ROBINS APPLEBY
BARRISTERS + SOLICITORS

LEGAL PULSE
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# NEWS

## LIMITED PARTNERS BEWARE! SURPRISING CASH DISTRIBUTION RULES

BY JONATHAN ZEPP AND MATTHEW MCGUIGAN

Parties contemplating the formation of a limited partnership in Ontario should consider the implications of a recent Ontario Superior Court of Justice (ONSC) decision, *Anthony v Binscarth Holdings GP Inc.* (*Anthony*). The Court considered limited partners' entitlement to annual cash distributions, and specifically, their ability to cause the general partner to pay such distributions. The Court's analysis provides the following key insights which prospective limited partners and general partners alike should consider when negotiating limited partnership agreements:

1. Limited partners should be cognizant that they are not entitled under the *Limited Partnerships Act* (the Act) to cash distributions of the partnership's profit, absent a contractual term to that effect; and
2. In a similar vein, general partners should be cognizant that there is no requirement under the Act to provide cash distributions to limited partners. So long as the partnership credits the limited partners' capital accounts with each limited partners' proportionate share of profits, the absence of cash distributions is not a violation of the Act.

### ANTHONY V BINSCARTH HOLDINGS GP INC.

In *Anthony*, certain limited partners (the Applicants) of Binscarth Holdings L.P. applied for a declaration that they were entitled to receive payment of 100% of their proportionate share of the partnership income on an annual basis by way of cash distribution. The partnership was governed by a limited partnership agreement which included provisions providing the general partner with absolute discretion with respect to distributions of cash and partnership assets. The limited partnership agreement contained only one provision restricting such discretion, section 8.1(b), which required a minimum distribution to the limited partners for the purpose of covering their taxes payable on account of their proportionate allocation of partnership income.

The ONSC found that the limited partnership agreement was sufficiently clear that the general partner had "sole discretion" with respect to distributions and therefore, the Applicants had no entitlement to cause the general partner to make such distributions.

### THE COURT'S REASONING

The Applicant's primary argument was that section 11(1) of the Act required the partnership to distribute all partnership profits to the limited partners each year. The Applicants acknowledged that the limited partnership agreement did not mandate distributions of net profits, other than those required to cover taxes payable, but argued that this omission was in contravention of section 11(1) of the Act.

In considering this argument the Court analyzed section 11(1) of the Act, which states:

> 11 (1) A limited partner has, subject to this Act, the right,
>
> (A) to a share of the profits or other compensation by way of income; and
>
> (B) to have the limited partner's contribution to the limited partnership returned.

The Court stated that the Applicants' interpretation of section 11(1)(a) was an argument that the words "a limited partner has, …, the right, to a share of the profits …" are synonymous with "a limited partner has, …, the right, to a distribution of the limited partner's share of the profits …". The Court disagreed with this equivalency, finding that the mandate found in section 11(1) is satisfied by crediting the limited partners' capital account with their proportionate share of the partnership's income.

The ONSC's conclusion was further supported by the following arguments:

1. Throughout the Act, distributions are referenced as "payments to limited partners." Therefore, the Court concluded that if section 11(1) was referring to distributions, the Legislature would have used the term "payments";
2. Section 24 of the Act discusses the existence of accumulated profits in the limited partners' capital accounts. The Court noted that such accumulations would not be possible under the Applicants' argument that they were entitled to annual cash distributions of all partnership income; and
3. A requirement that the partnership provide annual cash distributions of all partnership income would conflict with other provisions of the limited partnership agreement dealing with additional investment by the partnership.

Ultimately, the Court rejected the Applicants' argument, finding that there was no requirement under the Act for the partnership to make annual cash distributions, and therefore the discretion provided to the general partner in the limited partnership agreement was not in contravention of the Act. The Court nonetheless found that such a requirement could be provided for in the limited partnership agreement itself, such as the requirement under section 8.1(b) to provide minimum distributions for the purpose of covering taxes payable by the partners

### KEY TAKEAWAYS

Those purporting to enter into a limited partnership agreement should be sure to consider *Anthony* when negotiating provisions with respect to cash distributions. Specifically:

1. Limited partners should understand that there is no legislative requirement that a limited partnership make cash distributions of partnership income. Therefore, limited partners concerned with obtaining distributions should negotiate a term in the agreement either requiring distributions or providing the limited partners with the ability to cause the general partner to make such distributions; and
2. General partners should understand that the partnership is under no obligation to provide cash distributions under the Act and limited partners cannot cause such distributions under the Act. Finally, general partners should recognize that provisions providing them with absolute discretion with respect to distributions are not in contravention of the Act and will thus be enforced by the Courts.

# SECURE YOUR LEGACY: THE IMPORTANCE OF A WILL

**BY HEELA DONSKY WALKER AND ERRAN LEE**

With almost half of Canadians lacking a Will, it is vital to raise awareness about how this document can protect families and ensure that wishes are respected after death, especially for individuals with significant wealth or other complexities.

There are numerous reasons to make a Will and Estate Plan. We have highlighted some key considerations.

## 1. AVOID LEAVING A MESS FOR YOUR LOVED ONES

Losing a loved one is always a challenging time. Without a Will, families face additional stress when left without clear guidance on how to manage and distribute the estate of their loved one. A Will serves as a roadmap for your chosen representatives, helping to minimize conflict and confusion.

Your Will allows you to appoint an executor whom you trust and who has the right skillset to manage your estate. It also allows you to determine how your estate will be distributed, and to specify any particular gifts you may wish to leave to certain individuals and/or charities.

In today's legal landscape, increased regulations make it difficult to administer even a well-thought out and properly drafted Will. A poorly drafted Will can lead to interpretation issues and family rifts, while incomplete or outdated records of assets can cause significant delays.

There are potentially even further risks involved for individuals with significant wealth; estates with diverse asset classes, beneficiaries in different jurisdictions, or blended family structures require careful planning. Without a Will, loved ones may face prolonged delays in accessing assets, or may be eligible to receive less (or sometimes nothing at all) adding further hardship to the entire family.

## 2. TAKE ADVANTAGE OF TAX MINIMIZATION OPPORTUNITIES

Effective estate planning can reduce the tax burden on your beneficiaries. In other words, failing to make an effective plan, that takes into account tax planning, could have the result of decreasing the value of the inheritance your loved ones receive.

A qualified solicitor can assist in your estate planning to maximize any tax deferrals available, preserve access to the principal residence exemption on certain real estate properties you may own, and other potential income/capital gains savings that may be relevant. There are also probate minimization strategies to minimize the amount of probate fees (referred to as estate administration tax in Ontario) payable and facilitate faster access to your assets for your beneficiaries following your death. Probate is a legal process that may be required to access certain assets that form part of an individual's estate. There are legal fees involved as well as a tax of about 1.5% of the value of the assets being probated. Some individuals, with proper planning, can avoid the probate process altogether, while many others can benefit from probate minimization, resulting in savings flowing to their beneficiaries' pockets. If the deceased did not have a valid Will, probate cannot be avoided and is often more complicated, time-consuming and expensive, than where there is a valid Will.

High net worth individuals may have further opportunities to benefit from advanced estate planning techniques which reduce tax liability on their death by shifting gains to the next generation.

An estate planning legal expert can guide you through this analytical process and make recommendations in consideration of your familial goals, while also taking into account planning opportunities that may be available to align with your specific circumstances.

## 3. DECREASE SURPRISES AND INCREASE YOUR PEACE OF MIND

A properly drafted and executed Will reflects your wishes and provides the peace of mind that comes with knowing that your assets will be dealt with in an effective way and in line with your intentions.

The requirement to probate a Will is a common surprise that arises in the context of many estate administrations. In particular, for individuals in Ontario who own shares of certain private corporations, executing a separate corporate Will can circumvent probate on the value of the corporate shares. For most business-owners in Ontario, this commonly applied strategy results in significant savings to the estate. When an individual dies without a separate corporate Will, or without a Will at all, and has shares of a corporation, their executor and beneficiaries are disappointed when they learn of significant probate fees they are required to satisfy which could have been easily avoided.

## OTHER COMMON SURPRISES INCLUDE:

- The requirement for an estate to file United States Form 706NA. Some estates could have a US filing requirement even though they are not American and do not own any US real estate at death. A Canadian resident (who is not a US citizen or green card holder), whose estate exceeds certain threshold values and who holds certain US investments (e.g. directly owning shares of Facebook, even if held through a Canadian brokerage account), may need to file this form within a strict deadline. The filing is very detailed and requires significant disclosure to the United States' Internal Revenue Service. U.S. estate tax can also apply if the deceased's wealth exceeds certain thresholds.
- Personal articles (i.e. household items, cars, artwork) may not be as high ranking a priority during the planning process for some, but can end up causing a disproportionate amount of family conflict after death. Personal articles typically have a lower monetary value relative to other estate assets, but can cause unnecessary complication and stress without sufficient instructions in the Will for distribution and flexibility for the executor to carry out the distribution process.

A routine review of your Will is highly recommended every five to ten years to ensure it reflects both your current wishes and best practises in Will drafting. An earlier review should follow any major life changes that you may experience.

While having a Will is crucial, Powers of Attorney (POAs) are equally important. POAs come into effect while an individual is still living. You should appoint a representative you trust and provide clear instructions as to how they should manage your wealth for you and your dependants during your lifetime in the event you become incapable of managing your wealth yourself. If you do not have POAs and become incapacitated, you will no longer be in a position to choose who to appoint as your representative. The process to have one appointed then becomes expensive and time-consuming, as it will generally require a lengthy court process and legal representation. Access to assets may be inaccessible during this period and the appointed person may end up being someone who would not have been your first choice to appoint. This can result in an additional burden on those who care for you, and questions surrounding who is entitled to apply in priority to others can lead to familial conflict.

If you haven't done so already, take the time to plan for the future and protect your loved ones, reduce stress, and ensure your wishes are respected.

# PROPER PLANNING AVOIDS TAX PITFALLS

**BY LORNE GREENSPOON AND ALEXANDER CAPUTO**

In *Evans et al. v. The Attorney General of Canada, 2024 ONSC 1955* (*Evans*), the Ontario Superior Court addressed an application for the rectification of a resolution made by the trustee of the Evans Family Trust (the Trust). The resolution, which was intended to allocate $375,000 of taxable capital gains to the beneficiaries, failed to clearly specify the allocation of these capital gains, resulting in unintended tax consequences.

The Trust held shares in two companies. After the Trust was settled, the shares in these companies were sold, generating a significant capital gain. Discussions regarding the allocation of these capital gains to the beneficiaries lasted several years, with the intention of allowing each beneficiary to use their Lifetime Capital Gains Exemption (LCGE). Once a decision was made to allocate the capital gains, a formal resolution was drafted. However, the resolution failed to clearly specify the amounts being allocated, leading to ambiguity and a subsequent reassessment by the Canada Revenue Agency (CRA).

The CRA reassessed the Trust, arguing that due to the ambiguity in the documentation, the income should be taxed within the Trust at the tax rate rather than in the hands of the beneficiaries with no tax by virtue of the application of the LCGE. In response, the Applicants filed for rectification, asserting that the resolution did not reflect the original intended agreement. Relying on the principles set out in *Canada (AG) v. Fairmont Hotels Inc., 2016 SCC 56*, the Court found that the Applicants had provided sufficient evidence that the trustee had intended to allocate $375,000 to each beneficiary in the formal resolution. Despite minor inconsistencies in the affidavits, the evidence was deemed credible and supported by relevant documents. The Court granted rectification, clarifying that the resolution should reflect the original intent, and rejected the notion that potential claims against professional advisors would preclude rectification. The Court's decision allowed the beneficiaries to utilize their LCGE, thereby eliminating the tax on the sale.

This case highlights the critical importance of accurate documentation in estate and tax planning. When the Income Tax Act requires specific actions to be taken, it is essential that the proper authorizations are clearly outlined in the documentation. Failure to do so can result in adverse tax consequences if that mistake can not be rectified. Alternatively, even if rectification is granted, the tax payer would bear the burden of significant stress, years of litigation and the associated costs. It is important to get it right the first time, even if it is possible to rectify the issue at a later date.

## KEY TAKEAWAYS

**Accurate Documentation is Essential:**
In estate and tax planning, particularly when the Income Tax Act mandates specific actions, it is critical to ensure that documentation is precise and clear. Ambiguities can lead to unintended tax consequences, as illustrated in the *Evans* case.

**Rectification is a Powerful but Uncertain Remedy:**
While rectification can correct errors in documentation, it is a discretionary remedy that a Court could order and therefore is uncertain. To avoid potential complications, it is advisable not to leave the resolution of ambiguities up to the Courts, but rather to ensure clear and accurate documentation from the outset.

**The Value of Expert Legal Counsel:**
Retaining professional advisors with the relevant expertise can make a significant difference in protecting your interests. With the expertise of skilled professionals, you can navigate complex tax and estate planning matters more efficiently, potentially saving time, money, and avoiding costly tax pitfalls.

# BIG DEALS AND CASES

## PEOPLES TRUST SECURES VICTORY ON LIEN PRIORITY MOTION

On November 28, 2024, the Ontario Superior Court of Justice (Commercial List) ruled in favour of *Peoples Trust in Peoples Trust Company v. Vandyk-Backyard Queensview Limited*, a significant decision affirming the priority of registered mortgages over unperfected construction liens.

Acting for Peoples Trust, our team (Dominique Michaud and Philip Holdsworth) successfully argued that the statutory framework under the *Construction Act* creates a clear and decisive code for lien priorities. Justice Osborne agreed that commercial lenders are entitled to rely on title searches and statutory declarations when advancing funds. Importantly, the Court rejected attempts by lien claimants to impose additional due diligence obligations on mortgage lenders, emphasizing the need for contractors to act promptly in preserving their lien rights.

This decision offers critical clarity for commercial construction lenders: registered mortgages retain their priority when statutory conditions are met. For developers and contractors, it underscores the importance of proactive lien registration to protect claims.

Our success reflects the strategic advocacy and technical precision required to navigate complex construction financing disputes. This ruling will guide stakeholders in balancing their rights while reinforcing the integrity of Ontario's construction lien regime.

## LEADING THE WAY IN AFFORDABLE HOUSING

At Robins Appleby, we stay on top of housing policy in Ontario and specialize in navigating complex housing initiatives that make a meaningful impact.

One such initiative is the City of Toronto Multi-Unit Residential Acquisition Program ("MURA"), which provides critical financial support to non-profits, co-ops, Indigenous housing providers, and land trusts seeking to acquire apartment buildings and multi-tenant properties in order to provide below-market housing.

As part of the MURA program, non-profit organizations can access deposit and pre-acquisition funding to quickly secure properties and conduct essential due diligence. However, the application process and subsequent acquisition can be intricate, requiring expertise in both financing and inter-lender coordination. That's where we come in.

Our non-profit clients have been leaders in utilizing the MURA program, and we are proud to have helped several organizations successfully navigate these opportunities. Under the guidance of partners Rachel Puma and John Fox (who leads our Affordable and Social Housing Group), the firm has now completed four MURA acquisitions for Houselink and Mainstay Community Housing and Raising the Roof Chez Toît, and we are currently assisting with two additional MURA projects.

These transactions often involve CMHC-backed financing alongside MURA funding, requiring careful coordination between lenders. Our team has extensive experience resolving the complex inter-lender issues that arise, ensuring our clients' success at every stage of the acquisition.

## BMO FUNDS $112M IN MAJOR LAND ACQUISITIONS IN GTA

The Robins Appleby Lending Team of Leor Margulies, Ladislav Kovac, Cindy Applegath, and Natalie Mulhall assisted Bank of Montreal in funding two major land acquisition transactions in the Stouffville/Markham area in 2024. The first was completed in the summer of 2024 with BMO providing $37M for a complex share acquisition transaction involving a twenty-five acre site that was zoned and draft plan approved for a mixture of low and medium density units totalling 882 units.

Subsequently, in the late Fall, the Robins Appleby lending team again represented BMO to fund a further land acquisition of a 133 acre site also in the Stouffville/Markham area by the same borrower via a $75M financing. The site had draft subdivision approvals which would ultimately result in over 1,200 apartments, towns and singles plus a large greenbelt area.

There has been a dearth of land financing and acquisitions since the market downturn of April 2022, but these two major transactions give hope that there is enough confidence by at least some builders and lenders that this market is going to return and that there is value in acquiring entitled land that is ready to go to servicing and sale.

# ANNOUNCEMENTS

## 40 YEARS STRONG!

This year, we proudly celebrate Leor Margulies' remarkable forty-year journey with Robins Appleby. As head of the Commercial Real Estate Lending and Development Groups, Leor has built one of the most respected teams in the industry, representing financial institutions on major real estate transactions and developers in ground-breaking projects. As a leader in construction lending and development, Leor has not only shaped the Commercial Real Estate Lending and Development Groups, but also set the standard for excellence in real estate law. His innovative approach, tenacity, and passion have guided financial institutions and developers alike, resulting in transformative projects across Ontario. From structuring complex syndicated loans to spearheading iconic developments like One Bloor and Emerald City, Leor's impact is profound. Beyond his legal acumen, Leor has been a dedicated mentor, guiding young lawyers with his knowledge, entrepreneurial approach, and unwavering commitment to excellence. His impact is not only reflected in the landmark deals he has closed but in the thriving department and inspired colleagues he has built. He has also served on the BILD executive and Board of Directors since 1999, tirelessly working on behalf of the residential building industry in the GTA. His dedication to the industry, clients, and the firm reflects his unwavering commitment. He was recently inducted as the first non-builder, to the BILD Hall of Fame, on March 4, 2025, to cap off an amazing 26 years of service to BILD. Congratulations, Leor, on this extraordinary milestone!

## CONGRATULATIONS TO TWO OF OUR LITIGATION AND DISPUTE RESOLUTION LAWYERS ON BEING ADMITTED AS PARTNERS OF ROBINS APPLEBY LLP

### JOSEPH (JOEY) JAMIL

Joey has built a robust practice representing private companies and institutional clients in complex litigation, including commercial disputes, insolvency proceedings, fraud matters, class actions, and real estate disputes. His strategic approach and litigation acumen make him a trusted advisor in resolving contentious business challenges.

### PHILIP HOLDSWORTH

Philip is trusted counsel for commercial and construction disputes, enforcement of security, fraud recovery, and insolvency proceedings. A qualified arbitrator, Philip also represents clients in commercial arbitration, providing practical solutions for businesses navigating high-value disputes.

# LAWYER SPOTLIGHT: PHILIP HOLDSWORTH

**Q) How long have you been with Robins Appleby and what is the one thing you value most about the firm?**

A) I joined the firm in February 2020, a few weeks before the pandemic shutdowns began and everyone was sent to work from home for a year.

I value the growth in my professional career that my colleagues have facilitated and encouraged, and the sense that they have my back and support me in that development.

**Q) Could you tell us more about your practice and what excites you the most about it?**

A) I have a broad civil litigation practice, with the majority of my cases being complex commercial disputes. This means I primarily deal with business disputes involving multiple contracts, parties, and/or legal issues, and/or complex or specialized facts requiring expert evidence.

My practice exposes me to a wide range of industries, where I get to help find and create solutions to disputes within the framework of the law, using the tools and procedures that litigation allows. We can freeze assets of fraudsters, secure disputed property, and help clients recover after significant losses.

**Q) What fun fact about yourself can you share that would surprise people?**

A) I once flew a fighter jet in an aerial combat training session at a NATO training air force base.

**Q) We heard you used to have a completely different career, what made you decide to become a lawyer?**

A) Before I went to law school I worked as a public relations consultant, advising clients on digital & social media strategy. I quit to go to law school because a mentor recommended that a law degree would give me tools to create real results for clients, and help me understand and influence policy and legislation.

**Q) If you could have a do-over, what would you change (if anything)?**

A) I like being a litigator because it allows me to use reason, diligence and strategy to win disputes with real outcomes. With those stakes on the line, it can also be quite stressful. I like math, physics and technology, and might have ended up in one of those fields. At one point I was very intrigued by biomimicry; when engineers draw from nature to develop new technology.

**Q) What's the best advice you've ever gotten?**

A) "Everyone is the protagonist of their own story". It always helps me frame my understanding of human behavior, at the micro and macro level.

**Q) We hear you're having a second child soon, Congrats! Is there anything that you're nervous about the second time around?**

A) Our first child was born during the pandemic. This time will be totally different. I am looking forward to my son getting a sibling, and cautiously optimistic that his excitement will smooth over being dethroned as an only child!

# DEPARTMENT HIGHLIGHT

## CONDOMINIUM DEVELOPMENT AND SALES

The Condominium Group at Robins Appleby has been assisting developers, both large and small, and experienced and new builders, with their projects for over thirty-five years. Our experienced team of lawyers and clerks have seen tremendous growth in the number and complexity of condominium projects over the years, firstly in Toronto, then in the GTA and now across Ontario.

Our team of seasoned lawyers, clerks and assistants works with developers from the moment they seek to acquire a site, and then assists them and their municipal legal and planning teams through the rezoning and development process.

We add value at the HCRA and TARION application stages, as we have significant expertise in dealing with the registration and security issues with both organizations. The recent establishment of HCRA has added a level of complexity and challenges to developers. The Condominium Group, led by Leor Margulies, has excellent relationships with both organizations and can open doors which quite often, remain closed to others. Leor's over twenty years on the Board and numerous committees of BILD have helped him establish strong connections and credibility with the regulatory authorities.

Developers need a strong and experienced team familiar with the ever-changing landscape of legislative and regulatory requirements for condominium projects. Robins Appleby provides both practical and creative solutions to issues for projects of all sizes.

We have significant experience in all types of condominium development including:

- Complex mixed-use projects such as the iconic 1 Bloor Street East Project developed by Great Gulf;
- A standard condominium within a common elements condominium for stacked/mid-rise and freehold projects combined in one development;
- Phased projects involving inter-connected buildings or a series of buildings where phasing makes the most sense based on timing and efficiency, such as the first Ontario golf club course condominium, The Sixth by Kylemore Communities; and
- Simple freehold common element condominiums for towns and singles which have become extremely popular over the last decade.

Our team works with the developer and its marketing team to create the disclosure package and agreements of purchase and sale used to launch projects, and then manages purchaser relationships, deposits, deposit releases, and all other aspects of the condominium project.

Together with our financing team, we assist developers in negotiating financing arrangements and coordinating bonding facilities with the deposit insurers for whom they also represent.

# COMMUNITY INVOLVEMENT & EVENTS

## FEED THE HUNGRY

In October 2024, Robins Appleby proudly sponsored a meal for the Law Society of Ontario's "Feed the Hungry" program, continuing a tradition of support spanning multiple years. This impactful program, rooted in social justice, inclusion, and compassion, provides year-round meal services to those facing food insecurity in Toronto. Several of our lawyers volunteered their time to serve meals at Osgoode Hall, contributing to an effort that offers more than just a meal—it fosters dignity, care, and community. We are honoured to support this initiative every year, which serves over 1,200 hot meals weekly and depends on the generosity of donors and volunteers to create a kinder, more inclusive world.

## SPREADING HOLIDAY CHEER THROUGH GIVING BACK

The holiday season is a time for joy, reflection, and giving back to our community. At Robins Appleby, we are proud to have supported Toys for Tots Canada and the Daily Bread Food Bank this year. Through these initiatives, we aim to bring smiles to children by ensuring there's a toy under the tree and to help families enjoy a warm meal during the holidays. We are committed to making a positive impact in the lives of those in need.

## PUMPKINS AND PETALS

In September 2024, we hosted our Pumpkins and Petals Women's Event, bringing together 40 clients and lawyers for an evening of creativity, connection, and celebration. The event was a vibrant mix of mingling, delicious food and drinks, and a hands-on workshop where attendees created stunning pumpkin floral centerpieces, blending artistry with autumnal charm. More than just a night of fun, the event embodied the spirit of empowering women—offering a space to foster relationships, share ideas, and support one another in their professional and personal journeys. It was a testament to the strength and beauty of collaboration among women, leaving everyone inspired and uplifted.