

Creditors' Rights to Enforce Claims Against RRSP's and RRIF's

Estate Planning and Asset Protection

As the economic outlook becomes increasingly gloomy in 2009, many are looking to arrange their estates to protect their key assets from potential creditors. Conversely, with real estate and other markets in a tailspin and unemployment rising, RRSP's and RRIF's become more obvious targets for creditors attempting to enforce their claims.

There are a number of provisions in provincial legislation and the federal *Bankruptcy and Insolvency Act* by which creditors can attack transactions made by persons who are insolvent or on the eve of insolvency. Therefore, optimum time for active planning to protect assets is when cash flow is growing and liabilities are decreasing. However, if liabilities do not exceed the realizable value of assets, and debts are being paid as they become due, planning to protect assets from creditors' claims remains viable, even in a down economy.

No Exemption for Seizure of RRSP's and RRIF's; Certain Exceptions

In a nutshell, in Ontario RRSP's and RRIF's are not protected from the claims of creditors. However there are important exceptions for the following:

- Locked-in RRSP's, which are RRSP's established with transfers from registered pension plans
- RRSP's and RRIF's sold by insurance companies as part of a life policy in which a spouse (including a same-sex spouse), child, grandchild or parent of the life insured is named as a beneficiary, or in the case of any other beneficiary designation so long as it is an irrevocable designation.

Creditor protection planning should be an important consideration for owner-managers, professionals and other entrepreneurs. The life insurance products which are RRSP eligible should therefore receive high consideration, but beware also that these products bear substantial fees and MER's well above comparable non-insurance products. Since spouses are separate as to property, spousal RRSP's are another viable option to consider.

The exemption for locked-in RRSP's underscores the advantages afforded participants in registered pension plans, as compared to most Canadians who have to rely on the RRSP as their primary retirement savings vehicle.

Seizure After Death

When death occurs, creditors realize that their time for getting paid is short, and as well, many debts and obligations crystallize as a result of death. However, creditors have a harder time of it after death if they wish to seize RRSP's or RRIF's. If a beneficiary has been designated in the RRSP or RRIF, the Courts in Ontario have ruled that the deceased's creditors can not claim against the policy. In effect, the proceeds belong to the designated beneficiary(ies) immediately after the moment of death. Since this is not the case if there is no designated beneficiary with the result that the RRSP or RRIF is payable to the deceased's estate, this itself is a good reason for naming a beneficiary to an RRSP or RRIF. When designating anyone other than a spouse, there can have some quite unexpected reverberations within the estate and therefore it is very important to review your will and obtain tax advice before naming a beneficiary other than a spouse. (Provided that a person intends to benefit his or her spouse, we routinely advise clients to include a clause in their wills to designate their spouse as a beneficiary of any RRSP's and RRIF's as a precaution against the possibility that the designation in the RRSP / RRIF documents has been overlooked.)

Everything Changes in Bankruptcy

As a result of amendments to the federal *Bankruptcy and Insolvency Act* which came into force in July, 2008, RRSP's, RRIF's and other registered plans under the Income Tax Act (such as Deferred Profit Share Plans) no longer form part of the bankrupt's estate for distribution among creditors, with the exception of contributions during the 12 months before the date of the bankruptcy.

It is easy to envisage the situation where the debtor whose RRSP is substantial decides to file for bankruptcy to preserve the RRSP assets and protect them from seizure by creditors.

The province has not announced any plans to pass legislation to provide that RRSP's and RRIF's are exempt for seizure. On the one hand, this would bring consistency to the provincial law and the federal bankruptcy law, and also help put RRSP / RRIF investors on an equal footing with participants in registered pension plans. Some would argue that such a change increases credit risk and the cost of credit, but since the federal bankruptcy legislation has already completed the move, this particular horse may already have bolted from the barn.

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