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STEP Inside

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STEP Worldwide Council News

This is a report about the activities of Kathleen Cunningham, Nancy Golding, and John Poyser from the STEP Worldwide Council meetings in December 2015. On behalf of Canada, Kathleen attended the branch development committee meeting on December 7; she also met with the working party on council membership. The STEP Worldwide Board of Directors reviewed the working party's report and recommendations in early March 2016.

Kathleen and Nancy each attended and chaired one session as the Canadian representatives from the STEP Worldwide Council at the leaders forum on December 9. The purpose of this forum, which was attended by approximately 80 STEP representatives, was to discuss priorities at both the branch and national levels. The forum proved to be very engaging and invigorating. Most striking was the level of consensus among participants from such a wide range of jurisdictions on so many issues, ideas, and priorities. The STEP Worldwide report identified three emerging priorities.

1. Creating a branded profession of trusted advisors to families
2. Supporting every STEP branch to adopt an education plan
3. Advocating trusts and their uses to the public

Kathleen, Nancy, and John will take comments from the forum about the priorities back to Canada and work to achieve the goals and implement the service priorities that were identified.

Kathleen, Nancy, and John all attended the council meeting on December 8, where the objectives of the leaders forum were considered. Because there will be a number of vacancies on the STEP Worldwide Board of Directors in 2016, the role of council and board members was reviewed, as was the induction process for new council members. Consultants who were retained by STEP Worldwide provided information about their analysis of this process. In addition, with the completion of the pilot project in January 2016, the employer partnership program was reviewed in detail. A presentation was made to the STEP Canada Board of Directors the following day, and Kathleen, Nancy, and John will be encouraging further discussions with Canadian employers over the coming year.

Kathleen, Nancy and John all attended Council meetings on April 14 and 15, 2016 which will be reported on in the next edition of *STEP Inside*.

If you have any questions or concerns, please do not hesitate to contact any of us: Kathleen at kcunningham@bcli.org, Nancy at ngolding@blg.com, and John at jpoyser@traditionlaw.com.

FAMILY BUSINESS SUCCESSION AND AN ADVISER'S CONFLICT OF INTEREST

JOAN JUNG, TEP

Minden Gross LLP

Family business succession is generally known to be rife with income tax issues, but the recent Ontario Court of Appeal decision in *Roth Estate v. Juschka and Brock*, 2016 ONCA 92, is a reminder that an adviser must beware of becoming involved in conflict-of-interest situations.

A lawyer, Mr. Brock, acted on the transfer of shares from Mr. and Mrs. Roth to Mr. and Mrs. Juschka, their daughter and son-in-law. Mr. Roth had many years of experience in the grocery business. He had worked his way up to an executive position in a major grocery chain, where he was responsible for expansion and finding new stores. He was also involved in the sale of stores that the grocery chain wanted to dispose of. As a result, Mr. Roth became aware of a store in Corunna that was for sale. At the time, his son-in-law was working part-time in a grocery store, and Mr. Roth thought that the Corunna store would provide an opportunity for both families. Mr. Roth and Mr. Juschka had a close relationship, and Mr. Roth thought that he could pass on his experience and knowledge of the grocery business to his son-in-law. The two families moved to Corunna. Both Mr. Roth and Mr. Juschka contributed \$10,000 in equity, and Mr. Roth advanced an additional \$40,000 to fund the purchase of the Corunna store. Roth-Juschka Holding Ltd. was incorporated, with Mr. Roth holding 51 percent of the shares, and Mr. and Mrs. Juschka holding 49 percent.

The store was successful. Profits

were split between the two families on a 51:49 percentage basis. Seven years later, Mr. Roth was diagnosed with cancer. The diagnosis caused him to consider succession planning for the store and to calculate the income that he and his wife would need for the rest of their lives.

Mr. Brock had acted for the Roths and the Juschkas on separate residential purchase transactions. He had acted on the incorporation of Roth-Juschka Holding Ltd., the acquisition of the store, and the subsequent incorporation of holding corporations for both the Roths and Juschkas. Mr. Roth spoke with Mr. Brock about amending his will to leave his shares to the Juschkas. Mr. Roth had a second daughter with whom he had a difficult relationship, and Mrs. Roth had a difficult relationship with Mrs. Juschka. Mr. Roth also sought advice from his accountants, and at least one meeting was attended by the accountants, the lawyer, Mr. Roth, and Mr. Juschka. Ultimately, Mr. Brock was instructed to prepare the documents under which Mr. Roth sold his shares to the Juschkas for a \$408,000 promissory note, payable on demand 40 years hence and bearing interest at a commercial interest rate. Mr. Roth had discretion to waive or reduce the interest. The note expressly provided that it was due and payable on demand in the event of the sale of the Corunna store or in the event that Mrs. Juschka became the holder of less than 50 percent of the voting shares.

In addition, consulting agreements were entered into with both Mr. and Mrs. Roth; the agreements provided for consulting fees to be paid to each of them, calculated on the basis of 50 percent of the profits of the Corunna store, with some reduction over time. The term of each agreement was

essentially the lifetime of Mr. or Mrs. Roth. The agreements were personally guaranteed by the Juschkas. By this time, neither Mr. nor Mrs. Roth was working in the business. Apparently, the understanding was that the promissory note would be forgiven by Mr. and Mrs. Roth in their wills, and their wills were so amended shortly thereafter.

For 10 years after these transactions, consulting fees were paid to Mr. and Mrs. Roth as agreed. The Corunna

amount of the note. These findings were upheld on appeal.

While the trial court dismissed the third-party claim against the lawyer, the Court of Appeal held that Mr. Brock had failed to warn the Juschkas of the risks of the transaction. Although all parties were amicable when the shares were transferred, there was nevertheless a significant potential for a conflict of interest between the Roths and the Juschkas, and Mr. Brock was acting for both parties. The Court of Appeal con-

The case serves as a reminder that lawyers who act both for a family business and for the family business owners can easily find themselves in a conflict-of-interest situation when the business passes from one generation to the next.

store then encountered financial difficulties. There had been a store expansion, financed in part by Sobey's. The consulting fees were reduced. Mr. Roth was unhappy and threatened to demand payment of the note. The Juschkas sought advice from Mr. Brock, and he advised that they were obliged to make the payments under the consulting agreements. Family relationships became strained. A few years later, the Juschkas faced the choice of bankruptcy or selling the store to Sobey's. They chose to sell. Mr. Roth died, and Mrs. Roth demanded payment of the note in light of the sale of the Corunna store.

The matter went to litigation, and the Juschkas made a third-party claim against Mr. Brock.

The trial court held that the Juschkas were liable on the promissory note. It rejected their assertion that the consulting fees, as paid over time, were intended to reduce the principal

amount of the note. The court concluded that Mr. Brock was clearly in a conflict-of-interest situation and could not discharge his fiduciary duty to act in the best interests of the Juschkas. The court determined that the Juschkas should have been told to seek independent legal advice; if they had done so, they would have been warned that the structure left them liable not only for the promissory note (which was apparently the fair market value of the 51 percent interest at the time of the share transfer) but also for the payment of an ongoing consulting fee payment, which in time could exceed the principal amount of the note.

The case serves as a reminder that lawyers who act both for a family business and for the family business owners can easily find themselves in a conflict-of-interest situation when the business passes from one generation to the next.