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MILLER THOMSON ON ESTATE PLANNING

Miller Thomson

Release No. 2, December 2023

Miller Thomson on Estate Planning offers insight into estate planning, trusts, estate administration, insurance planning, charitable planning, business succession and corporate restructuring and the legal implications of immigration, emigration, and other cross board issues. This practical looseleaf service is updated regularly to ensure that you'll always have access to the latest information and developments.

What's New in this Update:

This release features updates to the commentary and case law in Chapter 1 (Ownership and Succession to Property) and Chapter 18 (International Planning).

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Commentary Highlights:

- **Ownership and Succession to Property — Planning for Death —** The COVID-19 pandemic precipitated changes to will signings in many jurisdictions. For example, Alberta has amended its *Wills and Succession Act* until at least August 15, 2024, to deem individuals connected via electronic technology to be in the presence of a testator for the purposes of witnessing the signing of a will. British Columbia became the first Canadian province to allow electronic wills. Previously, the law required a physical will with a wet ink signature in the presence of two witnesses (who could be present physically or virtually). The updated law allows testators to make electronic wills that are signed and stored electronically.
- **Ownership and Succession to Property — Forms of Property Ownership — Joint Tenancy — Right of Survivorship —** In recent years, two decisions of the Ontario Superior Court of Justice came to different results with respect to beneficiary designations. In *Calmusky v. Calmusky*, 2020 ONSC 1506 (Ont. S.C.J.), the Court found that the presumption of resulting trust applied to a registered account designated to an adult beneficiary. However, in *Mak (Estate) v. Mak*, 2021 ONSC 4415 (Ont. S.C.J.), the Court reached the opposite conclusion, finding that a resulting trust cannot apply to a beneficiary designation of a registered plan. In a Nova Scotia case, the court declined to follow *Calmusky* and did not apply the presumption of resulting trust to TFSA accounts: *Fitzgerald Estate v. Fitzgerald*, 2021 NSSC 355 (N.S. S.C.).
- **International Planning — Section 94 of the ITA — Non-Resident Trusts Deemed Resident in Canada — Consequences of Section 94 — The Resident and Non-Resident Portions —** The CRA has taken the position that where a return of income is filed late, the election would not be considered late, so long as the election is filed with the return of income. However, where the election is not included with the return of income when it is filed, the election would be considered late. The CRA appears to have taken this position based on a Federal Court of Appeal’s decision. Accordingly, the CRA is of the opinion that “where an election is required to be filed in the taxpayer’s return of income for the year, such an election would not be considered-late filed if the election was filed with a return of income for that year that was late-filed”: Canada Revenue Agency, CRA View, 2022-0924801C6 –STEP 2022—Q3—Electing contributor and electing trust (June 15, 2022) [2022-0924801C6].

ProView Developments

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