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Guidance Provided by Ministry of Finance in Respect of Multiple Wills

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Ontario is notorious for its high estate administration taxes. While the provincial government's most recent budget provides some relief in respect of this burden (increasing the size of estates that are exempt from payment of estate administration tax to those valued at $50,000 or less), planning to minimize or avoid estate administration tax remains a primary estate planning concern for many Ontario residents.

A common and effective mechanism for limiting exposure to estate administration taxes is the use of multiple wills to reduce the assets to be administered under the probated will. Typically, a Primary Last Will and Testament covers only those assets for which probate is required, often including real property, while a Secondary Will addresses the disposition of all other assets. The Ministry of Finance has recently provided guidance regarding the use of Primary and Secondary Wills, clarifying the state of the law following the *Re Milne Estate* litigation.

Re Milne Estate

Prior to its successful appeal, *Re Milne Estate*, 2018 ONSC 4174, was a source of concern for estate planners throughout the province. The decision raised the issue of the validity of multiple wills on the basis of their use of discretionary allocation clauses, which eliminate the "certainty of subject matter" required for a valid trust. The lower court's determination was made on the basis that a will is a trust in respect of which the three-certainties test applies.

In *Re Milne Estate*, 2019 ONSC 579, the Divisional Court clarified that discretionary allocation clauses are not fatal to the validity of a will (at para 24):

> The fact that an allocation clause is discretionary does not mean that the power conferred by it can be exercised arbitrarily. The power of an executor to allocate must be exercised in accordance with the standards of applicable fiduciary duty.

The Court recognized the impracticality of providing a definitive list of assets for which a Certificate of Appointment of Estate Trustee With a Will may or may not be required by the time of the testator’s death, often years after the preparation and execution of Primary and Secondary Wills.

The Divisional Court reviewed the issue of whether a will was, as Justice Dunphy of the Superior Court of Justice had suggested, a trust. While a will may give rise to the creation of one or more testamentary trusts, a will itself is not a trust and, accordingly, the three certainties need not be satisfied in order for the will to be valid. To be valid, a will must instead comply with the formal requirements outlined within the *Succession Law Reform Act*, R.S.O. 1990, c. S.26.

Aftermath of *Re Milne Estate*

While the Divisional Court's decision in *Re Milne Estate* supported the use of a discretionary allocation of assets between Primary and Secondary Wills based on a determination by the estate trustee for the need of probate, some uncertainty remained in respect of how far trustee discretion could go and how best to prepare multiple wills without unnecessarily exposing assets to estate administration tax.

Consider, for example, discretionary allocation clauses worded as follows:

> Primary Will:
>
> *This Will applies to any assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is required for the transfer or realization thereof.*
>
> Secondary Will:
>
> *This Will applies to any assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for the transfer or realization thereof.*

Prior to the testator's death and the estate trustee's determination as to which assets require probate, it cannot be determined in respect of some assets whether they will fall under the Primary or Secondary Will. As a result, drafting solicitors may want to include dispositive clauses dealing with specific assets within both documents. For example:

> Primary Will:
>
> *To the extent that this asset is governed by my Primary Will, I direct my Trustees to transfer [my house] ...*
>
> Secondary Will:
>
> *To the extent that this asset is governed by my Secondary Will, I direct my Trustees to transfer [my house] …*

However, until very recently, it was unclear whether such wording appearing in both wills would expose an estate to estate administration tax in respect of assets identified within a Primary Will (but being administered under the Secondary Will) and/or whether these assets would need to be included in the Estate Information Return.

Recent Guidance Provided by the Ministry of Finance

In response to the above scenario and proposed wording for Primary and Secondary Wills, the Ministry of Finance has shared the following position:

> The responsibility for determining whether an asset requires an estate certificate to transfer it, rests with the estate representative. The estate representative would therefore, in the case described above, make a determination as to whether the "house" requires a grant of authority in order to transfer it based upon objective criterion.
>
> If the estate representative determines that an estate certificate is not required for the purpose of transferring the house, this asset would be excluded from the Estate Information Return. Please note that pursuant to the Minister's power of audit and inspection under section 4.7 of the *Estate Administration Tax Act 1998,* the Minister may request, among other things, information, documents and records relating to the determination.

This clarification provides meaningful guidance to estate lawyers in assisting clients to create estate plans in a manner that reflects both a client's testamentary intentions and minimizes probate-related estate expenses.

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Taxpayer Retains Right to Remain Silent: Tax Authority Cannot Compel Oral Interviews

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Under the *Income Tax Act*, the Canada Revenue Agency (CRA) is vested with broad powers to audit taxpayers. The CRA may "inspect, audit or examine" the books and records of taxpayers (see paragraph 231.1(1)(a)). It can access information, including from third parties, that taxpayers are required to keep, as well as information that merely happens to be in their records.

Taxpayers are also required to give the CRA all reasonable assistance and to answer all proper questions relating to the administration or enforcement of the Act. However, a recent decision of the Federal Court of Appeal confirms that taxpayers have the right to remain silent; the CRA does not have the power to compel oral interviews.

CRA Demands Oral Interviews

The CRA has increasingly requested oral interviews during audits. In *Minister of National Revenue v. Cameco Corporation*, 2019 FCA 67, the CRA sought oral interviews from upwards of 25 people employed by the taxpayer, including employees of non-Canadian subsidiaries. The taxpayer declined the request on the basis that the CRA did not have the power to compel such interviews, but offered to respond to written questions.

The taxpayer had a history of otherwise being compliant. For prior audits, it had voluntarily submitted to similar requests, but was concerned in this case that the CRA's demand could cause prejudice to its appeal that was concurrently proceeding in the Tax Court of Canada. That appeal involved earlier taxation years but raised the very issues that were the subject of the audit.

To counter the taxpayer's refusal, the CRA brought a compliance order application in the Federal Court pursuant to section 231.7 of the Act. In support of that application, the CRA took the position that the general power in paragraph 231.1(1)(a) to "inspect, audit or examine" the books and records of a taxpayer is broad and includes the ability to compel oral responses. The CRA argued its interpretation was consistent with the purpose of the provision to verify taxpayers' information and ensure compliance, along with the broader public interest in supporting a self-assessment system of taxation.

The Federal Court rejected the CRA's position. The Court accepted, as a matter of general principle, that the CRA can conduct oral interviews and that this ability is an inherent and integral part of its audit powers. However, the Court concluded that the CRA did not have an

unlimited right to conduct oral interviews of an indeterminate number of employees at the audit stage while litigation was concurrently ongoing.

The CRA appealed to the Federal Court of Appeal.

Federal Court of Appeal Refuses CRA's Demand

In dismissing the CRA's appeal, the Federal Court of Appeal (reasons written by Justice Rennie and concurred with by Justice Laskin) held that the general power to "inspect, audit or examine" the books and records of a taxpayer does not extend to compelling a taxpayer to submit to oral interviews.

The Court of Appeal determined that the text of paragraph 231.1(1)(a) focuses on the ability of the CRA to access information in the books and records of the taxpayer and that nothing in the text suggests an implicit power to compel a person to answer oral questions. The Court of Appeal reinforced this reading by noting that in other statutes where Parliament has intended to compel a person to provide oral answers in response to a government inquiry, it has done so expressly.

While agreeing that it is important that the CRA be equipped to verify information in the context of a self-reporting tax system, the Court of Appeal held that such a purpose cannot replace the language used by Parliament. The Court further stated that the CRA has other investigatory powers to pursue information from a taxpayer (for example, seeking information from third parties and authorizing a formal inquiry). The Court of Appeal observed that it was not expressing a view as to whether these other powers are sufficient such that the CRA does not need the power to compel oral answers, but any change to provide such a power was a policy matter for Parliament.

The Court of Appeal also observed that the legislative history of paragraph 231.1(1)(a) removed any possible doubt regarding the scope of the provision. The predecessor provision used the word "orally" in connection with the duty to answer all proper questions relating to an audit and offered the CRA the option of requiring a taxpayer to give answers under oath. The Court found the exclusion of those terms in the current version of the provision to be telling.

CRA Found to be Overreaching

Justice Woods wrote a separate judgment concurring in the result, but advancing different reasons. While Justice Woods held that it was not necessary to consider the scope of the CRA's audit powers more generally, she saw no reviewable error in the Federal Court's decision. Specifically, she found that the decision centred on four unique and compelling facts: the issue under audit involved multiple taxation years; the taxpayer came to court with "clean hands" having complied with all other requests, including having voluntarily agreed to oral interviews in prior years; the large number of interviews requested and the taxpayer's offer to answer written questions; and the concurrent Tax Court litigation.

While Justice Rennie did not agree that these considerations should be taken into account, Justice Woods believed that such facts were relevant to the exercise of the Federal Court's discretion in deciding whether to enforce compliance. Justice Woods concluded that the facts amply supported the conclusion that the CRA was overreaching.

CRA Maintains Position

Following the Federal Court of Appeal's decision, the CRA updated its position on obtaining information from taxpayers for audit purposes (Communiqué Number AD-19-02, Dated 2019-06-03). According to the CRA, the decision does not diminish the responsibilities of taxpayers to "cooperate and answer questions during the course of an audit." As such, the CRA will continue to request oral interviews to expedite the audit process. If a taxpayer refuses to comply, the CRA will make inferences and assumptions about the facts (as it is otherwise permitted to do) and will assess on that basis. It remains to be seen how taxpayers will respond in practice.