

appoint an Associate Chief Justice as a matter of some priority. And if the appointment is not Gerry Rip, the government might feel constrained to explain why.

CRA NOW ACCEPTS GIFTS TO U.S. RELIGIOUS SCHOOLS

Robert Hayhoe

As discussed in an article last September,¹ we had become aware that the Canada Revenue Agency was refusing to apply Information Circular IC 75-23, *Tuition Fees and Charitable Donations paid to Privately Supported Secular and Religious Schools*² to situations involving gifts to U.S.-based religious schools. We understand that the CRA has now abandoned its earlier position and accepts that gifts to U.S. religious schools can form the basis for a charitable donation tax credit under Article XXI(6) of the Canada-U.S. Tax Treaty. As discussed in more detail in the September piece, Article XXI(6) provides that gifts by a Canadian resident to a U.S. charity are treated as gifts to a Canadian registered charity to the extent that the Canadian taxpayer has U.S.-source income.

IC 75-23 provides that when an amount is paid as tuition to a religious school, the difference between the total amount paid as tuition and the amount paid that relates to secular schooling can be treated as a charitable donation. We understand that in some cases the CRA had refused to permit individuals with U.S.-source income to treat any portion of tuition paid to U.S. religious schools as a charitable donation.

However, after the publication of the September 2005 article, we were contacted by a senior tax practitioner who confirmed that his personal notice of objection, filed on the basis that the religious portion of tuition paid to his child's U.S. religious school was a gift that could form the basis of a charitable donation tax credit pursuant to Article XXI(6), had been accepted. The CRA Appeals Directorate has now

reassessed this senior tax practitioner to accept his tax credit claim.

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RRSP UNSEIZABILITY: EXPANDING OR CONTRACTING?

Daniel Frajman

Recent judgments have made it clear that in Quebec, standard self-directed RRSPs can be seized by the creditors of the owner of the RRSP (the "owner"). However, RRSPs differing sufficiently from that standard may be unseizable by creditors, at least under current Quebec case law. It remains to be seen whether recent amendments to the federal *Bankruptcy and Insolvency Act (BIA)* will follow these and other cases rendered under provincial unseizability rules in Quebec and in the other provinces.

The leading Quebec case in this area, *Bank of Nova Scotia v. Thibault*,¹ was rendered by the Supreme Court of Canada in 2004. This and later Quebec cases seem to effectively state the following conditions for unseizability of private retirement plans:

- There is unseizability when the RRSP is used to purchase a real or true *annuity* issued by either an insurer or a trust company, and where the beneficiary of the real annuity is either designated as irrevocable, or is the owner's spouse, child, grandchild, parent or grandparent;
- There is also unseizability when the RRSP structure is seen as a real or true *trust* in which the RRSP assets can be fairly characterized as having been taken off the owner's personal balance sheet.

In one recent Quebec case,² an RRSP invested in segregated mutual funds was held as seizable insofar as it was not a real annuity or trust. The Court seemed to underline that in the RRSP context, a contract entered into with an insurer often is *not* per se

1 Volume XXVII, no 19 at p. 147.

2 See www.cra-arc.gc.ca/E/pub/tp/ic75-23/README.html.

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

2 *Gervais v. Appel & Cie Inc.*, [2005] J.Q. No. 12715, on appeal under Quebec Court of Appeal Docket No. 500-09-015833-056.

unseizable just because the insurer is a party, but rather it is usually certain annuities issued by insurers (under the above conditions) that are unseizable.

Another recent example is the Quebec Court of Appeal decision of *Pierre Roy & Associés Inc. v. Bagnoud*³. In this case, the RRSP was not of the standard variety, as the owner had only limited control over the kinds of investments in the RRSP, and the owner could access the RRSP assets prior to retirement only if she became disabled. The Court held that the RRSP assets had been "alienated" (transferred) from the owner to a real trust and that the RRSP was therefore unseizable.

Standard self-directed RRSPs would therefore be seizable, but it is not difficult to imagine that a properly drafted amendment to standard self-directed RRSP language could create a real trust that would be unseizable, at least in Quebec. It may be possible to work with a flexible financial institution to implement this.

However, it seems unclear as to whether recent federal legislation will expand or contract RRSP unseizability. In this regard, note that the cases referred to above are generally summarized in amendments to the *BIA* passed on November 25, 2005⁴ (but likely not coming into force until June 30, 2006 or later, according to reports from Industry Canada). The *BIA* has until now not specifically referred to RRSPs. These amendments would make unseizable all RRSPs (other than contributions made in the one year before bankruptcy), subject to certain caps, but only so long as the RRSP is "locked-in"⁵ (i.e., probably, the owner would only have limited rights to make withdrawals, and only limited rights to make investment decisions).

Industry Canada is reporting that regulations fleshing out these amendments may be issued by spring 2006. Hopefully the regulations will acknowledge that real trusts are locked-in so as to be unseizable, but it probably will be up to the public to con-

tact and convince Industry Canada to ensure that this is the case, and to also ensure that undue caps are not placed on any contributions that are unseizable. Otherwise, this recent federal RRSP legislation could provide the consumer with less protection from seizure than exists under the existing case law.

It should be noted that the starting point for the above-mentioned new rules in the *BIA* appears to be that the above-mentioned *BIA* amendments apply to property of the owner.⁶ There seems therefore to be a possibility that the new rules in the *BIA* do not actually extend to an RRSP set up as a real Quebec trust, since property subject to a real trust usually would not be the property of the owner, and therefore would not have to rely on a *BIA* exemption from seizure rule in order to be shielded from creditors.

In a similar vein, it will also be interesting to see how the new rules in the *BIA* affect RRSP case law relating to other situations where the retirement plan appears to not be the property of the owner or his or her estate. For example, there is the 2004 Ontario Court of Appeal decision in *Amherst Crane Rentals Ltd. v. Perring*.⁷ *Amherst Crane* had held (based on s. 53 of Ontario's *Succession Law Reform Act*, which has an equivalent in Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, and Nova Scotia,⁸ but not in Quebec), apparently with respect to self-directed RRSPs, that so long as the owner designates a beneficiary to receive the RRSP proceeds on the owner's death, then the RRSP will on the death of the owner be shielded from his or her creditors.

The federal government clearly has not finished the work it has started on RRSP unseizability. We hope that this work will end in making the law more coherent and equitable, and in expanding rather than contracting the ability to protect RRSPs from execution and seizure.

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3 [2005] J.Q. No. 5931, 46 C.C.P.B. 159 (Que. C.A.).

4 New s. 67(1)(b.3) *BIA*, as enacted by federal Bill C-55 (now S.C. 2005, c. 47), s. 57(1).

5 In this regard, see Industry Canada News Release of June 3, 2005, and related information, at http://strategis.ic.gc.ca/epic/internet/incilp-pdci/nsf/en/h_cl00781e.html.

6 S. 67(1) *BIA*.

7 [2004] 5 C.T.C. 5, 2004 D.T.C. 6584, leave to appeal refused (February 3, 2005), Doc 30507 (S.C.C.).

8 Barry Corbin, "Creditor Protection on Death for all RRSPs", *The Canadian Taxpayer*, Vol. XXVI, no. 15 at pp 116-117.