

June 16, 2008

The Hon. Chris Bentley
Attorney General of Ontario
Ministry of the Attorney General
720 Bay Street, 11th Floor
Toronto, ON M5G 2K1

Proposed Amendments to the *Succession Law Reform Act*

Dear Minister,

We are writing on behalf of the Ontario Bar Association to draw to your attention an issue that arises out of draft amendments to the *Income Tax Act* (Canada) tabled by the federal government to establish Tax-Free Savings Accounts (TFSA's).

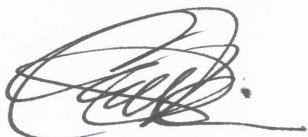
The issue that we believe should be of concern to Ontarians is with respect to beneficiary designations for TFSA's. We recommend that Ontario change the *Succession Law Reform Act* (SLRA) to allow for beneficiary designations of TFSA's in the same way it allowed for beneficiary designations of RRSP's and RRIF's. The attached submission, drafted by the OBA's Trusts & Estates Law Section and endorsed by all 35 practice sections of the Ontario Bar Association, sets out these issues and provides some analysis.

The current status of Ontario succession law does not recognize beneficiary designations in the context of a TFSA. Beneficiary designations outside Wills can result in faster and more cost effective transfers of property because often the transmission would not require an application for probate. The Individual who owns a TFSA will likely expect to be able to use beneficiary designations in the plan document to deal with the testamentary succession of the TFSA. Provincial legislative reform is required to give effect to the designation of Successor Holders/beneficiaries of TFSA's outside Wills. Until such changes are made to Ontario law, assuming the draft legislation is finalized and TFSA's become available after 2008, TFSA's must be dealt with specifically in Wills or they will pass as part of the residue when the Individual dies.

We recommend that a regulation be enacted as contemplated by section 53.1 of the SLRA to allow for beneficiary designations of TFSA's in the same way it allowed for beneficiary designations of RRSP's and RRIF's.

We would be pleased to speak with you on this issue should you have any questions or wish to discuss it further.

Yours very truly,



Greg Goulin
OBA President

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Tax-Free Savings Account – Beneficiary Designation Problem

1) Background

The February 2008 Federal Budget¹ proposes to introduce the Tax-Free Savings Account (“TFSA”), a registered savings vehicle which allows a resident individual 18 years of age and older (“Individual”) to contribute \$5,000 each year to the TFSA with income and gains to accumulate in and then be withdrawn from the TFSA on a tax free basis. Funds can be deposited, invested, pledged and withdrawn as the Individual chooses. The Individual is permitted to name his or her spouse or common-law partner (“Spouse”) as a successor holder of the TFSA (“Successor Holder”). Upon the Individual’s death, if the Successor Holder becomes the owner of the Individual’s TFSA, the Successor Holder is able to maintain the tax-exempt status of the deceased Individual’s TFSA without reducing the Successor Holder’s personal contribution room for the Successor Holder’s own TFSA. The Budget and draft legislation² does not refer to any other person who can be a Successor Holder.

2) Issues

The key issues arising from designations of Successor Holders are:

1. whether the designation of a Successor Holder/beneficiary is a testamentary disposition by the Individual;
2. whether the federal government has jurisdiction to allow for the designation of a Successor Holder/beneficiary; and
3. apart from a testamentary disposition through a valid Will, whether Ontario legislation allows for designation of a Successor Holder/beneficiary of a TFSA.

3) Summary Conclusion

Since the TFSA contemplates preferred tax treatment for surviving Spouses who inherit TFSAs, it is contemplated most people who are part of a couple will leave their TFSA to the surviving Spouse. While this could be done by Will, because many people are used to the beneficiary designation available under registered retirement savings plans registered (RRSPs) and retirement income funds (RRIFs), we predict most people in a couple relationship will expect to be able to leave their TFSA by beneficiary designation outside a Will as well. The making of beneficiary designations outside a Will is within provincial, not federal jurisdiction. None of the provinces’ legislation currently contemplates a beneficiary designation for plans such as TFSAs, apart from TFSAs that are issued as life insurance.³

Unless Ontario changes its legislation, people purchasing their TFSAs through banks, mutual fund companies and brokerages will not be able to make a designation of a beneficiary or name a Spouse as a Successor Holder except in a valid Will.

¹ <http://www.budget.gc.ca/2008/plan/chap3b-eng.asp>; <http://www.budget.gc.ca/2008/plan/ann4a-eng.asp#personal>

² http://www.fin.gc.ca/drleg/wmmMarch08_e.html

³ The Insurance Acts allow for beneficiary designations of insurance products. See *Insurance Act*, R.S.O. 1990, c. I.8, s. 190

4) Discussion

Jurisdiction over property rights

Property rights, including the succession of property on death of an individual, are within provincial jurisdiction⁴. The naming of a Successor Holder or beneficiary deals with the succession of the property within the TFSA when the Individual dies. The tax exempt status of the property in the Individual's TFSA when it passes to the Successor Holder may be within the jurisdiction of the federal government and the federal *Income Tax Act*, but the means by which the property passes on death of the Individual is not.

Testamentary Nature of Designation of Plan Beneficiary

The issue of the testamentary nature of the designation of a beneficiary of a non-insurance plan was dealt with in *Re MacInnes Estate*, [1935] S.C.R. 200. The plan in question was an employee benefit plan. On the plan application the employee signed, he had named his wife to receive the value of his benefits from the plan when he died. One witness signed the form as well.

The significant attributes of the plan were:

- The employee could withdraw his contributions at any time;
- He could and had pledged the assets in the plan as security for a loan;
- He could revoke or change the beneficiaries or divert the money to his estate by instrument in writing or by Will;
- The naming of the beneficiary did not create any charge or trust in favour of the beneficiary against the employee; and
- The right of the beneficiary was dependent upon the death of the employee for its vigour and effect.

The Supreme Court of Canada confirmed: “if the person executing [the instrument] intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.”

The SCC agreed that, being a testamentary disposition, the disposition had to meet the requirements for a valid Will and since it did not, having only one witness instead of two, it was ineffective and the plan benefits formed part of the employee's estate and passed under his Will, to different beneficiaries from the one named in the plan document.

Provincial Response to Re MacInnes

Based on the finding in *Re MacInnes*, the provinces, including Ontario, brought in legislation to specifically permit the naming of beneficiaries of employee plans in instruments (e.g. plan application forms) without the requirements of the formality of a Will.⁵ Designations in Wills were specifically permitted as well.

⁴ s.92 (13) of *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c.3.

⁵ Quebec deals with beneficiary designations differently. Currently, no beneficiary designations are permitted for trusts governing RRSPs and RRIFs. The succession of these plans must be dealt with in Wills.

Later, amendments were made to these laws to specifically allow beneficiary designations for RRSPs and RRIFs and in certain cases, other specifically named registered plans under the *Income Tax Act*. However, TFSAs currently do not fall within the description of plans covered in this legislation.

TFSAs – Designation of Successor Holder/Beneficiary is Testamentary Disposition

The Individual who holds a TFSA has full rights to the TFSA prior to the Individual's death: e.g. ability to pledge the account as security, to withdraw from the account at any time, to leave it on death as chosen. The draft legislation specifically provides that the Successor Holder's rights as "holder" do not come into effect until the Individual has died. Therefore, any instrument designating the Successor Holder does not take effect until after the death of the Individual. Thus, it is the intention of the Individual that the instrument should not take effect until after his or her death and it is dependent upon death for its "vigour and effect."

The designation of a Successor Holder meets the test confirmed by the Supreme Court in *Re MacInnes Estate* i.e. that it is a testamentary act. Therefore, the provincial laws of succession and Wills will apply.

Provincial laws

Most provincial succession laws currently allow for the designation of beneficiaries in instances involving a "plan," without the formalities normally required for a Will. The Ontario *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (*SLRA*) has the following provision:

Designation of beneficiaries

51.(1)A participant may designate a person to receive a benefit payable under a plan on the participant's death,

(a) by an instrument signed by him or her or signed on his or her behalf by another person in his or her presence and by his or her direction; or

(b) by will, and may revoke the designation by either of those methods.

The definition of a “plan” in s.50 of the *SLRA* is:

“plan” means,

(a) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement or a fund, trust, scheme, contract or arrangement for other benefits for employees, former employees, directors, former directors, agents or former agents of an employer or their dependants or beneficiaries,

(b) a fund, trust, scheme, contract or arrangement for the payment of a periodic sum for life or for a fixed or variable term, or

(c) a fund, trust, scheme, contract or arrangement of a class that is prescribed for the purposes of this Part by a regulation made under section 53.1,

and includes a retirement savings plan, a retirement income fund and a home ownership savings plan as defined in the *Income Tax Act* (Canada) and an Ontario home ownership savings plan under the *Ontario Home Ownership Savings Plan Act*.

The definition specifically includes RRSPs and RRIFs as defined in the *Income Tax Act*. A TFSA does not fall within the scope of this definition so the beneficiary designation allowed under s.51 of the *SLRA* would not apply to a TFSA.