TAX DEFERRAL: OLD AND NEW

Philip Friedlan

Philip Friedlan, Friedlan Law, Toronto/Markham, Ontario, BSc., McGill University, BCL, McGill University, LL.B, University of Toronto, MBA, York University. Mr. Friedlan's practice includes corporate and personal tax planning, estate planning and legal implementation of tax and estate plans. Frequent writer and speaker on taxation, estate planning and related legal matters. Co-Chair of the 2008 Ontario Tax Conference, Canadian Tax Foundation and several preceding years. Governor and Member of the Canadian Tax Foundation. Member of the Canadian Bar Association and the Society of Trust and Estate Practitioners and CALU.

INTRODUCTION

For many years the Income Tax Act[1] has provided taxpayers with several non-employer – provided tax-advantaged savings plans, namely, the registered retirement savings plan[2] the registered retirement income fund[3] and the registered education savings plan.[4] In addition, exempt life insurance policies have also enabled taxpayers to save and to earn investment income on a tax-advantaged basis.

As a result of the 2007 and the 2008 Federal Budgets two new tax-advantaged plans were created, the registered disability savings plan[5] and the tax-free savings account.[6] The Canada Disability Savings Grant[7] program and the Canadian Disability Savings Bond[8] program were created with the RDSP. The CDSG and CDSB programs were created under the Canada Disability Savings Act.[9] The RDSP, CDSG and CDSB were created by the federal government to help parents and others save for the long-term financial security of children with severe disabilities. The 2008 Budget Papers indicate that the TFSA was created to improve the taxation of savings.

The purpose of this paper is to provide a brief review of the existing non-employer provided tax-advantaged saving plans and exempt life insurance and a detailed review of the RDSP and the TFSA and to discuss some of the benefits and the disadvantages of the new plans as compared to the existing plans.

THE EXISTING TAX-ADVANTAGED PLANS

RRSPs

Basic Features

The current system for retirement savings has been in place for about eighteen years. The basic features of the RRSP are as follows:[10]

(a) Contributions, within certain limits, to an individual's RRSP or the RRSP of his or her spouse or common-law partner are deductible in computing the contributor's income,

(b) excess contributions result in adverse tax consequences,

(c) investment income earned in a RRSP is not subject to income tax in the RRSP,

(d) the RRSP must be matured by the end of the year in which the annuitant under the plan (i.e. the plan holder) attains the age of 71,

(e) payments out of an RRSP to the annuitant are included in the annuitant's income, and

(f) on the death the value of the RRSP is taxable to the deceased in the year of death unless a rollover is available.

Contributions

An RRSP contribution is deductible for a year if made on or before the day that is 60 days after the end of the year provided that it has not been deducted for a prior year.[11] The maximum deductible amount that an individual may contribute to an RRSP for a year (the RRSP deduction limit) is:

(a) the individual's unused RRSP deduction room at the end of the prior year (i.e. the individual's carry forward amount), plus

(b) the individual's annual RRSP contribution limit for the year (i.e. the lesser of 18% of the individual's prior year's earned income and the RRSP dollar limit for the year, over the individual's pension adjustments ("PAs") for the prior year and prescribed amounts in respect of the individual), plus

(c) the individual's total pension adjustment reversal for the year, less

(d) the individual's net past service pension adjustment (net PSPA) for the year.[12]

The RRSP dollar limit is the money purchase limit for the preceding year. The RRSP dollar limit for 2008 – 2010 is shown below:[13]

Year	Limit
2008	$20,000
2009	$21,000
2010	$22,000

Starting in 2010, the limit is indexed to the average wage.[14]

Generally, the PA is relevant for a member of a registered pension plan ("RPP") or a deferred profit sharing plan ("DPSP") and represents the value of the benefits that have accrued in a year to an individual under a DPSP or a benefit provision of an RPP. Generally, a PSPA represents the value of certain past service benefits provided to an employee under a defined benefit RPP.

Earned Income

The earned income of an individual is one of the determinants of the RRSP deduction limit. The earned income of a taxpayer for a taxation year who is resident in Canada throughout the year includes, among other items, the taxpayer's employment income, without reduction of registered pension plan contributions, RCA contributions and employment insurance premiums, net income (i.e. income less losses) from carrying on one or more businesses as a sole proprietor or a partner actively engaged in the business, and net rental income (i.e. rental income less rental losses) from real property.[15] Special rules apply for periods in which a taxpayer was not resident in Canada.[16]

Qualified Investments for an RRSP Trust

In the case of an RRSP that is a trust, adverse tax consequences, as are briefly described below, will arise if the trust acquires and/or holds a property that is not a qualified investment. First, if the RRSP trust acquires a property that is not a qualified investment, the fair market value of such property at the time of acquisition is included in the income of the taxpayer who is the annuitant under the plan for the taxation year in which the investment was acquired.[17] The RRSP trust is taxable on the income and capital gains arising from investments that are not qualified investments (net of losses and capital losses arising from such investments).[18] A one percent (1%) per month penalty tax is imposed on the RRSP trust in respect of investments held at the end of the month that are not qualified investments based on the fair market value of the property at the time of acquisition. However, the penalty tax does not apply to property in respect of which there was an income inclusion under subsection 146(10).[19]

Excess Contributions, etc.

A one percent (1%) per month penalty tax will apply on an individual's cumulative excess amount. The tax is payable by the individual.[20] In the case of an individual who has never been a member of a pension plan or group RRSP, the individual's cumulative excess amount in a taxation year will be equal to the total RRSP contributions made (after 1990) less the individual's available deduction room (both unused room from prior year's and current year's room) less, where the individual reached age 18 in the prior year, $2,000.00.[21]

An individual can access some of the funds held in RRSP on a non-taxable basis under the Home Buyers' Plan[22] and the Lifelong learning Plan.[23]

RRIFs

Basic Features

The funds and/or assets held in an individual's RRSP can be transferred on a rollover basis to a RRIF for the individual.[24] The basic features of the RRIF are as follows:[25]

(a) with limited exceptions an individual's RRIF can only receive funds or property from such individual's, RRSP, RRIF or RPP,

(b) the investment income earned in a RRIF is not subject to income tax in the RRIF,

(c) commencing in the year following the year in which the RRIF was acquired, a minimum amount must be withdrawn in every year,

(d) payments received by the annuitant out of a RRIF are included income,

(e) on the death of the last annuitant under a RRIF, the fair market value of the RRIF is included in such deceased annuitant's income in the year of death unless a rollover is available.[26]

Qualified Investments for a RRIF Trust

In the case of a RRIF trust adverse tax consequences, as are briefly described below, will arise if the trust acquires and/or holds a property that is not a non-qualified investment. First, if the trust acquires a property that is not a qualified investment, the fair market value of the non-qualified investment at the time of acquisition is included in the income of the taxpayer who is the annuitant under the plan for the taxation year in which the investment was acquired.[27] The RRIF trust is taxable on the income and capital gains arising from such investments (net of loses and capital losses arising from such investments).[28] A penalty tax of one percent (1%) per month on investments held at the end of the month that are not qualified investments based on the fair market value of the investments at the time of acquisition will apply. The tax is payable by the RRIF trust. However, the penalty tax does not apply to property in respect of which there was an income inclusion under subsection 146.3(7).[29]

RESPs

Basic Features

The RESP is a vehicle that is available to assist families to save for the purpose of funding post-secondary education. The basic features of the RESP are as follows:[30]

(a) contributions made to an RESP are not deductible in computing income or taxable income,

(b) excess contributions result in adverse tax consequences,

(c) investment income earned in an RESP is not subject to income tax in the plan,

(d) investment income which is paid out as education assistance payments can be made to a qualifying beneficiary and is taxed in the hands of the beneficiary,

(e) provided that certain conditions are satisfied, investment income can be paid out to a subscriber under the plan as accumulated income payments and is taxed in the recipient's hands and is subject to an additional 20% tax.

The federal government provides assistance for post-secondary education by making the following grants in respect of a child to the child's RESP:[31]

(a) the Canada Education Savings Grant[32] equal of 20% of the annual contribution made to the child's RESP to a maximum of $500 per year[33] plus an additional income-based amount of 20% of the first $500.00 of annual contribution if family income is below a certain amount ($37,178 in 2007) and 10% of the first $500.00 of annual contribution if family income is between certain levels ($37,178-74,357 in 2007).[34] No grant is made for a year if the child was age 17 or older at the end of the preceding year. The total lifetime CESGs made in respect of a child cannot exceed $7,200.[35]

(b) the Canada Learning Bond[36] for a child of a lower income families and in respect of whom a national child supplement or a special allowance under the Children's Special Allowance Act is payable for at least one month in the year. An initial grant of $500 plus $100 grant in each subsequent year until the year in which the child reaches age 16 is provided.[37]

The CESGs and the CLBs are included in education assistance payments.[38] CESGs and CLBs not used for qualifying purposes must be repaid.

Recent RESP Changes

As a result of the 2008 federal budget certain changes were made to the RESP rules which are summarized below.

An RESP must now terminate by the end of the 35th year following the year in which the plan was entered into (rather than by end of the year that includes the 25th anniversary of the plan).[39] If the plan is a specified plan (i.e. basically as plan where beneficiary qualifies for the disability tax credit) the plan must now terminate by the end of the 40th year following the year in which the plan was entered into the plan.[40]

Previously, contributions (other than plan transfers) could be made to an RESP for 21 years following the year in which the plan was entered into (for 25 years where the plan is a specified plan). The limits have been extended for 10 years, to 31 years and 35 years respectively.[41]

Previously, no contributions could be made to a family plan for a beneficiary who was 21 years or older. This limit has also been extended for 10 years, to age 31.[42]

Prior to the recent amendments, education assistance payments could only be made to a beneficiary if he or she was enrolled in a qualifying post-secondary program. As a result of the recent amendments, such payments can be paid to a beneficiary for up to six (6) months after ceasing to be enrolled in a qualifying educational program.[43]

Qualified Investments

Adverse tax consequences will arise if an RESP trust acquires investments there are not qualified investments.[44] An RESP is revocable by the Canada Revenue Agency ("CRA") at any time that the RESP trust acquires property that is not a qualified investment, or property held by the trust ceases to be a qualified investment and such property is not disposed of by the trust within 60 days after the time that such property was acquired.[45] There is no income inclusion when an RESP trust acquires property that is not a qualified investment. A one percent (1%) per month penalty tax is imposed on the RESP trust in respect of the property held by the trust at the end of the month that are not qualified investments based on the fair market value of such property at the time of acquisition.[46]

RESP Overpayments

A subscriber under an RESP in respect of an individual must pay a one per cent (1%) per month penalty tax equal to the amount, if any, by which the total of the subscriber's gross cumulative excess at the end of the month exceeds the portion of the excess withdrawn from an RESP before the end of the month.[47]

A "subscriber's gross cumulative excess" in respect of an individual is the total of all amounts each of which is the subscriber's share of the excess amount for a year in respect of such individual.[48] A "subscriber's share of the excess amount" for a year in respect of an individual is that portion of the excess amount for the year in respect of an individual based on the portion of such subscriber's contributions (made after February 20, 1990) to all RESPs in respect of such individual to the total of all contributions made after that date to all RESPs in respect of such individual.[49]

The "excess amount" in respect of an individual for a year that is 2007 or a subsequent taxation year is:

(a) the total of all contributions made to RESPs in respect of such individual,

over

(b) the amount, if any, by which $50,000 (the RESP lifetime limit) exceeds the total of all contributions made to RESPs in respect of such individual in all years preceding the particular year.[50]

Accumulated Income Payments

As noted earlier a subscriber under an RESP can, in certain circumstances, receive investment income earned in the RESP as accumulated income payments. The recipient must include such payments in his/her income.[51] The recipient of such payments must pay an additional 20% tax (12% in the case of a Quebec resident) on the amount of such payment.[52] However, the tax does not apply to the accumulated income payments that are transferred to the subscriber's RRSP or the RRSP of the subscriber's spouse or common-law partner and deducted under subsection 146(5) or (5.1).[53]

Life Insurance

Non-registered life insurance policies (i.e. policies that are not or are not issued pursuant to deferred income plans) that are "exempt policies" can be used as tax-advantaged savings vehicles because of the attractive tax treatment granted to them under the Tax Act. For the purpose of this paper, the term "non-registered life insurance policy" does not include a "segregated fund" policy. From a policy perspective, an exempt policy is regarded as being primarily for insurance protection. A life insurance policy that satisfies the conditions of the "exempt test" will be an "exempt policy.[54]

If the policy fails the exempt test then the policy will be or become a non-exempt policy subject to annual accrual taxation.[55] The exempt test places limits in the amount of investment income that can be earned in a life insurance policy on a tax-advantaged basis.

The basic features of a non-registered life insurance policy that is an exempt policy are as follows:[56]

(a) premiums/contributions made to the policy are not deductible in computing income or taxable income, however a deduction can be available if the policy is used as collateral security for a loan,

(b) "excess" premiums/contributions result in adverse tax consequences,

(c) investment earned in the policy is not subject to income tax in the policy,

(d) the policyholder will be taxed on the income arising on the disposition of an interest in the policy – a disposition being, among other things, a surrender of the policy, a partial withdrawal from the policy or a policy loan,[57]

(e) the death benefit (including any investment income earned in the policy) is tax-free.[58]

A capital gain or loss cannot arise on the disposition of an interest in a non-registered life insurance policy.[59]

The assignment of a life insurance policy as collateral security for a loan is not a disposition[60] and, therefore, no income arises from such a transaction. Consequently, a number of arrangements are available using loans whereby the accumulation in the policy can in effect be accessed during the lifetime of the life insured on a tax-free basis and the loans repaid using the tax-free death benefit. It is beyond the scope of this paper to discuss these types of arrangements.

RDSPs

Basic Features

RDSPs, CDSGs and CDSBs were created as a result of the 2007 Federal Budget to assist parents and others save for the long-term financial security of children with severe disabilities. The applicable legislation is effective for 2008.

The basic features of the RDSP are as follows:[61]

(a) an RDSP is for an individual who qualifies for the tax credit for mental or physical impairment in subsection 118.3(1)(ignoring paragraph (c) thereof-the restriction relating to remuneration for attendant care),

(b) non-deductible contributions to a maximum of 200,000 can be made to the RDSP for a qualifying individual, with contributions being prohibited after the end of the year in which the individual attains age 59,

(c) excess contributions result in adverse tax consequences,

(d) investment income earned in the RDSP is not subject to income tax in the plan, and

(e) the "income" portion of each disability assistance payment is included in the income of the beneficiary of the RDSP.

CDSGs and CDSBs

The federal government provides financial assistance to a qualifying individual under the CDSG and CDSB programs by making contributions to the individual's RDSP.

Under the CDSG program,

(a) if family income less than or equal to $74,357, the federal government will contribute:

(i) $3 for every $1 contributed on the first $500 of contributions, and

(ii) $2 for every $1 contributed on the next $1,000 of contributions,[62]

(b) in any other case, including if family income is over $74,357:

(i) $1 for every $1 contributed on the first $1,000 of contributions.[63]

The amount of $74,357 is indexed to inflation for each year after 2007.[64] The federal government will contribute a maximum of $70,000 of CDSGs in respect of an individual in his/her lifetime.[65]

To assist families of low and modest income, the federal government will pay into an RDSP of a qualifying individual as follows:

(a) if family income is less than or equal to $20,883, $1,000 for the year,[66] and

(b) if family income is more than $20,883 but less than $37,178, a pro-rated portion of the $1,000.[67]

The amounts of $20,883 and $37,178 are indexed to inflation for each year after 2007.[68] The federal government will contribute a maximum of $20,000.00 of CDSB's in respect of a beneficiary during his/her lifetime,[69]

The conditions under which the government can pay a CDSG or a CDSB into an RDSP are set out in the *Canada Disability Savings Regulations*.[70] CDSGs and CDSBs can be contributed to an RDSP of a beneficiary up to the end of the year in which the beneficiary reaches age 49.[71]

The issuer of an RDSP must repay the federal government CDSGs and CDSBs included in the assistance holdback amount if

(a) the RDSP is terminated;

(b) the plan ceases to be an RDSP as a result of the application of paragraph 146.4(10)(a);

(c) a disability assistance payment is made from the RDSP;

(d) the beneficiary ceases to be a DTC–eligible individual; or

(e) the beneficiary dies.[72]

A "disability assistance payment" is any payment made from an RDSP to the plan beneficiary or his/her estate.[73]

The amount that must be repaid as a result of the occurrence of an event described in paragraphs (a) to (e) above is the lesser of

(a) the assistance holdback amount of the RDSP immediately before the occurrence; and

(b) the fair market value, immediately before the occurrence, of the property held by the RDSP.[74]

An "assistance holdback amount" is defined to mean at a particular time, the total amount of CDSBs and CDSGs paid into an RDSP within the 10-year period before the particular time, less any amount of CDSB or CDSG paid in that 10-year period that has been repaid to the federal government.[75]

This repayment require penalizes payments from an RDSP within 10 years of the payment of a CDSG or CDSB into the plan.

In addition,

(a) the issuer of an RDSP must repay the federal government, any portion of an amount paid into the RDSP as a CDSG or CDSB to which there was no entitlement under the CDS Act or the CDS Regulations,[76]

(b) A beneficiary of an RDSP must repay the federal government any portion of a disability assistance payment attributable to CDSG or CDSB to which the beneficiary was not entitled under the CDS Act or the CDS Regulations.[77]

RDSPs – The Basics

Basically, there can only be one RDSP in respect of a particular individual.[78] A disability savings plan is an arrangement that satisfies the following:

(a) it is an arrangement between a federally or provincially licensed trust company that has entered into an agreement with the Minister of Human Resources and Social Development that applies to the arrangement for the purposes of the CDS Act and one or more of the following persons,

    (i) the beneficiary under the plan,

    (ii) a qualifying person in relation to the beneficiary,

    (iii) a legal parent of the beneficiary who is not a qualifying person in relation to the beneficiary but is the holder of another RDSP of the beneficiary,

(b) it is an arrangement under which one or more contributions are to be made in trust to the issuer to be invested for the purpose of making payments from the plan to the plan beneficiary, and

(c) it is entered into a taxation year in which the beneficiary is a DTC-eligible individual.[79]

A “DTC-eligible individual” in respect of a taxation year means an individual in respect of whom the disability tax credit can be deducted in computing tax payable or could be deducted if the restriction for attendant care was ignored.[80]

A “qualifying person” in relation to a beneficiary means

(a) if the beneficiary has not reached the age of majority,

(i) a legal parent of the beneficiary,

(ii) a guardian, tutor, curator or other individual who is legally authorized, at the time in question, to act on behalf of the beneficiary, and

(iii) a public department, agency or institution that is legally authorized, at the time in question, to act on behalf of the beneficiary,

(b) if the beneficiary has reached the age of majority but is not contractually competent to enter into a disability savings plan, an entity/person referred to in subparagraphs (a)(ii) or (iii) above.[81]

If the individual in respect of whom a DSP is being established has reached the age of majority and is competent to enter into the plan, a new plan can only entered into with that beneficiary or his/her legal parent who is the holder of an existing RDSP at the time the new plan is being established.

The “holder” of a DSP at any time is defined to mean each of the following:

(a) an entity that has, at that time, rights as an entity with whom the issuer entered into the plan,

(b) an entity that has, at that time, rights as a successor or assignee of another plan holder of the plan, and

(c) the beneficiary, if the beneficiary is not a plan holder of the plan under paragraph (a) or (b) above however, has at that time, rights under the plan to make decisions (either alone or with other holders of the plan) concerning the plan, except where the beneficiary’s only such right is to direct that disability assistance payments be made as provided for in subparagraph 146.4(4)(n)(iii).[82]

The Department of Finance provided the following four examples relating to holders of DSPs in the Explanatory Notes to the definitions:

“*Example 1***-** The mother and father of a minor child jointly establish a disability savings plan for the child. – The parents are joint holders of the plan.

Example 2 **-** A father establishes a disability savings plan for his child. The plan provides for decisions regarding the plan to be made solely by the father until the child reaches the age of majority, and then to be made jointly with the child. – The father is the sole holder of the plan until the child reaches the age of majority, at which time the father and the child become joint holders of the plan.

Example 3 **-** The mother and father of an adult child with a mental impairment are the legal guardians of the child. The father establishes a disability savings plan for the child. Upon the father's death, the mother acquires the father's rights under the plan. – The father and mother are successive holders of the plan.

Example 4 **-** A single mother, of a child with a physical impairment, establishes a disability savings plan for the child. The mother dies while the child is still a minor. The Children's Aid Society assumes custody and care of the child, and acquires the mother's rights and obligations under the disability savings plan. Upon reaching the age of majority, the child acquires all rights and obligations under the plan. – The mother, the Children's Aid Society and the child are successive holders of the plan."[83]

Becoming an RDSP

A DSP must become an RDSP and to do so, the following conditions must be satisfied:

(a) before the plan is entered into, the plan issuer must have received written notification from the CRA that, in its opinion, a plan with identical terms would, if entered into, comply with the conditions provided in subsection 146.4(4)(i.e. the plan conditions").

(b) at or before the time the plan is entered into the plan issuer must be provided with the Social Insurance Number of the beneficiary and the Social Insurance Number or Business Number, as applicable, of each of the person entering into the plan; and

(c) except in the case of plan transfer, the beneficiary must be resident in Canada at the time the plan is entered into.[84]

Further, the DSP will be deemed to have never been an RDSP if:

(a) within 60 days of the plan being entered into, the plan issuer has not notified the Minister of Human Resources and Social Development of the plan's existence in the prescribed form containing the prescribed information, or

(b) within 120 days of the plan being entered into (or such later day as the Minister of Human Resources and Social Development considers reasonable in the circumstances), the pre-existing RDSP under which the beneficiary of the new plan was the beneficiary is terminated.[85]

A DSP plan issuer must have a specimen plan approved by the CRA before the issuer's plan is marketed.

Plan Conditions

To qualify and continue to qualify as an RDSP, a DSP must satisfy many conditions – 16 paragraphs of conditions in the Tax Act to be exact, which are discussed below.[86] These conditions must be provided for in the written terms of the plan document(s)

Beneficiary Benefit Conditions

These conditions relate to the beneficiary under the plan and are as follows:

(a) the plan must be operated exclusively for the benefit of the beneficiary under the plan;

(b) the designation of the beneficiary under the plan must be irrevocable; and

(c) no right of the beneficiary to receive payments from the plan is capable, either in whole or in part, of surrender or assignment.[87]

Conditions relating to holders of RDSPs

The following conditions relate to holders of RDSPs:

(a) under the plan only the following persons/entities can acquire rights as a successor or assignee of a plan holder:

    (i) the beneficiary,

    (ii) the beneficiary's estate,

    (iii) a current plan holder,

    (iv) a qualifying person in relation to the beneficiary at the time the rights are acquired, or

    (v) a legal parent of the beneficiary who was previously a holder of the plan;[88]

(b) if a holder (other than the beneficiary's legal parent) ceases to be a qualifying person in relation to the beneficiary such entity must cease to be a holder of the plan.[89] The exclusion of legal parents from this provision allows a legal parent who established a DSP for his/her minor child to continue to be the plan holder after the child attains the age of majority even if the beneficiary has full capacity;

(c) there must be at least one plan holder at all times and the plan may provide for the beneficiary or the beneficiary's estate to automatically acquire rights as a successor or assignee of a holder in order to ensure compliance with the one plan holder

requirements.[90] This condition means that the plan provision should have a mechanism for plan holder succession:

(d) a new holder of an existing plan is prohibited from exercising their rights as a plan holder (except to the extent otherwise permitted by either the CRA or the Minister of Human Resources and Social Development)until the issuer has been advised of the entity having become a holder of the plan and has been provided with the new holder's Social Insurance Number or Business Number, as the case may be.[91] The issuer has an obligation to provide that number to the Minister of Human Resources and Social Development within 60 days of the later of being given such advice and of being provided with such a number.[92]

Conditions relating to Contributions

The following three conditions place restrictions on plan contributions (a contribution being defined to exclude CDSGs and CDSBs [93]):

(a) contributions cannot be made to the plan at any time if,

   (i) the beneficiary is not a DTC-eligible individual in respect of the taxation year that includes that time, or

   (ii) the beneficiary dies before that time;[94]

(b) Contributions (except permitted transfers between plans) can not be made to the plan in the following circumstances:

   (i) after the year in which the beneficiary reaches 59 years of age,

   (ii) at a time when the beneficiary is not resident in Canada, and

   (iii) if the total of the particular contribution and all other contributions to the particular plan and any other RDSP of the beneficiary would exceed $200,000;[95]

(c) contributions cannot be made by an entity that is not a holder of the plan, except with the written consent of a holder of the plan,[96]

There is no restriction on who may contribute to the RDSP, other than the consent requirement noted above.

Conditions relating to payments from an RDSP

The following six conditions relate to payments from an RDSP:

(a) only the following payments may be made from the plan:

(i) disability assistance payments, being any payment made from the plan to the beneficiary or to the beneficiary's estate,[97]

(ii) a permitted transfer to another RDSP of the beneficiary, and

(iii) repayments to the federal government under the CDS Act;[98]

(b) a disability assistance payment cannot be made if the payment would result in the fair market value of the plan assets immediately after the payment being less than the assistance holdback amount in relation to the plan.[99] This condition will ensure that the plan has sufficient assets to satisfy potential repayment obligations under the CDS Act;

(c) lifetime disability assistance payments must begin no later than the end of the year in which the beneficiary reaches 60 years of age or, if the plan is established in the year in which the beneficiary reaches 60 years of age or in a later calendar year (the establishment of which plan could only occur as a result of transfer from an existing plan RDSP) in the calendar year following the year in which the plan is established.[100] The new plan may, however, be required to make disability assistance payments in the year of the plan transfer;[101]

"Lifetime disability assistance payments" under a DSP of a beneficiary means disability assistance payments:

(i) that are identified under the terms of the plan as lifetime disability assistance payments, and

(ii) that, after such payments begin to be paid, are payable at least annually until the earlier of the day on which the beneficiary dies and the day on which the plan is terminated;[102]

(d) the total amount of lifetime disability assistance payments that can be made in any calendar year is limited to the amount determined in accordance with a specified formula.[103] The Explanatory Notes state that the formula is to allow the payment of plan assets to be spread out relatively evenly over the remainder of the beneficiary's life.[104] The limit does not apply to a "specified year" which is the calendar year in which a medical doctor has provided written certification that the beneficiary is not likely to survive more than five (5) years and each of the following five (5) calendar years;[105]

(e) the plan must stipulate whether or not disability assistance payments that are not lifetime disability payments are permitted under the plan[106] This provision would seem to allow, subject to the limits described in paragraph (f) below, for lump sum payments;

(f) certain provisions must be included in the plan limiting the amounts of disability payments that can be made in a calendar year, if the total of all CDSGs and CDSBs made into all RDSPs of the beneficiary before the start of that year exceeds the total of all ordinary contributions (other than plan transfers) made for the start of that year to all

RDSPs of that beneficiary.[107] The Explanatory Notes state that the provision imposes limits on and are to ensure that the plan beneficiary has certain rights relating to disability payments that may be made in the particular calendar year.[108]

Other Conditions

The following are the two remaining conditions imposed on plans:

(a) the issuer must, when directed by the plan holders, transfer all of the plan assets (or an amount equal to the value) to another RDSP of the beneficiary, together with all information in the issuer's possession that may be considered necessary for the new plan to comply with the requirements under the Tax Act and with any conditions and obligations imposed under the CDS Act; [109] and

(b) any amounts remaining in the plan (after taking into consideration any repayments under the CDS Act) must be paid to the beneficiary or the beneficiary's estate and for the plan to be terminated, by the end of the calendar year following the earlier of:

    (i) the calendar year in which the beneficiary dies; and

    (ii) the first calendar year throughout which the beneficiary has no severe prolonged impairments in physical or mental functions as described in paragraph 118.3(1)(a.1).[110]

The requirement that any amounts remaining in a RDSP be paid on the death of the beneficiary to the beneficiary's estate raises estate planning concerns. The beneficiary may not be competent to make a will. Consequently, the remaining proceeds of the RDSP would be distributed according to the applicable law of intestacy (the *Succession Law Reform Act* in Ontario). It would seem appropriate that the plan conditions allow for an alternate method of distribution in the case of plan termination.

Taxation of RDSP Trust

An RDSP trust is not taxable on its taxable income for a taxation year,[111] except that:

(a) the trust is taxable on its taxable income for such year if the trust has borrowed money in that year or in a preceding taxation year and has not repaid the loan before the beginning of the year,[112] and

(b) the trust is taxable on its taxable income for the year from businesses carried on in the year and on income earned on investments that are not qualified investments (as defined in subsection 205(11)) and for this purpose capital dividends are included income and capital gains and capital loss are fully includable.[113]

Taxation of Disability Assistance Payments

A portion of each disability assistance payment made from an RDSP of a beneficiary is included in the income of the beneficiary, if alive at the time of payment, otherwise in the income of the beneficiary's estate. [114]

The amount included in income is the amount by which the payment exceeds the non-taxable portion of the payment. The non-taxable portion of a payment is that proportion of the payment that the excess of total contributions (other than permitted plan transfers) to all RDSPs of the beneficiary over the total of the non-taxable portion of previously paid disability payments bears to the excess of the fair market value of plan assets over the assistance holdback amount in relation to the plan.[115] As a result of this provision a portion of each disability assistance payment is non-taxable recognizing that contributions are not deductible while a portion is taxable thereby taxing CDSGs, CDSBs and investment income earned in the plan.

It should be noted a deduction is available for the repayment of CDSG or CDSBs under the CDS Act to the extent that the amount was previously included in the taxpayer's income under section 146.4. [116]

Transfers between RDSPs

A transfer from an RDSP of a beneficiary to another RDSP of that beneficiary occurs on a rollover basis if the following conditions are satisfied:

(a) the transfer must be a direct transfer to another RDSP plan of the beneficiary,

(b) the transferor plan must be terminated immediately after the transfer,

(c) the issuer of the transferor plan must provide the issuer of the recipient plan with all information in its possession as may reasonably considered necessary for the recipient plan to comply with the Tax Act and the conditions and obligations of the CDS Act, and

(d) where the beneficiary attained the age of 59 before the year in which the transfer occurs, the issuer of the recipient plan undertakes to pay to the beneficiary any disability assistance payments that the transferor plan would have been required to pay during the calendar year of the transfer had that transfer not occurred. [117]

Paragraph (b) above ensures that there can only be one RDSP in respect of a beneficiary at any time.

Loss of Registered Status – Non Compliance

An RDSP is non-compliant if at any time

(a) the RDSP fails to comply with any condition set out in subsection 146.4(4),

(b) there is a failure to administer the plan in accordance with its terms, other than the terms that stipulate that the plan is to be operated exclusively for the benefit of the beneficiary, or

(c) a persons fails to comply with a condition or obligation imposed with respect to the RDSP under the CDS Act and the Minister of Human Resources and Social Developments notifies the CRA that in the Minister's opinion the plan should considered non-compliant. [118]

Adverse tax consequences arise if an RDSP is non-compliant and are as follows:

(a) the plan ceases to be registered plan; [119]

(b) immediately before the plan ceases to be an RDSP, there is a deemed payment of a disability assistance payment to the plan beneficiary, or if the beneficiary is deceased, his/her estate, equal to the excess of the fair market value of the plan assets over the assistance holdback amount in relation to the plan, thereby causing an income inclusion of the taxable portion of the deemed payment; [120]

(c) if the plan is non-compliant because of the making of a disability assistance payment that results in the fair market value of the plan assets held immediately after the payment to be less than the assistance holdback amount in relation to the plan, then immediately before the plan ceases to be a registered plan, there is an additional deemed payment of a disability assistance payment, in effect equal to the portion of assistance holdback amount improperly paid out which is fully taxable.[121]

The CRA is given the authority and discretion to alleviate the consequences of a plan being non-compliant for failure to comply with plan conditions or for failure to administer the plan accordance with its terms. The CRA may waive or delay the application of the failure provision thereby avoiding or delaying the adverse tax consequences.[122] If the failure relates to the making of a prohibited contribution and the contribution is withdrawn within the time period specified by the CRA, the CRA can, in effect, cause the failure not to have occurred.[123] The CRA is also given the authority to alleviate the adverse tax consequences where the plan is not terminated within the required time period following the death of the beneficiary or following the beneficiary ceasing to be a DTC-eligible individual. [124]

Issuer Obligations

Certain obligations are imposed on the issuer of an RDSP namely,

(a) where an entity becomes a holder of an existing plan, the issuer must notify the Minister of Human Resources and Social Development in a prescribed form containing prescribed information within a specified time period,

(b) the issuer must not amend a plan without the prior written notification from the CRA that in the CRA's opinion, a plan with terms identical to the terms of the amended plan will comply the conditions of subsection 146.4(4),

(c) if the issuer becomes aware that the plan is or is likely to become non-compliant, the issuer must notify the CRA and the Minister of Human Resources and Social Development of such within 30 days of becoming so aware, and

(d) the issuer must exercise the care, diligence and skill of a reasonably prudent person to minimize the possibility that the plan holder may become liable to pay tax under Part XI. [125]

The issuer can be subject to penalties for failure to comply with these obligations. [126]

Qualified Investments for RDSPs

Qualified investments for an RDSP. which are generally similar to qualified investments RRSP, include:

(a) money, deposits and guaranteed investment certificates,

(b) federal, provincial and municipal government bonds,

(c) mutual funds and segregated fund policies,

(d) share, units and options that are listed on a designated stock exchange in Canada or in a foreign country, and

(e) investments prescribed by section 4900 of the *Income Tax Regulations*.[127]

In addition, the following annuity contracts issued by a licensed annuities provider (e.g. a life insurance company) are qualified investments for an RDSP:

(a) an annuity contract where

(i) the RDSP trust is the only person who (ignoring any subsequent transfer of a contract by the trust) is or may become entitled to any annuity payments under the contract, and

(ii) the holder of the contract has a right to surrender the contract at any time for an amount that would, if reasonable sales and administration charges were ignored, approximate the value of funds that could otherwise be applied to fund for future periodic payments under the contract,[128]

(b) an annuity contract where:

(i) annual or more frequent periodic payments are or may be made under the contract to the holder of the contract,

(ii) the RDSP trust is the only person who (ignoring any subsequent transfer of the contract by the trust) is or may become entitled to any annuity payments under the contract,

(iii) neither the time nor the amount of any payment under the contract may vary because of the length of any life (other than the life of the beneficiary under the plan),

(iv) the day on which the periodic payments begin or are to begin is not later than the end of the later of the year in which the beneficiary under the plan attains the age of 60 and the year following the year in which the contract was acquired by the RDSP trust,

(v) the periodic payments are payable for the life of the beneficiary under the plan and either there is no guaranteed period under the contract or there is a guaranteed period that does not exceed 15 years,

(vi) the periodic payments are equal, or are not equal solely because one or more adjustments that would, if the contract were an RRSP annuity, be in accordance with subparagraphs 146(3)(b)(iii) to (v) (e.g. an adjustment because the annuity is a segregated fund annuity or an adjustment for CPI) or that arise because of a uniform deduction in the entitlement to the periodic payments as a consequence of a partial surrender of rights to the periodic payments, and

(vii) the contract requires that, in the event that the plan must be terminated because of the death of the beneficiary or the beneficiary ceases to be a DTC-eligible individual in accordance with paragraph 146.4(4)(p), any amounts that would otherwise be payable after the termination be commuted to a single payment.[129]

Penalty Taxes in respect of RDSPs

A variety of penalty taxes may be imposed in respect of RDSPs.[130] The tax may be imposed on the plan holder(s) or the issuer of the plan. The penalty taxes are discussed below.

Inadequate Consideration

A penalty tax is imposed for a calendar year if the RDSP trust of a beneficiary

(a) disposes of property for consideration less than the fair market value of property at the time of disposition, or for no consideration, or

(b) acquires property for consideration greater than the fair market value of the property at the time of the acquisition.[131]

The amount of the tax is equal to the amount by which the fair market value of the property differs from the consideration received or paid, as applicable or, if there is no consideration, such fair market value.[132] Each plan holder at the time the tax is imposed is jointly and severally to pay the tax.[133]

The CRA has the discretion to pay all or part of the tax collected to the RDSP trust of such beneficiary if

(a) it is just and equitable to do so in all the circumstances; and

(b) the CRA is satisfied that neither the beneficiary nor any existing holder of such plan was involved in the transaction that gave rise to the tax.[134]

Such a payment by the CRA is not a contribution to the RDSP.[135]

Tax on Non-Qualified Investments

A penalty tax is imposed for a calendar year if in the year, the RDSP trust acquires property that is not a qualified investment or property held by the trust ceases to be a qualified investment.[136]

The amount of the tax is equal to the 50% of the fair market value of the property at the time when it was acquired or at the time immediately before the time it ceased to be a qualified investment, as applicable.[137] Each plan holder at the time the tax is imposed is jointly and severally liable to pay the tax.[138]

The person(s) liable to pay the tax are entitled to a refund if the plan trust disposes of the non-qualified investment before the end of the calendar year following the calendar year in which the tax arose (or such later time as the CRA considers reasonable in the circumstances). The amount of the refund is equal to the lesser amount of the tax and the proceeds of the disposition.[139] However, there is no entitlement to a refund if it is reasonable to expect that any of these persons knew or ought to have known when the property was acquired that it was not or would cease to be, a qualified investment.[140]

Tax Where Advantage Extended

A penalty tax is imposed for a calendar year, in connection with an RDSP if, in the year, an advantage, in relation to the RDSP is extended to any person who is or who does not deal at arm's length with, a beneficiary under, or a holder of the plan.[141] The amount of the tax is:

(a) in the case of a benefit, the fair market value of the benefit, and

(b) in the case of a loan, the amount of the loan.[142]

Each plan holder at the time the tax is imposed is jointly and severally liable to pay the tax. However, if the advantage is extended by the plan issuer (or a person not dealing at arm's length with the issuer), the issuer is liable to pay the tax, not the holders.[143]

An advantage in relation to an RDSP means any benefit or loan that is conditional in any way on the existence of the plan.[144] Disability assistance payments, plan contributions, permitted plan transfers, CDSGs, CDSBs and a benefit derived from the provision of administrative or investment services in respect of the plan are not an advantage nor is a loan made in the ordinary course of the lender's ordinary money lending business if at the time the loan was made *bona fide* arrangements were made for repayment of the loan within a reasonable time and whose sole purpose was to enable a person to make a contribution to the plan.[145]

A benefit includes a payment or allocation of an amount to an RDSP as a return on investment that cannot reasonably be considered to be on terms that would apply to a similar transaction in an open market between arm's length parties.[146]

Tax on use of property as Security

A penalty tax is imposed for a calendar year on the issuer of a RDSP, if in the year, with the consent and the knowledge of the issuer, the RDSP trust uses or permits to be used any property held by the trust as security for indebtedness of any kind.[147] The amount of the tax is equal to the fair market value of the property at the time the property commenced to be used as security.[148]

Waiver of Tax Liability

The CRA has the authority to waive or cancel all or part of the tax liability arising under Part XI of the Tax Act (i.e. penalty taxes in respect of RDSPs) where it is just and equitable to do so in all the circumstances including whether the tax arose as a consequence of reasonable error and the extent to which the relevant transaction gave rise to double tax under Part XI.[149]

Tax Withholding – Residents

The withholding of tax on payments to a Canadian resident from an RDSP is now authorized. [150] The Explanatory Notes to paragraph 153(1)(i) state that the *Income Tax Regulations* will be amended to allow $15,000 of the taxable portion of payments to be withdrawn each year without being subject to tax withholding with the taxable portion of payments in excess of that amount to be subject to tax withholding at the same rates that apply to payments from a RRIF. [151]

Tax Withholding - Non-Residents

The issuer of an RDSP will be required to withhold tax on the taxable portion of payments made to non-residents of Canada.[152] The withholding tax rate is 25%[153] unless such rate is reduced by a tax treaty.

Other Issues relating to RDSPs

This section deals with several issues relevant to RDSPs.

Interest Deduction Denied

As is the case with interest on money borrowed to make a contribution to an RRSP, an RESP and a TFSA, interest on money borrowed to make a contribution to an RDSP is not deductible in computing income.[154]

Capital Loss Denial

As is the case with respect to a capital loss arising on the disposition of property to an RRSP trust, an RRIF trust or a TFSA trust, the capital loss arising on a disposition of property to an RDSP trust is nil.[155]

Attribution Rules

The attribution rules in 74.1 to 74.3 of Tax Act do not apply to contributions to RDSPs[156] nor is property held in an RDSP Trust subject to the attribution rules in subsection 75(2).[157]

Changes in Residence

As is the case for an RRSP, a RRIF, an RESP and a TFSA, an RDSP is an "excluded right or interest".[158] Accordingly, there is no deemed disposition and reacquisition of such interest when an individual ceases to be or becomes resident in Canada.[159] Therefore, no income inclusion will arise in respect of an RDSP when an individual ceases to be resident Canada.

Joint and Several Liability – Section 160

In general terms, RDSP plan holders are jointly and severally liable with the plan beneficiary (or his/her estate) for the taxes arising with respect to the deregistration of a plan that is non-compliant.[160]

OAS Benefits

Payments from an RDSP are not taken into account in determining the recovery tax on Old Age Security Benefits.[161] Such payments are also not taken into account for the purpose of determining of the Guaranteed Income Supplement.[162]

Employment Insurance

Payments from an RDSP are not taken into account for the purpose of determining if Employment Insurance benefits must be repaid.[163]

TFSAs

Basic Features

The TFSA was created as a result of the 2008 Federal Budget for the stated purpose of improving the taxation of savings. The basic features of the TFSA are as follows:

(a) contributions to a TFSA are not deductible for income tax purposes,

(b) excess contributions will result an adverse tax consequences,

(c) investment income earned in the TFSA is not subject to income tax, and

(d) payments out of a TFSA are not subject to income tax.

TFSAs – The Basics

The provisions with respect to TFSAs are applicable starting in 2009. A TFSA arrangement cannot be entered into until 2009.[164]

Qualifying Arrangement

An arrangement can only be a TFSA if it is a "qualifying arrangement". A "qualifying arrangement" is an arrangement between an individual who is at least age 18[165] and a person (the "issuer") that is:

(a) a trust arrangement the issuer of which is federally or provincially licensed trust company;

(b) an annuity contract with a federally or provincially licensed person authorize to carry an annuities business in Canada (e.g. a life insurance company); or

(c) a deposit instrument with certain financial institutions such as a bank or trust company that is a member of the Canadian Payments Association.[166]

The written provisions of the arrangement must also provide as follows:

(a) contributions must be made to the issuer in consideration of, or to be used, invested or otherwise applied for the purpose of making distributions to the holder;[167]

(b) the parties agree that the issuer will file with the CRA an election to register the arrangement as a TSFA;[168]

The written provisions of the arrangement must include and the arrangement must comply at all times with the following conditions:

(a) the arrangement must be maintained for the exclusive benefit of the holder (ignoring any right of a person to receive a payment of or under the arrangement only on or after the death of the holder);

(b) while there is a holder of the arrangement, only the holder or the issuer can have rights under the arrangement relating to the amount and timing of distributions and the investing of funds;

(c) no one other than the holder can make a contribution. The Explanatory Notes to subsection 146.2(2) state that this condition will not preclude contributions from being made on behalf of the holder under an agency agreement, such as contributions made under an employer-sponsored group arrangement.[169] A gift from one family member to another family member who makes a contribution to his/her TFSA should also not be prohibited by this condition;

(d) distributions must be allowed to reduce the amount of tax that would otherwise be payable by the holder under sections 207.02 or 207.03;

(e) the issuer must, at the direction of the holder, transfer all or any part of the property held in connection with the arrangement (or an amount equal to its value) to another TFSA of the holder;

(f) if the arrangement is a trust, the trust is prohibited from borrowing money or other property for the purposes of the arrangement; and

(g) the arrangements must comply with prescribed conditions.[170] (The Explanatory Notes to subsection 146.2(2) state that no specific conditions are anticipated [171]).

Becoming a TFSA

An arrangement becomes a TFSA at the time it is entered into if

(a) it is “qualifying arrangement” at the time it is entered into; and

(b) before March of the calendar year following the year in which the arrangement was entered into, the issuer files an election (in prescribed form and manner) with the CRA to register the arrangement as a TFSA under the Social Insurance Number of the individual with whom the issuer entered into the arrangement.[172]

Holder & Survivor

The term "holder" of an arrangement is defined as follows:

(a) until the death of the individual who entered into the arrangement with the issuer, the individual; and

(b) at and after the death of the individual, the individual's survivor, if the survivor acquires

(i) all of the individual's rights as the holder of the arrangement, and

(ii) to the extent it is not included in the rights described in subparagraph (b)(i) above, the unconditional right to revoke any beneficiary designation made, or similar direction imposed, by the individual under the arrangement or relating to property held in connection with the arrangement.[173]

The "survivor" of an individual means another individual who is a spouse or common-law partner of that individual immediately before the death of that individual.[174]

The definition of holder is relevant for certain of the conditions that an arrangement must satisfy to be a qualifying arrangement, for determining when an arrangement ceases to be TFSA on the death of the last holder as well as for the imposition of penalty taxes on the death of the last holder.

Approval Process – TFSA Issuer

A "distribution" under an arrangement under which an individual is the holder is a payment out of or under the arrangement in satisfaction of all or part of the holder's interest in the arrangement.[175]

The CRA has recently released a memorandum setting out the approval process that TFSA issuer must follow before an election to register an arrangement as a TFSA can be much. To make an election, the issuer must have a TFSA identification number. To obtain this number the issuer must complete form RC236, Application for a Tax-Free Savings Account, and file the completed form along with a specimen of the plan with the CRA. The issuer can only file the election after it receives the CRA'a approval of the application package and the TFSA identification number.[176]

Taxation of the TFSA

The income earned in a TFSA, regardless of whether the TFSA is a trust, an annuity contract or deposit instrument is not taxable.[177]

A TFSA trust, however, can be taxable as follows. The trust is taxable on its income for the year from carrying on one or more businesses and on income earned on investments that are non-

qualified investments (as defined in subsection 207.01(1)) and, for this purpose, capital dividends are included income and capital gains and capital loss are fully includable.[178]

Ceasing to be TFSA

General

An arrangement will cease to be a TFSA at the earliest of the following times:

(a) the time at which the last holder dies,

(b) the time at which the arrangement ceases to be a qualifying arrangement,

(c) the earliest time at which the arrangement is not administered in accordance with the conditions in subsection 146.2(2).[179]

If an arrangement ceases be a TFSA, then there is a deemed disposition and reacquisition at fair market value. In the case of an annuity contract or deposit instrument, there is a deemed disposition and reacquisition of the contract or deposit, as the case may be, at fair market value and with respect to an annuity contract it is deemed to be a separate annuity contract that is not a TFSA.[180] In the case of TFSA trust, the trust is deemed to have disposed of each of its properties immediately before the particular time at which the arrangement ceases to be a TFSA, and to have reacquired each of those properties at the particular time at fair market value. The trust's current taxation year is deemed to have ended immediately before the particular time and for a new taxation to have begun at the particular time.[181]

These rules cause an arrangement that ceases to be a TFSA to become taxable under the ordinary provisions in Part I of the Tax Act.

Death

On the death of the last holder, an arrangement ceases to be a TFSA. Special rules have been introduced with respect to a trust ceasing to be a TFSA on the death of the last holder.[182] The Explanatory Notes to proposed subsection 146.2(9) in the July 14 Draft Legislation state that their purpose is to avoid undue administrative and reporting difficulties and to bring the tax treatment of TFSA trusts in closer alignment with that of RRSPs trusts on the death of the annuitant. The TFSA trust is deemed to be a TFSA for certain provisions of the Tax Act and the *Income Tax Regulations* until the earlier of the time at which the trust ceases to exist and the end of the first calendar year that begins after the holder dies.[183]

This provision permits the trust to maintain its tax exempt status until that time. The deemed disposition and reacquisition of property and the year end termination will occur at that time. Payments made during the period in which the arrangement retains its TFSA status in full or partial satisfaction of a taxpayer's beneficial interest in the trust are included in the recipient's income, except to the extent designated by the trust as being attributable to the fair market value of the property of the trust at the death of the holder.[184]

If the trust continues to exist after the expiry of the period in which it maintains its TFSA status then the trust must include in its income for its first taxation year that begins after the end of that period, the income and capital gains earned in that period that was not paid out in that period.[185]

Successor Holder on Death

On the death of the TFSA holder, a surviving spouse or common-law partner of the deceased can become the holder of the plan provided that, as noted earlier, the survivor acquires all of the deceased's rights as holder including the unconditional right to revoke any beneficiary designation made or similar direction imposed by the deceased under the TFSA or relating to property held in connection with the TFSA.[186]

The Explanatory Notes to the definition of "holder" state that requiring that the survivor to have such rights is included to ensure that the survivor has control of the TFSA.[187] It is not clear why the survivor must have this so called "unconditional right" to revoke. The Department of Finance apparently wants to ensure that these tax-free benefits of TFSA do not accrue to someone other than a surviving spouse or common-law partner.

If, following the death of the holder of the TFSA, someone other than a surviving spouse or common-law partner of the deceased, becomes the holder, the arrangement will cease to be a TFSA.[188]

Estate Planning & TFSAs

Generally, provincial law governs property and civil rights within the province. In case of Ontario, relevant legislation includes the *Insurance Act,* R.S.O. 1990, c. I.8, as amended and the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, as amended.

In the case of a TFSA annuity contract issued by a life insurer to a resident of Ontario, the owner of the contract is entitled to designate the owner's personal representative or a beneficiary to receive insurance money.[189] The insurance money that becomes payable to a designated beneficiary does not form part of the estate of the owner and is not subject to the claims of the creditiors of the owner.[190]

In addition, the owner may designate in the contract (or an agreement in writing) another person to become the successor owner on the death of the current owner. In such case,

(a) the rights and interests of the owner in the contract do not, upon the death of the owner, form part of his or her estate; and

(b) upon the death of the owner, the person named in the contract or in the agreement has the rights and interests given to the owner by the contract and by this Part V of the *Insurance Act* (Ontario) and shall be deemed to be insured.[191]

Thus, an annuity contract issued by insurer should be able to satisfy the conditions that a TFSA must meet under the Tax Act. If successor owner is to be a surviving spouse or common-law partner of the holder, it would seem that an annuity contract would have to terminate on the death of the survivor of the two of them, i.e. there would need to be two measuring lives under the annuity contract.

In the case of a TFSA that is a trust or deposit instrument, the *Succession Law Reform Act* (Ontario) does not allow the holder to designate another person to receive a benefit payable under the TFSA on the death of the holder or become the successor owner. This may be a testamentary act that would need to be dealt with in the holder's last will and testament.[192]

In such case, the interest in the deceased's TFSA would pass to his/her personal representatives to be distributed to the person(s) entitled to the TFSA under the deceased's last will and testament or, in the case of an intestacy, in accordance with the *Succession Law Reform Act* (Ontario). Under the current rules for TFSAs, will an arrangement cease to be a TFSA because the personal representatives of the deceased first become the holder of the TFSA by operation of law even if a surviving spouse or common-law partner of the holder subsequently becomes the holder under the deceased's last will and testament or the law of intestacy.

However, some of the difficulties should be alleviated by the "exempt contribution" as discussed later in the section titled "Exempt Contributions".

Contributions & Tax on Excess Contributions

In general terms, individuals age 18 or older will acquire $5,000 of TFSA contribution room each year starting in 2009. The $5,000 ("TFSA dollar limit") is indexed to inflation starting 2010.[193] Unused contribution room can be used in future years and withdrawals from a TFSA in a year will increase the individual's unused TFSA contribution room in the next year.

Limits are placed on contributions to TFSAs by imposing on an individual a monthly penalty tax on that individual's "excess TFSA amount". The amount of the tax for a calendar month is 1% of the highest amount of the "excess TFSA amount" in that calendar month.[194] The excess TFSA amount at a particular time in a calendar year of an individual is determined as follows:

(a) the total of the individual's contributions to a TFSA made in the calendar year and at or before the particular time (other than qualifying transfers and exempt contributions),

less

(b) the individual's unused TFSA contribution room at the end of the preceding year,

less

(c) the total of the distributions made in the preceding calendar year from the individual's TFSA's (other than a qualifying transfer or a prescribed distribution),

less

(d) the TFSA dollar limit for the calendar year, provided that at any time in the year the individual is resident in Canada, otherwise, nil,

less

(e) the total of the qualifying portions of distributions made in the calendar year and at or before the particular time where the qualifying portion of a distribution is:

 (iii) nil, if the distribution is a qualifying transfer or a prescribed distribution,

 (iv) otherwise, the lesser of the amount of the distribution and the amount that would be the individual's excess TFSA amount at the time of the distribution if no distribution was made. [195]

The Explanatory Notes to the definition of the "excess TFSA amount" provided by the Department of Finance in the July 14 Draft Legislation state that it is not anticipated to prescribe a distribution for variable E of the definition of "excess TFSA amount". [196]

An individual's "unused TFSA contribution room" at the end of a calendar year that is after 2008 is determined as follows:

(a) the individual's "unused TFSA contribution room" at the end of the preceding calendar year (which is nil for years before 2009),

plus

(b) the sum of all distributions made from the individual's TFSAs in the preceding calendar years (other than a qualifying transfer or a prescribed distribution),

(c) the individual's TFSA dollar limit for that calendar year, provided the individual is 18 year or older and resident in Canada at any time in the year,

less

(d) the sum of the individual's contributions to a TFSA in that calendar year (other than a qualifying transfer or an exempt contribution.)[197]

Direct Transfers

A "qualifying transfer" is a direct transfer of an amount from an individual's TFSA to

(a) another TFSA of the individual, or

(b) to the TFSA of the individual's spouse or common-law partner or former spouse or former common-law partner, where the individuals are living separate and apart at the time of the transfer and, in general terms, the transfer relates to a property division arising from marriage or common-law partnership breakdown.[198]

A qualifying transfer is not considered to be a contribution to a TFSA. Effectively, a qualifying transfer does not reduce an individual's unused contribution room.

Exempt Contribution

An exempt contribution is a contribution made in a calendar year to a TFSA by the individual (the "survivor") who was the spouse or common-law partner of another individual immediately before the death of that other individual if the following conditions are satisfied:

(a) the contribution is made during the period (the "rollover period") between the death of the other individual and the end of the first calendar year that begins after the death of that individual (or any later time acceptable to the CRA),

(b) a payment (the "survivor payment") was made to the survivor during the rollover period as a consequence of the other individual's death, directly or indirectly out of a plan that ceased to be a TFSA because of that death,

(c) within 30 days following the date of the contribution, the survivor designates in a prescribed form and manner, the contribution in relation to the survivor payment,

(d) the contribution does not exceed the least of the following three amounts:

 (i) the excess of the survivor payment over the total of all other contributions to TFSAs designated by the survivor in relation to the survivor payment,

 (ii) the excess of the fair market value of the particular TFSA of the deceased, (specifically, the annuity contract, the deposit instrument or the properties of the TFSA trust, as applicable) immediately before the death of the deceased over the total of all other exempt contributions made by the survivor at or before the time of such contribution,

 (iii) if the deceased had, immediately before death, an excess TFSA amount or if survivor payments are made to more than one survivor, nil or, if allowed by the CRA, a greater amount, [199] (Under the Tax Act an individual can have both a spouse and a common-law partner).

By virtue of certain provisions, specifically the definitions of "excess TFSA amount" and "exempt contribution", the value of a deceased's TFSA immediately before death can be transferred without adverse tax consequences to the TFSA of a surviving spouse or common-law partner of the deceased.

The use of the "exempt contribution" may be a way of dealing with the legal difficulties of a surviving spouse or common-law partner becoming the successor holder of the deceased's TFSA. For example, by virtue of paragraph (b) of the definition of "exempt contribution", a contribution by a surviving spouse or common-law partner of a deceased TFSA holder should not be disqualified as an "exempt contribution" because the proceeds of the deceased's TFSA were paid to his/her executor and distributed by the executor to the surviving spouse or common-law partner pursuant to the deceased's last will and testament.

Penalty Tax & Survivor

If an individual's spouse or common-law partner immediately before the individual's death becomes the holder of a TFSA of the deceased as a consequence of the death and immediately before the death, the deceased had an excess TFSA amount (and therefore, would have been subject to the 1% penalty tax), the survivor is treated (except for the definition of "exempt contribution") to have made, at the beginning of the month following the death, a contribution to a TFSA equal to the excess of such excess TFSA amount over the fair market value of all property held in connection with TFSAs that ceased to be TFSAs because of the death.[200]

This provision could have the effect of imposing the 1% penalty tax on the deceased's surviving spouse or common-law partner.

Qualified & Prohibited Investments for TFSA Trusts

Qualified Investments for TFSA, which are generally similar to qualified investments for RRSPs, include:

(a) money, deposits and guaranteed investment certificates,

(b) federal, provincial and municipal government bonds,

(c) mutual funds and segregated fund policies,

(d) share, units and options that are listed on a designated stock exchange in Canada or in a foreign country, and

(e) other investments prescribed by section 4900 of the *Income Tax regulations*.[201]

In addition, the following annuity contract issued by a licensed annuities provider (e.g. a life insurance company) is a qualified investment for a TFSA trust:

(a) an annuity contract where

  (i) the TFSA trust is the only person who (ignoring any subsequent transfer of a contract by the trust) is or may become entitled to any annuity payments under the contract, and

(ii) the holder of the contract has a right to surrender the contract at any time for an amount that would, if reasonable sales and administration charges were ignored, approximate the value of funds that could otherwise be applied to fund for future periodic payments under the contract, [202]

A "non-qualified investment" for a TFSA trust is property that is not a qualified investment for a TFSA trust.[203]

With respect to a TFSA trust, the Tax Act will contain the concept of a "prohibited investment" for a TFSA. The Explanatory Notes in the July 14 Draft Legislation states that the "prohibited investment concept is intended to guard against tax planning opportunities with respect to closely held investments by TFSA trusts.[204] A prohibited investment is:

(a) a debt of the holder of the TFSA trust,

(b) a share, interest in or a debt of a corporation, partnership or trust in which the holder of the TFSA has a significant interest(as defined in subsection 207.01(4)),

(c) a share, interest in, or a debt of a person or partnership that does not deal at arm's length with the holder or a corporation, partnership or trust in which the TFSA trust holder has a significant interest (as defined in subsection 207.01(4)),

(d) an interest in, or a right to acquire described in paragraphs (a), (b), or (c) above, and

(e) prescribed property.[205]

Prescribed property will be defined in the *Income Tax Regulations*. A prohibited investment does not include "prescribed excluded property".[206]

Under draft *Income Tax Regulations*, a mortgage secured by real property situated in Canada and insured under the National Housing Act or by an approved private insurer will be prescribed excluded property.[207] As a result a TFSA trust will be permitted to investing the holder's own mortgage.

A TFSA will be permitted to hold shares of certain Canadian-controlled private corporations, cooperative corporations or venture capital corporations. If such shares cease to meet the requirements, the shares will become prohibited investments.[208]

Penalty Taxes

Tax on Prohibited or Non-Qualified Investments

A penalty tax is imposed for a calendar year if in the year, the TFSA trust acquires property that is a prohibited investment or a non-qualified investment or property held by the trust becomes a prohibited investment or a non-qualified investment.[209]

The amount of the tax is equal to the 50% of the fair market value of the property at the time when it was acquired or at the time it becomes a prohibited investment or a non-qualified investment, as applicable.[210]

If a TFSA trust holds a property that is both a prohibited investment and a non-qualified investment, it is treated only as a non-qualified investment for the purpose of the penalty tax and subsection 146.2(4).[211] This avoids the application of the penalty tax twice. The holder of the TFSA trust is liable to pay the tax.[212]

The person liable to pay the tax is entitled to a refund if the trust disposes of the relevant property before the end of the calendar year following the calendar year in which the tax arose (or such later time as the CRA considers reasonable in the circumstances). The amount of the refund is equal to the amount of the tax.[213] However, there is no entitlement to a refund if it is reasonable to consider that the holder knew or ought to have known when the property was acquired that it was not or would become, a prohibited investment or a non-qualified investment.[214]

For the purposes of the Tax Act, if after the tax in subsection 207.04(1) is imposed in respect of a property held by a TFSA trust property ceases to be a prohibited investment or a non-qualified investment, such property is deemed to have been disposed of and reacquired at fair market value.[215] The provision will make available the refund of tax provided for a subsection 207.04(4) and will also trigger realization of any accrued capital gain which gain should be taxable under subsection 146.2(4)(to be renumbered as subsection 146.2(6) by the July 14 Draft Legislation or 207.04(6).

An additional tax is imposed on the holder of a TFSA trust if the trust holds any prohibited investments.[216] The amount of the tax payable for a calendar year is the amount of income tax that the TFSA trust would pay for the taxation year that ends in the calendar year on the income earned in respect of the prohibited investments (including realized capital gains and losses) and for this purpose capital dividends are included income and capital gains and losses are fully included.[217]

Tax Where Advantage Extended

A penalty tax is imposed for a calendar year in connection with a TFSA if, in the year, an advantage in relation to the TFSA is extended to a person who is or who does not deal at arm's length with the holder of the TFSA.[218] The amount of the tax is:

(a) in the case of a benefit, the fair market value of the benefit, and

(b) in case of a loan or an indebtedness, the amount of the loan or indebtedness.[219]

The holder of the TFSA is liable for this penalty tax.[220] If, however the advantage is extended by the TFSA issuer (or by a person not dealing at arm's length with the issuer) then the issuer is liable to pay this penalty tax.[221]

An “advantage” in relation to a TFSA is:

(a) a benefit, loan or indebtedness that is conditional in any way on the existence of the TFSA, other than

(i) a benefit derived from the provision of administrative or investment services in respect of the TFSA, and

(ii) a loan or indebtedness (including the use of the TFSA as security for a loan or indebtedness) the terms and conditions of which are terms and conditions that arm’s length persons would have entered into,[222]

(b) an increase in the total fair market value of the property held in connection with the TFSA if it is reasonable to consider, having regard to all the circumstances, that the increase is attributable, directly or indirectly, to

(i) a transaction or event or a series of transactions or events that

(A) would not have occurred in an opened market in which parties deal with each other at arm’s length and act prudently, knowledgeably and willingly, and

(B) had as one of its main purposes to enable a person or a partnership to benefit from the exemption from tax under Part I of any amount in respect of the TFSA, or

(ii) a payment received as, on account or in lieu of, or in satisfaction of, a payment

(A) for services provided by a person who is, or who does not deal at arm’s length with, the holder of the TFSA, or

(B) of interest, of a dividend, of rent, of a royalty or of any other return on investment, or of proceeds of disposition, in respect of property (other than property held in connection with the TFSA)held by a person who is, or who does not deal at arm’s length with, the holder of the TFSA,[223]

(c) a prescribed benefit.[224]

The Explanatory Notes in the July 14 Draft Legislation to the definition of “advantage” state that it not anticipated to prescribe a benefit for the purpose of the definition.[225]

Penalty Tax – Non-Resident Contribution

A monthly penalty tax is imposed on an individual who makes a contribution to a TFSA while a non-resident of Canada. The tax is one percent(1%) of the contribution and is payable until the earlier of the first time at which the amount of the contribution equals or exceeds the total distributions made after the making of the non-resident contribution from the individual’s TFSAs

and that are designated by the individual in the prescribed manner to be distributions in connection with the contribution and not in connection with any other contribution and the time at which the individual becomes resident in Canada.[226]

Waiver of Penalty Taxes

The CRA has the discretion to waive all or part of the tax payable in respect of an excess TFSA amount (i.e. excess contribution) or on non-resident contributions if:

(a) the individual establishes to the satisfaction of the CRA that the liability arose as a consequence of an error, and

(b) the individual acts without delay to cause one or more distributions to be made out of TFSAs, the total amount of which is not less than the amount in respect of which the individual would otherwise be liable to pay the tax.[227]

The CRA has the discretion to waive all or part of the tax liability that arose under subsection 207.04(1) because the TFSA trust acquires or holds a prohibited investment or a non-qualified investment or arising under section 207.05 because an advantage has been extended where the CRA considers it just and equitable to do so have regard to all the circumstances including:

(a) whether the tax arose as a consequence of reasonable error, and

(b) the extent to which the transaction that gave rise to the tax also gave rise to another tax under Part XI.01.[228]

Using TFSA as Security for a Loan

There is no penalty tax imposed if the TFSA is used as a security for a loan or other indebtedness. If a TFSA is used as security for a loan or other indebtedness, this use will not cause the TFSA to not satisfy the qualifying arrangement conditions, if the following two conditions are met:

(a) the terms and conditions of the indebtedness are terms and conditions that persons dealing at arm's length with each other would have entered into, and

(b) it can be reasonably considered that none of the main purposes for that use is to enable a person (other than the holder) or a partnership to benefit from the tax exemption provided under Part I for TFSAs.[229]

If the loan or indebtedness does not satisfy these two conditions, then the TFSA would not satisfy the conditions to be a qualifying arrangement and would cease to be a TFSA.

Non-Resident Withholding Tax

Non-resident withholding tax applies to a payment to a non-resident of Canada after the death of the holder of a TFSA that would have been included in the recipient's income if the recipient had been resident in Canada.[230]

Other Issues relating to TFSAs

This section deals with several issues relevant to TFSAs.

Interest Deduction Denial

As is the case with interest on money borrowed to make a contribution to an RRSP, an RESP and RDSP, interest on money borrowed to make a contribution to a TFSA is not deductible in computing income.[231]

Se*rvices Fees Deduction Denial*

As in the case of RRSPs and RRIFs, a taxpayer is not permitted to deduct amounts paid or payable for services (e.g. investment counsel fees or administration fees) in respect of a TFSA under which the taxpayer is the holder.[232]

Capital Loss Denial

As is the case with respect to a capital loss arising on the disposition of property to an RRSP trust, an RRIF trust or an RDSP, the capital loss arising on a disposition of property to a TFSA is nil.[233]

Attribution Rules

The attribution rules in sections 74.1, 74.2 and 74.3 do not apply to a transfer of property by an individual to his/her spouse or common-law partner,

(a) while the property (or substituted property) is held in a TFSA of such spouse or common-law partner, and

(b) to the extent that the spouse or common-law partner does not, at the time of the contribution of the property to the TFSA have an excess TFSA amount.[234]

These attribution rules will not apply only while the property (or substituted property) is held in the TFSA and only if the contribution uses available contribution room of the spouse or common-law partner. The property held in TFSA trust is not subject to the attribution rules in subsection 75(2).[235]

Changes in Residence

As is the case for an RRSP, a RRIF, an RESP and an RDSP, a TFSA is an "excluded right or interest".[236] Accordingly, there is no deemed disposition and reacquisition of a TFSA when an individual ceases to be or becomes resident in Canada.[237] Therefore no income inclusion will arise in respect of a TFSA when an individual ceases to be resident in Canada.

Issuer Obligation

The issuer of a TFSA must exercise the care, diligence and skill of a reasonable prudent person to minimize the possibility that the TFSA trust holds a non-qualified investment.[238] Failure to comply with this obligation could result in the imposition of a penalty ($25 per day with a minimum penalty of $100 and a maximum penalty of $2,500).[239]

Direct Designation – Charitable Gifts

Individuals are entitled to tax credits for charitable gifts, crown gifts, cultural gifts and ecological gifts. If certain conditions are met, the tax credit is available to a deceased individual in the year of death for a transfer of money or by means of a negotiable instrument from the deceased's RRSP or RRIF (other than a plan that is a life insurance policy or annuity contract) where the transfer is made as a result of a qualified donee being named as a beneficiary under the plan.[240] This favourable treatment is extended to TFSAs (other than TFSAs that are annuity contracts offered by life insurance companies).[241]

Similar treatment is provided to life insurance policies and annuity contracts where the qualified donee is the named beneficiary.[242] This treatment will be available to TFSAs that are annuity contracts issued by life insurers.

It should be noted that there is no provision in the *Succession Law Reform Act* (Ontario) that allows such as designation to be made in respect of TFSAs that are not annuity contracts issued by a life issuer. The donation of such TFSAs must be effected in a will. Therefore, the extension of this favourable treatment is of no effect in Ontario at this time.

SELECTED COMMENTS ON PLAN CHOICE

Usually, individuals and families have a limited amount of funds available for savings. The funds may be invested in the vehicles discussed in this paper, namely; the RRSP, the RESP, the RDSP, the TFSA and exempt life insurance. In deciding which vehicle or vehicles to invest in, the investor will need to consider a variety of factors including individual and family needs, the purpose of the investment, the deductibility of contributions, the tax treatment of payments out of the vehicle, the contributions/grants to be made by the federal government to the plan, the nature of the investments to be acquired in the plan. A complex analysis of these factors will be required.

The RDSP is designed for a specific purpose, to assist savings for disabled children. The RDSP plan conditions are very complex. The CDSG and CDSB programs should be a strong incentive

to use the RDSP. There are deficiencies in the legislation which, as discussed earlier, create difficulties from an estate planning perspective. As an alternative, deductible contributions could be made to an RRSP. On death, the remaining funds in the RRSP or RRIF could be transferred on a rollover basis to the RRSP or RRIF of the deceased's financially dependent child or grandchild where the dependency is because of a physical or mental impairment or to an issuer to buy an eligible annuity or, if Bill C-10 becomes law, to a lifetime benefit trust.

The RESP exists to save for a child's education. The plan conditions for the RESP are less complex than the RDSP. The CESGs (and the CESBs for lower income families) make contributions to the RESP attractive. Until a child reaches age 18, a TFSA is not available and deductible contributions to an RRSP are only available if the annuitant has earned income. While payments out of the RESP to fund the child's education are taxable to the child, the effective rate may be nil or very low. Once the child reaches 18, contributions to a child's TFSA, instead of to an RESP, may be attractive since CESGs are no longer available and withdrawals from the TFSAs are not taxable.

The tax treatment and after-tax returns of the various vehicles are relevant to the decision-making process. In the Budget Papers for the 2008 Federal Budget, the Department of Finance provided some analysis of these issues for TFSAs, RRSP and unregistered savings. The following table was provided by the Department of Finance in those papers:

Net Proceeds From Savings in a TFSA Relative To Other Savings Vehicles

	TFSA	**RRSP**	**Unregistered Savings**
Pre-tax income	1,000	1,000	1,000
Tax (40% rate)	400	-	400
Net contribution	600	1,000	600
Investment income (20 years at 5.5%)	1,151	1,918	707
Gross proceeds (Net contribution + investment income)	1,751	2,918	1,307
Tax (40% rate)	-	1,167	-
Net proceeds	1,751	1,751	1,307
Net annual after-tax rate of return (%)	5.5	5.5	4.0[243]

The Department of Finance indicated the following in the 2008 Budget Papers regarding the foregoing table:

(a) With respect to the net contribution, the foregone consumption (saving) is $600 in all cases. In the RRSP case, the person contributes $1,000 but receives a $400 deduction in tax, thereby sacrificing net consumption of $600;

(b) With respect to the investment income on unregistered savings, the Department of Finance used a tax rate of 28% which represented a weighted average tax rate on an investment portfolio made up of 30% dividends, 30% capital gains and 40% interest;

(c) The net annual after-tax rate of return was measured in relation to foregone consumption of $600 and assumed annual nominal pre-tax rate of return of 5.5% invested for 20 years.[244]

The analysis indicates that where the tax rate on contributions is the same as that on withdrawals, the TFSA and the RRSP produce the same net rate of returns. If these tax rates differ, then the rate of return will differ between the two vehicles.

As noted by the Department of Finance in the 2008 Budget Papers:

(a) RRSP saving will provide a net rate of return higher than the TFSA where the effective tax rate on withdrawal is lower than the effective tax rate on the contribution, and

(b) TFSA saving will provide a net rate of return higher than the RRSP where the effective tax rate on withdrawal is higher than the effective tax rate on the contribution.[245]

A similar analysis could be undertaken for savings using exempt life insurance. However, the analysis would have to consider internal policy costs (e.g. administration fees and mortality costs), life expectancy in calculating a rate of return.

CONCLUSION

In this paper an overview of the RRSP, the RRIF, the RESP and exempt life insurance has been provided. The paper has provided a detailed review of the new tax-advantaged plans under the Tax Act – the RDSP and the TFSA. The RDSP and the TSFA provide new tax advantaged savings opportunities for Canadians. A variety of factors will need to be considered in deciding which tax-advantaged plans should be utilized.

ENDNOTES

[1] R.S.C. 1985 (5th Supplement) c. 1., as amended (referred to herein as the "Tax Act". Unless otherwise indicated all statutory references in the paper are to the Tax Act.
[2] Referred to herein as the "RRSP".
[3] Referred to herein as the "RRIF".
[4] Referred to herein as the "RESP".
[5] Referred to herein as the "RDSP".
[6] Referred to herein as the "TFSA".
[7] The Canada Disability Savings Grant is referred to herein as the "CDSG".
[8] The Canada Disability Savings Bond is referred to herein as the "CDSB".
[9] S.C. 2007 c. 35, s.136 (referred to herein as the "CDS Act").
[10] See generally section 146.
[11] Subsections 146(5) and (5.1) and paragraph 60(i).
[12] Subsections 146(5) and (5.1), paragraph 60(i) and definition of "RRSP Deduction Limit" in subsection 146(1).
[13] Definition of "RRSP dollar limit" in subsection 146(1) and definition of "money purchase limit" in subsection 147.1(1).
[14] Ibid.
[15] Definition of "earned income" in subsection 146(1).
[16] Ibid.
[17] Subsection 146(10).
[18] Subsection 146(10.1).
[19] Subsection 207.1(1).
[20] Subsection 204.1(2.1)
[21] Subsection 204.2(1.1).
[22] Section 146.01.
[23] Section 146.02.
[24] Paragraph 146(16)(a).
[25] Generally, section 146.3.
[26] See definition of "annuitant" in subsection 146.3(1) under which after the death of the first individual to receive payments under the RRIF, the annuitant may be the first individual's spouse or common-law partner.
[27] Subsection 146.3(7).
[28] Subsection 146.3(9).
[29] Subsection 207.1(4).
[30] Generally, see section 146.1.
[31] Generally, see the Canada Education Savings Act, S.C. 2004, c.26 as amended (referred to herein as the "CES Act".
[32] Referred to herein as the "CESG").
[33] Subsection 5(2) of the CES Act.
[34] Subsection 5(4) of the CES Act.
[35] Subsection 5(10) of the CES Act.
[36] Referred to herein as the "CLB".
[37] Subsection 6(2) of the CES Act.
[38] See definition of "educational assistance payments" in subsection 146.1(1).
[39] Subparagraph 146.1(2)(i)(ii).
[40] Subparagraph 146.1(2)(i)(i).
[41] Paragraph 146.1(2)(h).
[42] Clause 146.1(2)(j)(ii)(A).
[43] Subsections 146.1(2.21) and (2.22).
[44] The term "qualified investment" for a trust governed by RESP is defined in subsection 146.1(1).
[45] Paragraphs 146.1(2.1)(a) and (b).
[46] Subsection 207.1(3).
[47] Subsection 204.91(1).

[48] Definition of “subscriber’s gross cumulative excess “in subsection 204.9(1).
[49] Definition of “subscriber’s share of the excess amount” in subsection 204.9(1).
[50] Definition of “excess amount” and “RESP lifetime limit” in subsection 204.9(1).
[51] Subsection 146.1(7.1) and paragraph 56(1)(q).
[52] Subsection 204.94(2).
[53] Ibid.
[54] Definition of “exempt policy” in subsection 12.2(11) and subsection 306(1) of the Income Tax Regulations.
[55] Subsection 12.2(1) and paragraph 148(2)(d).
[56] See generally sections 12.2 and 148.
[57] Subsection 148(1), paragraph 56(1)(j) and the definition of “disposition” in subsection 148(9).
[58] Paragraph (k) of the definition of “disposition” in subsection 148(9).
[59] Subparagraphs 39(1)(a)(iii) and 39(1)(b)(ii).
[60] Paragraph (f) of the definition of “disposition” in subsection 148(9).
[61] Generally, see section 146.4.
[62] Paragraph 6(2)(a) of the CDS Act.
[63] Paragraph 6(2)(b) of the CDS Act.
[64] Subsection 6(6) of the CDS Act.
[65] Subsection 6(7) of the CDS Act.
[66] Paragraph 7(2) (a) of the CDS Act.
[67] Paragraph 7(2)(b) of the CDS Act.
[68] Subsection 7(8) of the CDS Act.
[69] Subsection 7(9) of the CDS Act.
[70] Section 2 and 3 of the *Canada Disability Savings Regulations*, SOR/2008-186, in force December 1, 2008 (referred to herein as the “CDS Regulations).
[71] Paragraphs 2(c) and 3(d) of the CDS Regulations.
[72] Subsection 5(1) of the CDS Regulations.
[73] Definition of “disability assistance payment” in subsection 146.4.
[74] Subsection 5(2) of the CDS Regulations.
[75] Definition of “assistance holdback amount” in section 1 of the CDS Regulations.
[76] Subsection 6(1) of the CDS Regulations.
[77] Subsection 6(2) of the CDS Regulations.
[78] Paragraph 146.4(3)(b)and subsection 146.4(8).
[79] Definition of “disability savings plan” in subsection 146.4(1) (the term “disabilities savings plan” is referred to herein as a “DSP”).
[80] Definition of “DTC-eligible individual” in subsection 146.4(1).
[81] Definition of “qualified person” in subsection 146.4(1).
[82] Definition of “holder” in subsection 146.4(1).
[83] Explanatory Notes under the definition of “holder” in subsection 146.4(1) in Canada, Department of Finance, Bill C-26, Budget and Economic Implementation Act, 2007 with Explanatory Notes released November 21, 2007 (these Explanatory Notes being referred to herein as the “2007 Explanatory Notes”).
[84] Subsection 146.4(2).
[85] Subsection 146.4(3).
[86] Subsection 146.4(4).
[87] Paragraph 146.4(4)(a).
[88] Paragraph 146.4(4)(b).
[89] Paragraph 146.4(4)(c).
[90] Paragraph 146.4(4)(d).
[91] Paragraph 146.4(4)(e).
[92] Paragraph 146.4(13)(a).
[93] Definition of “contribution” in subsection 146.4(1).
[94] Paragraph 146.4(4)(f).
[95] Paragraph 146.4(4)(g).
[96] Paragraph 146.4(4)(h).
[97] Definition of “disability assistance payment” in subsection 146.4(1).

[98] Paragraph 146.4(4)(i).
[99] Paragraph 146.4(4)(j).
[100] Paragraph 146.4(4)(k).
[101] Paragraph 146.4(8)(d).
[102] Definition of "lifetime disability assistance payments" in subsection of 146.4(1).
[103] Paragraph 146.4(4)(l).
[104] Explanatory Notes under paragraph 146.4(l) in the 2007 Explanatory Notes.
[105] Definition of "specified year" in subsection 146.4(1).
[106] Paragraph 146.4(4)(m).
[107] Paragraph 146.4(4)(n).
[108] Explanatory Notes to paragraph 146.49n) in the 2007 Explanatory Notes.
[109] Paragraph 146.4(4)(o).
[110] Paragraph 146.4(4)(p).
[111] Paragraph 146.4(5).
[112] Paragraph 146.4(5)(a).
[113] Paragraph 146.4(5)(b).
[114] Subsection 146.4(6) and paragraph 56(1)(q.1).
[115] Subsection 146.4(7).
[116] Paragraph 60(z).
[117] Subsections 146.4(8) and (9).
[118] Subsection 146.4(11).
[119] Paragraph 146.4(10)(a).
[120] Paragraph 146.4(10)(b).
[121] Paragraph 146.4(10)(c).
[122] Paragraphs 146.4(12)(a) and (b).
[123] Paragraph 146.4(12)(c).
[124] Paragraph 146.4(12)(d).
[125] Subsection 146.4(13).
[126] Subsection 162(7).
[127] Definition of "qualified investment" in subsection 205(1).
[128] Paragraph (b) of the definition of "qualified investment" in subsection 205(1).
[129] Paragraph (c) of the definition of "qualified investment" in subsection 205(1).
[130] Generally, Part XI of the Tax Act.
[131] Subsection 206(1).
[132] Subsection 206(2).
[133] Subsection 206(3).
[134] Subsection 206(4).
[135] Subsection 206(5).
[136] Subsection 206.1(1).
[137] Subsection 206.1(2).
[138] Subsection 206.1(3).
[139] Subsection 206.1(4)
[140] Paragraph 206.1(4)(b)
[141] Subsection 206.2(1).
[142] Subsection 206.2(2).
[143] Subsection 206.2(3).
[144] Definition of "advantage" in subsection 205(1).
[145] Ibid.
[146] Definition of "benefit" in subsection 205(1).
[147] Subsection 206.3(1).
[148] Subsection 206.3(2).
[149] Section 206.4).
[150] Paragraph 153(1)(i).
[151] Explanatory Notes to paragraph 153(1)(i) in the 2007 Explanatory Notes.
[152] Paragraph 212(1)(r).

[153] Ibid.
[154] Subsection 18(11).
[155] Subparagraph 40(2)(g)(iv).
[156] Paragraph 74.5(12)(a.2).
[157] Paragraph 75(3)(a).
[158] Subparagraph (a)(iii.1) of the definition of "excluded right or interest" in subsection 128.1(10).
[159] Subparagraphs 128.1(1)(b)(iv) and 128.1(4)(b)(iii).
[160] Subsection160.21(1).
[161] Definition "adjusted income" in subsection 180.2(1).
[162] Definition of "income" in section 2 of the *Old Age Security Act*(Canada).
[163] Definition of "income" in section 144 of the *Employment Insurance Act (Canada)* .
[164] Paragraph (a) of the definition of "qualifying arrangement in subsection 146.2(1) .
[165] Ibid.
[166] Paragraph (b) of the definition of "qualifying arrangement in subsection 146.2(1) as it will be amended by subsection 30(3) in Canada, Department of Finance, Legislative Proposals and Explanatory Notes relating to the Income Tax Act, the Excise Tax Act, 2001 and the Excise Tax Act released on July 14, 2008 (referred to herein as the July 14 Draft Legislation).
[167] Paragraph (c) of the definition of "qualifying arrangement" in subsection 146.2(1).
[168] Paragraph (d) of the definition of "qualifying arrangement" in subsection 146.2(1).
[169] Explanatory Notes to subsection 146.2(2) in, Canada, Department of Finance, Tax Provisions from the 2008 Federal Budget contained in Bill C-50 with Explanatory Notes (such Explanatory Notes being referred to herein as the "C-50 Explanatory Notes").
[170] Paragraph (e) of the definition of "qualifying arrangement" in subsection 146.2(1)and subsection 146.2(2).
[171] Explanatory Notes to subsection 146.2(2) in the C-50 Explanatory Notes.
[172] Subsection 146.2(3)(to be renumbered as subsection 146.2(5) by subsection 30(1) of the July 14 Draft Legislation.
[173] Definition of "holder" in subsection 146.2(1) of the Tax Act.
[174] Definition of "survivor" in subsection 146.2(1) of the Tax Act.
[175] Definition of "distribution" in subsection 146.2(1) of the Tax Act.
[176] CRA document titled "Tax-free Savings Account (TFSA), Application Package – Approval Process", dated August 29, 2008.
[177] Proposed paragraph (d.1) of the definition of "investment contract" in subsection 12(11)in subsection 2(2) of the July 14 Draft Legislation, proposed paragraph 304(1)(a.2) of the *Income Tax Regulations* in subsection 56(10) of the July 14 Draft Legislation, subsection 138.1(7), paragraph 148(1)(b.2), paragraph 149(1)(a.2), subsection 146.2(4)(to be renumbered as 146.2(6) by subsection 30(1) of the July 14 Draft Legislation), subsection 146.2(5)(to be renumbered as 146.2(7) by subsection 30(1) of the July 14 Draft Legislation).
[178] Subsection 146.2(4)(to be renumbered as 146.2(6) by subsection 30(1) in the July 14 Draft Legislation).
[179] Proposed subsection 146.2(5) as set out in subsection 30(4) of the July 14 Draft Legislation. .
[180] Subsections 146.2(7) and (8)(to be respectively renumbered as 146.2(10) and 146.2(11) by subsection 30(2) of the July 14 Draft Legislation).
[181] Subsections 146.2(6) (to be respectively renumbered as 146.2(8) by subsection 30(1) of the July 14 Draft Legislation).
[182] Proposed subsection 146.2(9) in subsection 30(5) of the July 14 Draft Legislation).
[183] Proposed paragraph 146.2(9)(a) in subsection 30(5) of the July 14 Draft Legislation).
[184] Proposed paragraph 146.2(9)(b) in subsection 30(5) of the July 14 Draft Legislation.
[185] Proposed paragraphs 146.2(9)(c) in subsection 30(5) of the July 14 Draft Legislation and 12(1)(z.5) in subsection 2(1) of the July 14 Draft Legislation.
[186] Definition of "holder" in subsection 146.2(1) of the Tax Act
[187] Explanatory Notes to the definition of "holder" in subsection 146.2(1) of the C-50 Explanatory Notes.
[188] Proposed subsection 146.2(5) in subsection 30(4) of July 14 Draft Legislation.
[189] Subsection 190(1) of the Insurance Act, R.S.O. 1990, c. I.8, as amended.
[190] Subsection 196(1) of the Insurance Act, R.S.O. 1990, c. I.8, as amended.
[191] Subsection 199(1) of the Insurance Act, R.S.O. 1990, c. I.8., as amended.
[192] For a discussion of this issue in "Tax-Free Savings Account – Beneficiary Designation Problem" by Ann Elise Alexander in Deadbeat, Vol 26, No. 1, published by the Trusts and Estates Section of Ontario Bar Association.

[193] Definition of "TFSA dollar limit" in subsection 207.01(1).
[194] Section 207.02.
[195] Definition of " excess TFSA amount" in subsection 207.01(1) as it will be amended by subsection 40(4) of the July 14 Draft Legislation.
[196] Explanatory Notes to the definition of "excess TFSA amount" in subsection 207.01(1) in the July 14 Draft Legislation.
[197] Definition of "unused contribution room" in subsection 207.01(1).
[198] Definition of "qualifying transfer" in subsection 207.01(1).
[199] Proposed definition of "exempt contribution" in subsection 207.01(1) as set out in subsection 40(7) of the July 14 Draft Legislation.
[200] Subsection 207.01(3) as it will be amended by subsection 40(9) of the July 14 Draft Legislation.
[201] Definition of "qualified investment" in subsection 207.01 (1).
[202] Paragraph (b) of the definition of "qualified investment" in subsection 207.01(1).
[203] Definition of "non-qualified investment" in subsection 207.01(1).
[204] Explanatory Notes to ITR 5000 in clause 64 of the Explanatory Notes in the July 14 Draft Legislation.
[205] Definition of "prohibited investment" in subsection 207.01(1) as it will be amended by subsections 40(5) and (6) of the July 14 Draft Legislation.
[206]Ibid.
[207] Proposed subsection 5000(1) of the *Income Tax Regulations* as set out in subsection 64(1) of the July 14 Draft Legislation.
[208] Proposed subsection 5000(2) of the *Income Tax Regulations* as set out in subsection 64(2) of the July 14 Draft Legislation .
[209] Subsection 207.04(1).
[210] Subsection 207.04(2).
[211] Subsection 207.04(3) as it will be amended by subsection 41(1) of the July 14 Draft Legislation.
[212] Subsection 207.04(1).
[213] Subsection 207.04(4).
[214] Subparagraph 207.04(4)(b)(i).
[215] Subsection 207.04(5).
[216] Subsection 207.04(6).
[217] Subsection 207.04(7) as it will be amended by subsection 41(2) of the July 14, Draft Legislation.
[218] Subsection 207.05(1).
[219] Subsection 207.05(2).
[220] Subsection 207.05(3).
[221]Ibid.
[222] Paragraph (a) of the definition of "advantage" in subsection 207.01(1) as it will be amended by subsection 40(2) of the July 14 draft Legislation.
[223] Proposed paragraph (b) of the definition of advantage in subsection 207.01(1) as set out in subsection 40(3) of the July 14 Draft Legislation.
[224] Proposed paragraph (c) of the definition of advantage in subsection 207.01(1) as set out in subsection 40(3) of the July 14 Draft Legislation.
[225] Explanatory Notes to the definition of "advantage" in subsection 207.01(1) in clause 40 of the Explanatory Notes in the July 14 Draft legislation.
[226] Section 207.03.
[227] Subsection 207.06(1).
[228] Subsection 207.06(2) as it will be amended by subsection 42(1) of the July 14 Draft Legislation.
[229] Proposed subsections 146.2(3) and (4) as set out in subsection 40(4) of the July 14 Draft Legislation.
[230] Proposed paragraph 212(1)(b) in subsection 44(1) of the July 14 Draft Legislation.
[231] Subsection 18(11).
[232] Paragraph 18(1)(u).
[233] Clauses 40(2)(g)(iv)(A).
[234] Paragraph 74.5(12)(c).
[235] Paragraph 75(3)(a).
[236] Subparagraph (a)(iii.2) of the definition of "excluded right or interest" in subsection 128.1(10).
[237] Subparagraphs 128.1(4))(b)(iii) and 128.1(1)(b)(iv).

[238] Subsection 207.01(5).
[239] Subsection 162(7).
[240] Subsection 118.1(5.3) as it will be amended by subsection 18(1) of the July 14 Draft Legislation.
[241] Ibid.
[242] Subsection 118.1(5.1).
[243] Canada, Department of Finance, 2008 Budget, Annex 4 to the Budget Papers, Tax Measures: Supplementary Information and Notice of Ways and Means Motion, page 278.
[244] Ibid.
[245] Ibid.

BIBLIOGRAPHY INFORMATION
Philip Friedlan, "Tax Deferral: Old and New," in *2008 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2008), 5:1-40.
© Canadian Tax Foundation