GIFTING CORPORATE LIABILITIES UNDER A WILL

By Suzana Popovic-Montag - August 2024

For clients who have a corporation or an interest in a corporation, a good testamentary plan ought to address how to dispose of those corporate interests. One particular issue that counsel ought to have the client turn their mind to is whether they want their corporate bequest to include liabilities owed to them by the corporation, such as mortgages or shareholder loans,[1] or whether they want the bequest to be limited to shares or other corporate property.[2]

Whether or not a bequest includes liabilities owed by the corporation to the deceased can have a significant impact on the value of a bequest. Not only do outstanding liabilities have financial value, but they may also provide a beneficiary with "more effective control" over a corporation than being a mere shareholder.[3]

The question of whether corporate liabilities are included in a bequest of corporate shares or corporate interests has come up a number of times in the case law, with inconsistent results.

The Law in Ontario

There is favourable Ontario case law on both sides of this issue. In *Wright, Re*,[4] Justice Wells held that a bequest of "any interest" in a corporation that the testator "may own, any shares or otherwise," was limited to shares of common and preferred stock and did not include a mortgage that the testator held against the company. In reaching this conclusion, the Court noted that "a debt owing by a company to a person [does not give] that creditor any 'interest' in the strict legal sense, in the company." Rather, as a creditor, the deceased merely had the ability to make a claim at the maturing of the mortgage.

In comparison, in *Fekete Estate v Simon*,[5] the Court held that a bequest of "all of my shares in the share capital of" two companies included shareholder loans owed to the deceased. Taking into consideration the fact that both corporations in this case were financed by shareholder

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[1] A shareholder loan is a "a debt-like form of financing provided by a shareholder to a company in which he or she owns shares:" *Ali Estate (Re)*, 2014 BCSC 340 at para. 36 [*Ali*].

[2] For tips regarding gifting corporate property, see the Solicitor's Tip from January 2024, "Gifting Corporate Property" (1 January 2024), online: Hull & Hull Knowledge <https://hullandhull.com/2024/01/gifting-corporate-property/>.

[3] *Ali*, *supra* note 1 at para 36.

[4] (1949), 4 DLR 678 (Ont HC).

[5] (2000), 32 ETR (2d) 202 (Ont SCJ) [*Fekete Estate*].

loans, rather than paid-up capital, the Court concluded that the wishes of the testator would be frustrated by the exclusion of the shareholder loans.

The Law Elsewhere in Canada

The law on this point is also inconsistent outside of Ontario. In one case, the British Columbia Supreme Court held that a bequest of the testator's "interest in the company" included shares, a shareholder loan owing to the deceased, and the amount owed by the company to the deceased pursuant to a promissory note.[6] The Court considered that the ordinary meaning of the term "interest" is "expansive," finding that it was "reasonable to conclude that in the context of the Will, the Deceased intended to bequeath the entirety of his financial stake in the Company."[7]

In a recent case from Newfoundland and Labrador, however, the Court reached the opposite conclusion, finding that the bequest of a "50% interest" in a corporation only included shares and did not include the shareholder loan owing to the deceased.[8] In light of the surrounding circumstances, specifically the fact that one of the testator's children would essentially be disinherited if the loans were included in the bequest, the Court held that the testator would have used different language had he intended to gift more than his shares.

Gifting Liabilities

Given the value of corporate liabilities and the inconsistent case law discussed above, it is advisable to ensure that a client's will expressly addresses whether or not a corporate bequest includes shareholder loans or other liabilities payable to the testator and their estate. A will clause which gifts corporate "bonds" may be adequate, since the Superior Court of Justice has recognized that "[a] bond is an acknowledged debt of a corporation" that can be secured or unsecured, and can cover shareholder loans and promissory notes.[9] However, given that the term "bond" has been interpreted in a variety of ways,[10] estate planning lawyers may wish to consider using more precise language, when possible, to ensure that future Court applications regarding how to interpret the client's will are unnecessary.

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[6] *Ali*, *supra* note 1.

[7] *Ibid.* at para 33.

[8] *Henley v. Henley*, 2022 NLSC 103, affd 2023 NLSC 47.

[9] *Fekete Estate*, *supra* note 5 at para 11.

[10] For example, it is noted in *Feeney's Canadian Law of Wills* that "[s]trictly speaking, the word 'bond' is confined to a security under seal." For liabilities that are not under seal, it would be preferable to use different language to describe the debt owed to the testator. See Ian M. Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto, Ontario: LexisNexis, 2000) (loose-leaf) at § 11.129.