

merited, the appointees seem to us to be worthy, on the whole, in terms of their achievements.

There are still at least seven vacancies, so those, outside Alberta, who had their hopes up may still anticipate their reward. In addition, aside and apart from retirement or death, three other Senators will reach 75 in 2005 and thus be forced out.

And given that some of the media will immediately comment on the "cost" of these Senators, we'd note that the non-appointment over the past 16 months has probably saved in excess of \$2 million. In our view, neither Harper nor Layton covered themselves in glory in terms of their reaction to the appointees, but then, probably nobody much cares.

BENEFICIARY DESIGNATIONS IN QUEBEC FOR RRSPs AND RESPs¹

Daniel Frajman

In two recent cases on appeal from Quebec, *Caisse Populaire Desjardins de Val-Brillant v. Blouin* ("Val-Brillant"),² and *Bank of Nova Scotia v. Thibault* ("Thibault"),³ the Supreme Court of Canada rendered decisions buttressing the rights of creditors wishing to satisfy their claims by realizing upon registered plans, such as registered retirement savings plans ("RRSPs"), owned by Quebecers.

Rather than focusing on creditors' rights in relation to registered plans, this article will instead review in general terms the following two principles, relating to beneficiary designations in Quebec, that should also be drawn from the *Val-Brillant* and *Thibault* decisions: firstly, Quebecers who own a self-directed RRSP or similar registered plan apparently must use a valid will to designate who shall be the beneficiary of the plan upon the owner's death; secondly, a valid will also appears to be the best vehicle for controlling who will benefit from a registered

education savings plan ("RESP") in the event of the death of the person who had established the RESP.

RRSPs

A self-directed RRSP held through one of the large investment dealers headquartered in Ontario is typically established by an account-opening form titled "Declaration of Trust", which states that a trust company affiliated with the investment dealer holds the RRSP assets as a trustee for the party setting up the plan, and that the proceeds of the plan shall be paid, upon the death of that party, to the beneficiary referred to in the account-opening form.

Val-Brillant and *Thibault* both indicate that although this kind of plan is a valid RRSP, as it establishes a valid debtor-creditor or contractual relationship between the party setting up the plan and the financial institution, it is neither an *inter vivos* trust nor a true annuity arrangement under Quebec law. In effect then, these decisions appear to imply that a Quebecer must designate the beneficiary of such a plan in a will, rather than in the account-opening form.

In this regard, note that Quebec does not have a provision that is similar to section 51 of Ontario's *Succession Law Reform Act*, which states that an RRSP beneficiary can be designated by any written instrument. In Quebec, perhaps because probate fees are negligible, article 1819 CCQ indicates that property can be transferred on death only by will or marriage contract (subject to certain exceptions, such as the payment of life insurance benefits, or when property has in fact already been transferred prior to death by way of a valid *inter vivos* trust, or by establishing a true annuity arrangement). Jointly owned property in Quebec is not even subject to a right of survivorship, and passes on death through the estate.

Also note a unique element of Quebec trust law. In the two above-mentioned Supreme Court cases, the party setting up the self-directed plan is described as having retained so much power over the plan (principally, the power to choose investments, and to make withdrawals from the plan) that the party was characterized as either never having settled a trust (*Val-Brillant*) or as being a *de facto* trustee of the plan (*Thibault*).

1 An earlier version of this article appeared in the November 19, 2004 edition of *The Lawyers Weekly*.

2 [2003] 1 S.C.R. 666, 36 C.C.P.B. 62, 2003 D.T.C. 5420.

3 [2004] 1 S.C.R. 758, 39 C.C.P.B. 168, 2004 D.T.C. 6437.

The Court in *Thibault* appeared to indicate that the arrangement in that case violated Quebec's rule on trustee independence (found at article 1275 CCQ) due to both the party setting up the plan (i.e., the settlor) and the trustee being seen as one and the same. Whereas the common law in provinces other than Quebec would not necessarily see this as violating trust rules, article 1275 CCQ states the following: "The settlor or the beneficiary may be a trustee but he shall act jointly with a trustee who is neither the settlor nor the beneficiary."

RESPs

In general, although contributions to an RESP are not deductible for tax purposes by the contributor, the income earned by the plan is not taxable until it is paid out to the beneficiary (typically a child or grandchild of the contributor) for purposes of funding the beneficiary's post-secondary education.

While at school, the child tends to have few sources of other income, and therefore payments to him or her are usually taxed at low rates, if at all. Furthermore, the federal government pays an annual grant which effectively tops up the contributions to the plan by an amount equal to about 20 percent of the first \$2,000 contributed to the plan that year for each child. (In addition to this government grant, the maximum contribution to the RESP each year is \$4,000 per child.) Given this tax deferral and the government grant, RESPs have become an important method of saving for a child's post-secondary education.

In determining how to designate the beneficiaries of an RESP upon the death of the contributor, it is worthwhile to review both the tax legislation governing RESPs (mostly found in the federal *Income Tax Act*, or ITA), and the typical forms entered into with financial institutions when an RESP is set up. The legislation and forms show that just as with the RRSPs seen in the *Val-Brillant* and *Thibault* cases, an RESP also establishes a contractual relationship, this time between a "subscriber" and a "promoter".

The relevant parties in relation to an RESP are referred to at subsection 146.1(1) ITA. In effect, an education savings plan is defined in the subsection

to mean an arrangement entered into between one or more subscribers and an organization referred to as a promoter, under which the promoter agrees to make payments to a designated beneficiary to further the latter's post-secondary school education.

Upon the death of the subscriber, the subsection perhaps cryptically indicates that the successor subscriber will be "any other person (including the estate of the subscriber) who makes contributions into the plan in respect of a beneficiary".

When setting up RESPs for individual beneficiaries, the typical RESP forms used by promoters such as the larger investment dealers (which usually provide self-directed plans), and used by the "group RESPs" (which usually provide fixed income returns that increase when the plan is held to maturity), both include the following in their provisions concerning beneficiaries: the beneficiary is named in the account-opening form; by notice to the promoter, the subscriber can in many circumstances revoke the designation of a beneficiary and name a new one; upon the death of the subscriber, the forms differ, with some indicating that the subscriber's rights and obligations under the plan pass to his or her heirs or legal representatives, and with others essentially quoting the ITA by indicating that the successor subscriber will be any person who thereafter contributes to the plan.

Therefore, as with RRSPs, it appears prudent for a Quebec resident to use a will also in relation to RESPs. It seems this could be done by designating in a will who shall succeed to the testator's rights and obligations as a subscriber with regard to any RESP. Depending on the circumstances, it may also be desirable to use the will to provide the successor with various instructions regarding future contributions, investments and beneficiaries relating to the RESP.

Choice of Law

Finally, note that although many of the registered plans referred to above contain statements that they are governed by Ontario law, Quebec law (and federal law applicable in Quebec) likely govern when the plan is set up by a Quebecer. This apparently

results from the Quebec Consumer Protection Act requiring that Quebec law be applied to consumer-merchant contracts.

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ONTARIO PROFESSIONAL SPORTS TEAMS TAKE TAX HIT

In mid-February, all professional sports teams in Ontario took a big tax hit when the Ontario Court of Appeal overturned an earlier decision which allowed them to escape the provincial health tax in respect of games played outside the province.¹

Some background is in order.

In 2004, Mr. Justice Ted Matlow decided that the teams which are of course employers of the players do not have to pay the heavy employer health tax (EHT) levy in respect of games which are played outside of Ontario. The big winners were the Toronto Blue Jays, the Maple Leafs and the Ottawa Senators, though the ruling will apply to other smaller organizations as well.

The background is as interesting as the decision. Apparently, former Premier Mike Harris made a "secret" deal with the teams exempting them from the tax on games played outside Ontario. This was presumably when the sports teams were crying

about their overhead and the problems inherent in the weakness of the Canadian dollar *vis à vis* the American currency.

When Ernie Eves took over from Harris, he killed the deal and the sports teams sued.

Judge Matlow, in upholding the deal, took the position that "each team carries on its business not only at its home venue but also at the venues of all of the other teams in the league, regardless of how revenue is shared by them". To the extent that the teams had a "permanent establishment" at locations outside of Ontario, the EHT would not be collected when the team was away from Toronto.

In so deciding, Matlow was not relying on the Harris "deal" but rather was looking at the facts of the case in the context of the tax legislation. The effect was to lower the cost of EHT to the teams and the decision involved a retroactive refund of some of the tax already paid.

The Province of Ontario appealed and a unanimous Court of Appeal agreed with the judgment of Chief Justice Roy McMurtry. McMurtry rejected the notion that the teams had a permanent establishment in each non-Ontario city in which they played. The Court decided that their "operations" in each city they visited was "so transitory that they couldn't be considered fixed places of business". That being so, the only "permanent establishment" for EHT purposes would be the teams' home city in Ontario and therefore they had to pay the EHT for their employees without regard to away games.

Not only does the decision mean the teams must pay the full tax but it also means that they will not get the hefty refund of taxes for prior years which they presumably were expecting. And to rub a bit of salt in the economic wounds, McMurtry ordered the teams to pay \$25,000 in legal costs toward the Ontario government's appeal.

¹ *Toronto Blue Jays Baseball Club v Ontario (Minister of Finance)* (February 15, 2005), Doc CA C41861 (Ont. C.A.), reported 2005 CarswellOnt 504, reversing (2004), 238 D.I.R. (4th) 536 (Ont. S.C.J.). We first wrote about this case in issue #18, Volume XXVI of *The Canadian Taxpayer*.