time with friends and family, and make plans for the new year. See you in January.

Ted Polci, CLU, TEP, Toronto Branch Chair

In this Newsletter

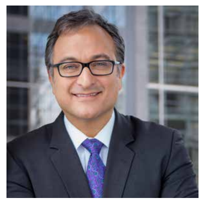
STEP Toronto Executive

STEP Toronto Presents...

January 9, 2019 – Strategic Philanthropy

Summary: Start the new year with a view to legacy building! Clients are becoming increasingly philanthropically motivated in their estate planning, requiring that estate planners and advisors keep in mind additional special considerations. This session will help you navigate philanthropic discussions with clients like:

1. As advisors, how do we approach the "legacy" discussion?
2. Understanding how recent tax changes may impact philanthropy and legacy planning
3. Structuring gifts – ideas for personal gifts, using private foundations, trusts and donor advised funds
4. Gift planning strategies

Moderator: **Gillian Musk**, MTI, TEP: BMO Trust Company

Speakers: **Tania Carnegie**, CPA, CA: KPMG LLP
Aneil Gokhale, Director, Philanthropy, Toronto Foundation
Mark Halpern, CFP, TEP: WEALTHinsurance.com Inc.

Registration: 2:30 PM

Event: 3:00 PM – 5:00 PM

Venue: *Live presentation:*

Ivey Tangerine Leadership Centre, Exchange Tower, Ground Floor,
130 King Street West, Toronto (map) ***new location**

Satellite locations - Online via webcast:

Borden Ladner Gervais LLP, Bay Adelaide Centre, East Tower, 22 Adelaide Street West,
Suite 3400, Toronto (map) ***new location**

S+C Partners LLP, 6465 Millcreek Drive, Unit 204, Mississauga (map)

Wilson Vukelich LLP, 60 Columbia Way, Markham (map)

STEP Toronto Upcoming Events

Wednesday, January 9, 2019, 3:00 pm – 5:00 pm
Strategic Philanthropy

Monday, January 14, 2019, 5:00 pm – 7:00 pm
Blue Monday - Seasonal Social Event (Members/Students Only)
Venue: BMO, First Canadian Place, 68th Floor, 100 King Street West, Toronto
Sponsored by BMO

Tuesday, February 5, 2019, 8:30 am – 4:30 pm
Succession in a Family Business (SPECIAL STEP Canada Full-Day Course*)

Thursday, February 14, 2019, 3:00 pm – 5:00 pm
Tax Update

Wednesday, April 10, 2019, 3:00 pm – 5:00 pm
Non-Tax Issues in Succession Planning & Annual Branch Meeting

Wednesday, May 22, 2019, 3:00 pm – 5:00 pm
How to Help Your Clients Choose the "Right" Fiduciaries

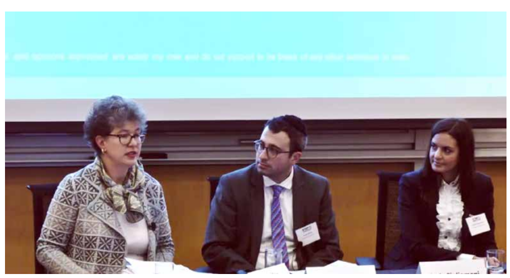
Thursday-Friday, June 6-7, 2019
STEP Canada 21st National Conference*
Metro Toronto Convention Centre, Toronto, ON

**National events and the Full-Day Course are not included in the passport.*
For registration information visit STEP.ca

In case you missed it…

November 15, 2018 – Case Law and Legal Update

Our Case Law and Legal Update seminar was a veritable buffet of case facts, comments, and discussion. It surveyed a wide variety of recent Court decisions from across Canada, curated by our panel of expert lawyers for the benefit of all the allied professions, helping practitioners understand the legal principles in play.



The moderator was Ian Lebane of TD Wealth, who warmly introduced the student case commentator Alexandra Ormond, an associate at Miller Thomson. The main panel of speakers consisted of senior in-house counsel from CIBC, Ann Elise Alexander, veteran litigator Arieh Bloom from Tupman & Bloom LLP, and Carla Figliomeni, an estates, trust and tax partner at Miller Thomson.

Alexandra discussed an interesting BC case, *Toigo Estate*, involving the Court's jurisdiction to review the exercise of discretion by the trustees of a large testamentary spousal trust. The life tenant Grandma asked the Trustees to encroach on estate capital and give her half the shares in the family company so she could sell them and use the proceeds (about $80 million dollars) in her own estate planning- effectively to rearrange the shares each branch of her family would ultimately inherit, which she wished to have more equally distributed. The Court held that the Trustees had the power to make the encroachment and exercised it on a proper basis and in a proper manner. It stressed that the Court was not making the decision- that is the Trustees' job. (Of course, the Court will review the what, how, why and when after the fact, if necessary.) Probably importantly, all the family members agreed with Grandma's request.

Carla Figliomeni led off discussing the *Milne* decision, where one of a pair of wills in a dual-will arrangement was found to be invalid. She helpfully set the stage for the students and non-lawyers watching by outlining the reasons behind the preparation of multiple wills, and the shock waves and uncertainty rippling through the legal community by virtue of Justice Dunphy's decision. She frankly canvassed some interim measures solicitors might take to deal with similar planning situations until the results of the appeal of the *Milne* decision are known. Carla also provided useful insight into the Moules Industriels case involving the tax problems that may be triggered in a common planning situation, where ownership of private company shares is held by trusts of various types. This can result in attribution of share ownership (not income attribution) to trust beneficiaries and result in corporations being associated, reducing access to the beneficial small business tax rate. She also provided the audience with useful if somewhat troubling information on proposed expansions of 'beneficial ownership reporting' in Canada. She discussed the *Laplante* case, where overly-aggressive efforts to exploit access to the tax-free Lifetime Capital Gains Exemption went awry. The Court was clearly skeptical that the tax-free sale of shares courtesy of the LCGE, followed immediately by 'donation' of the proceeds to Mr. Laplante, was a genuine transaction. Carla also noted an interesting case (Borges) where possible income from a so-called Henson trust was not garnishable for support arrears, and the Sato case, where the domicile of a peripatetic international banker who died in 2015 was found to be British Columbia- partly on the basis of a tax form filled out in 1999.

Video link: Carla Figliomeni

Ann Elise Alexander, from CIBC, provided her usual pithy, practical and excellent survey of 10 cases from her vantage point at the Bank. She took pains to try and help the audience better anticipate how their planning may work in the financial institution environment. Cases reviewed included self-dealing Powers of Attorney, the disparate capacity tests for beneficiary designations vs wills, and the perennial issue of joint accounts vs unhappy will beneficiaries . Hot-button aspects of RRSPs and RRIFs in estates include CRA's steadfast views on the death of the marriage breakdown rollover along with the spouse or former spouse, and the sticky nature of beneficiary liability for the tax triggered by the deemed plan deregistration on death.

Video link: Ann Elise Alexander

Arieh Bloom provided a detailed plunge into the murky estate questions about when limitation periods might or should start to run- when money is advanced, or possible trouble appears on the horizon, or when a demand for repayment is made? Does an Objection to a Passing of Accounts amount to a 'claim' as contemplated by the *Limitations Act*? There is clearly of a lot of angst potential for solicitors, who, Arieh advised, might be well-advised to spend more time recording the intent behind various financial and estate transactions. Lastly, he noted how the old notion of the executor's year was again affirmed in the *Rivard v Morris* case, where the Rule of Convenience was upheld. In the absence of specific language countermanding it, the willmaker should be assumed to have intended that interest would accrue on legacies still unpaid more than a year from the willmakers death. In the *Rivard* case, the Ontario Court of appeal felt that 5% was fair, on gifts of more than $500,000, even where the beneficiaries had been the instigators of litigation that delayed estate distribution.

Video link: Arieh Bloom

Article: Tax issues of interest to the U.S. person in Canada and their advisors

By: Sunita Doobay, LL.B., LL.M. (U.S. Tax) NYU, TEP, Blaney McMurtry LLP

U.S. shareholder

U.S. persons who are shareholders of Canadian corporations which are deemed controlled foreign corporations under the Internal Revenue Code will be subject to the transition tax as set out in section 965. The section 965 tax was aimed at forcing large companies such as Apple to repatriate large sums of cash (retained earnings) held outside of the U.S. back to the U.S. In Apple's case, the Company would be remitting retained earnings to a U.S. shareholder corporation. A foreign corporation remittance to a U.S. corporation is subject to a toll tax of 15.5% on cash and 8% on all other assets. Problematic for the Canadian shareholder is that there is no U.S. corporation to repatriate its cash and assets to. As such, an individual would be subject to much higher rates. According to Amanda Athanasiou, *Toll Charge is Taking Individuals by Surprise*, Tax Notes International, February 19, 2018, an individual would be subject to a toll rate of 27.3% for cash repatriated in 2018 and 14.1% for non-cash.

The favourable tax treatment to a U.S. corporate shareholder as compared to tax treatment of a U.S. individual shareholder has many practitioners considering the section 962 election under the Code which allows an individual US shareholder to be treated as if he or she was a corporate shareholder. This election, which can be made annually, also entitles the individual to claim a deemed paid foreign tax credit under section 960, which would otherwise be unavailable. Section 965 and IRC §951A are both part of subpart F of the Code and an argument can be made that an IRC §962 election is available to a US individual shareholder faced with the transition tax and with GILTI after the transition tax. On September 18, 2018 the U.S. Tax Court released *Barry M. Smith and Rochelle Smith v. Commissioner of Internal Revenue*, 151 T.C. No. 5 bolstering this thought. In the Smith case, the Court considered the section 962 election but not in a section 965 but in a regular subpart F context. The decision provides a sound review of the section 962 election. The Court explains that the section 962 election "do[es] not create hypothetical corporations or change real world facts. They simply provide a mechanism that enables an individual U.S. shareholder to elect what he or she may deem more desirable tax treatment".

In the Smith case, the CFCs at issue were based in Hong Kong and in Cyprus. The U.S. does not have a tax treaty with Hong Kong but it does have one with Cyprus. However, the Cyprus Treaty was not applicable as the Cyprus entity did not meet the LOB clause of the treaty. The taxpayers in Smith elected to treat their Hong Kong

CFC and Cyprus CFC as corporations pursuant to section 962. The issue was whether the distributions from the CFC now being treated as a domestic corporation could receive qualified dividend treatment pursuant to IRC §1(h)(11)(B)(i)(I) instead of being accorded ordinary dividend income treatment at a higher tax rate. A U.S. shareholder of a Canadian corporation would meet the IRC §1(h)(11)(B)(i)(I) test which accords qualified dividend treatment to dividends from domestic corporations or from "qualified foreign corporations". Section 1(h)(11)(C) defines a "qualified foreign corporation" as a corporation incorporated in the United States or a corporation eligible for benefits of a comprehensive income tax treaty with the United States. Notice 2006-101 provides that Canada meets the requirement of IRC §1(h)(11)(C).

The section 962 election is therefore worth considering for those U.S. persons in Canada deemed to be US Shareholders. For those who have already filed their 2017 tax returns, consideration should be given to filing an amended return with a section 962 election.

Treasury, IRS Announcement – Making large gifts now won't harm estates after 2025

The 2017 Tax Cuts and Jobs Act temporarily increased the base amount of the lifetime gift and estate tax from US$5 million to US$10 million to 2025. After 2025 the base amount of the life time gift and estate tax exemption will drop back to US$5 million. There was concern amongst advisors that the estate tax after 2025 could apply to gifts exempt from gift tax prior to 2025. On November 20, 2018, the Treasury and the IRS announced that individuals taking advantage of the increased gift and estate tax exclusion amount would not be adversely affected after 2025 when the exclusion amounts drops to pre-2018 levels. The Treasury and the IRS also announced the proposed regulations implementing the increased exemptions. The proposed regulations also amend the existing regulations to provide that in the case of decedents dying or gifts made after December 31, 2017 and before January 1, 2026, the increased base amount to US $10 million is adjusted for inflation.

US spouses share an unlimited marital deduction for federal estate tax purposes and do not have to rely on the increased life time estate tax exemption between each other. However, the estate of the last to die will bear the burden of the tax levied on the entire estate. Advisors have to remember that upon the first to die, one must elect on the estate tax return of the first spouse to die that the surviving spouse will be using the unused estate tax exemption upon his or her death. IRS Form 706, *United States Estate and Generation-Skipping Transfer Tax Return* will have to be filed by the surviving spouse declaring that the deceased spouse's available exemption be added to the surviving spouse' exemption. Given that for 2018 the base amount adjusted for inflation of the estate tax exemption is $11.2 million, care should be taken that the increased estate tax exemption is ported correctly upon the death of one U.S. spouse prior to 2026 to the surviving spouse.

The annual gift exclusion amount for 2019 remains at $15,000. A U.S. person may gift $15,000 to as many persons he or she wishes to.

Excise Tax on premiums on policies issued by non-U.S. insurance companies

Recently, there have been many queries about the1% excise tax levied by the U.S. under section 4371(2) of the Code on premiums, paid to non-U.S. insurance company, on a policy of life, sickness or accident insurance of a U.S. citizen or a U.S. resident.

This is not a new tax and goes back to the 1970s when it was known as a stamp tax. The section 4371 excise tax is an area often overlooked by advisors who are conditioned to rely on the Treaty which provides an exemption from income taxation where a Canadian corporation carries on business without a permanent establishment in the U.S.

The Canadian Tax Treaty however does not provide relief to a Canadian insurer or its agents or the beneficiaries of the policy where the life insured is a U.S. person and where the Canadian insurer does not carry on business in the U.S. or does not attribute the premiums in Canada to a U.S. office. Section 4371 to 4374, the relevant provisions of the Code, are the successor to the original stamp tax levied on foreign insurance companies. The retention of this stamp tax which is now called an excise tax was necessary in the eyes of Congress in order to reduce the competitive advantage of a foreign insurer's otherwise tax-free operation. See H.R. Rep. No. 2333, 77th Cong., 2d Sess., at 61 (1942); 61 Cong. Rec. 7180-81 (1921).

The Canadian Tax Treaty does not provide relief. Article 2 which addresses what taxes are covered under the Treaty does not exempt the section 4371 excise tax. As such an argument cannot be made pursuant to Article VII of the treaty that a premium paid in Canada to a Canadian or other non-US insurer would be exempt from U.S. taxation as such insurer was not carrying on a business through a U.S. permanent establishment. Section 4374 holds that the excise tax has to be paid by any person who makes, signs, issues or sells any of the documents and instruments subject to the tax, or for whose use or benefit the same are made, signed, issued or sold. This is a very broad scope of liability.

The IRS has stated in its *Excise Tax – Foreign Insurance Audit Techniques Guide* that

> "while the Service will generally seek payment of the excise tax from the U.S. person making the premium payment, the Service may, in its discretion, seek payment from .... any of the following persons:
>
> - The insured, sometimes referred to as the beneficiary,
> - The policyholder, if that person is someone other than the insured,
> - The insurance company, and
> - The broker obtaining the insurance.

Regulation 46.4374-1(d) warns that any person who fails to comply with the requirements of this section with intent to evade the tax shall, in addition to other penalties provided therefor, pay a fine of double the amount of tax.

Article: A Rule of Inconvenience?

By: Anna Alizadeh, JD, TEP, de VRIES LITIGATION LLP

A centuries' old practice gives personal representatives one year after the death of a deceased to wind up the deceased's estate[1]. This is often called the "executor's year". However, in today's world, it frequently takes more than one year to administer an estate.

What happens if a personal representative does not or is not in a position to distribute the estate after the executor's year ends? This was the issue in the recent Ontario Court of Appeal decision of *Rivard v Morris* [2].

1 For example, calling in estate assets, paying estate debts, and converting assets to enable distribution of the estate.
2 *Rivard v Morris*, 2018 ONCA 181 [***Rivard***].

BACKGROUND

The deceased died in October 2013. In his will, the deceased appointed his three children (a son and two daughters) as the co-estate trustees of his estate. He left each of his two daughters specific legacies of $530,000 and the residue of his estate to his son.

After their father's death, the daughters challenged his will. The will challenge settled in August 2016, finding that the deceased's will was valid. The daughters resigned as estate trustees. The daughters were paid their respective $530,000 legacies in October 2016 (2 years after the first anniversary of the deceased's death). However, they also claimed that they were owed interest at 5% per year on their respective legacies commencing on the first anniversary of the deceased's death.

When the issue came before the application judge, the court recognized a common-law rule providing that interest was to be paid on specific legacies not paid after the executor's year ends (the court did not name the common-law rule). However, the court exercised its discretion not to award any interest payment to the daughters on their specific legacies despite the passage of time. In coming to this decision, the court considered that (i) the daughters had been estate trustees during much of the administration period, and (ii) the daughters' will challenge delayed the estate's administration and distribution. The court recognized that the daughters were entitled to bring a will challenge. However, the court held that none of the parties "should be rewarded or penalized by the passage of time"[3].

The daughters appealed.

THE RULE OF CONVENIENCE

The Court of Appeal allowed the appeal, finding that the daughters were entitled to an interest payment of 5% per year on their respective $530,000 legacies, from the first anniversary of the deceased's death.

In coming to its decision, the Court of Appeal noted not only that estates should be wrapped up within the executor's year, but referenced the related equitable "rule of convenience" to explain that interest will accrue on specific legacies not paid after the executor's year ends.[4] The Court of Appeal defined the rule of convenience as follows:[5]

> [...] subject to the terms in the will to the contrary, if a specific legacy of personal property, or mixed fund of land and personal property, is payable under a will but is not paid to the beneficiary by the anniversary date of the death of the testator, the beneficiary will begin to earn interest on the value of the property from that date until they have received that property.

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3 *Rivard*, para 13.

4 The Court of Appeal also noted subrule 65.02(2) of the *Rules of Civil Procedure*, a provision to the same effect. Both the Court of Appeal and the application judge held this provision did not apply to this case. The Court of Appeal explained that this provision does not apply to all estate administration matters as it only provides for "interest on accounts taken in <u>administration proceedings</u>", where the application is governed by rr 65.01 and 65.02 and where a referee has been appointed to wind up the estate. In this case, the Court of Appeal noted that there was no notice of application for a proceeding for the estate's administration, no judgment given for the estate's administration, and no referee appointed to wind up the estate. Thus, the provision did not apply.

5 *Rivard*, para 40.

"Intended to Exact Rough Justice" [6]

In further explaining the rule of convenience, the Court of Appeal stated that interest is payable even if it is not possible or practical to make a payment within the executor's year. The Court of Appeal clarified that this rule is not damages or compensation for delay in payment. Rather, the rule is meant to be "a simple, predictable way of achieving the generally fair outcome of providing for the payment of interest on specific legacies"[7] and to give effect to the testator's intention.

The Court of Appeal explained that, if a testator does not believe the rule of convenience is fair, he or she can postpone or specify a date for the payment of specific legacies in his or her will. Alternatively, the testator can provide for a different rate of interest to apply on specific legacies paid after the first anniversary of the testator's death.[8]

The Court of Appeal's Decision

In this case, the Court of Appeal explained that the deceased had not provided any alternative dates for payment of the legacies in his will. Therefore, it was presumed that the deceased wanted his daughters to be paid within a year's time of his passing.

The Court of Appeal held that the daughters were entitled to interest on late payment of their specific legacies as payment was delayed by 2 years. The Court of Appeal explained that this was regardless of (i) being estate trustees during much of the administration period, and (ii) the delay in the estate's administration caused by their will challenge. Pursuant to the rule of convenience, the daughters were each entitled to an interest payment of 5% per year from the first anniversary of their father's death (or $53,000 each), payable from the residue of the estate.

With regard to the lower court's exercise of discretion to not order an interest payment, the Court of Appeal noted that there is no relevant Canadian or English case law indicating that courts have such discretion. While the Court of Appeal balanced arguments for and against such discretion, it did not ultimately decide this issue.[9]

CONCLUSION

It is not always reasonable to expect that an estate be wound up within one year of the date of death. Initial steps in an estate's administration[10] often take considerable time outside of the personal representative's control. Moreover, some estates can be difficult and complex to administer, particularly those with assets in other jurisdictions. Estates can also be tied up in court proceedings for months or even years.

As the Court of Appeal noted, one way to avoid the consequences of the rule of convenience is for the

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6 *Rivard*, para 45.

7 *Rivard*, para 45.

8 The Court of Appeal also cautioned that giving personal representatives general powers of postponement in a will is not specific enough to avoid the rule of convenience. The Court of Appeal explained that a general authority to postpone a payment does not necessarily mean the testator did not wish for interest to be paid on a postponed payment.

9 The Court of Appeal did comment that, if discretion was available, it must be applied in the clearest of cases.

10 For example, obtaining probate, calling in estate assets, paying estate debts, or obtaining a clearance certificate from the Canada Revenue Agency.

testator to specify in his or her will a date by which specific legacies are to be paid. Alternatively, a testator can provide for a different interest rate to apply on specific legacies paid after the first anniversary of the testator's death.

It may also be that the executor's year should be extended to 18 or 24 months. Or, perhaps, courts should have discretion to apply the rule of convenience or to award an interest payment. Each case should be decided on its facts. After all, the rule of convenience is an equitable principle and, as the Court of Appeal stated, "discretion is a hallmark of equity"[11].

When administering an estate, one should be mindful of the dual effects of the executor's year and the rule of convenience. You might even say that it would be in one's best *interest* to do so.

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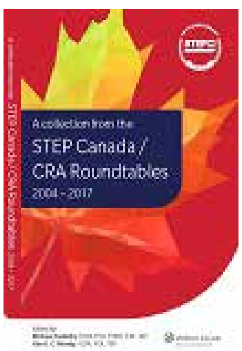
11 *Rivard*, para 58.

Written by Members

This segment will highlight books written by members of the Toronto branch of STEP Canada. If you have a suggestion for a book we could highlight (whether authored by you or a member you know), please contact Paul.Keul@scpllp.com.



The CRA Roundtable discussion is always a highlight of the STEP Canada National Conference. This collection of questions and answers from the 2004-2017 conferences is an informative "must have" publication for tax planners. The book comes with a link to the on-line version, so it can be searched electronically, as well as referenced in analog.

Previously highlighted in this year's newsletter:

Canadian Taxation of Life Insurance, by Florence Marino, B.A., LL.B., TEP, and John Natale, B.Comm., LL.B.

The Naked Opus, by Chris Delaney, TEP

Estate Planning with Life Insurance, 6th Edition, by Glenn R. Stephens, LL.B., TEP, FEA

About Connection

Please note that each advertiser is linked to their web page (as are our program sponsors on the last page). Please click through to their web pages to learn more about each of our sponsors and advertisers. STEP Toronto publishes 'Connection' for our membership 6-7 times per year between September and May. We welcome your feedback and contributions. We are also looking for volunteers to assist with this newsletter. Please send any comments or inquiries to Paul Keul paul.keul@scpllp.com.

Letters, announcements, opinions, comments from members

If you have an article or an idea that would be of interest to other members of STEP, please send them to Andreea Muth amuth@pallettvalo.com for consideration for inclusion in our next edition.

STEP continues to grow and we welcome membership inquiries. As a reminder, there are three routes to full membership; one based on experience (Assessment by Expertise) and two education routes (Assessment by Essay, Assessment by Exam).

If you know anyone who would be a good candidate for STEP membership, please direct them to the STEP Canada website for information.

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