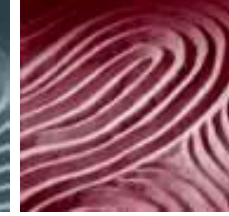


2500, 20 Queen St. West
Toronto, ON M5H 3S1
Canada
Tel. 416.595.8500
Fax.416.595.8695
www.millerthomson.com



MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents

TORONTO

VANCOUVER

WHITEHORSE

CALGARY

EDMONTON

WATERLOO-WELLINGTON

MARKHAM

MONTRÉAL

CREDITOR PROTECTION FOR RRSPs

By Rachel L. Blumenfeld

OCTOBER 2004

Creditor Protection for RRSPs

Two recent high-level Court decisions have clarified the creditor protection available for RRSPs (and RRIFs) in a number of situations. In one case, the Ontario Court of Appeal confirmed that an RRSP was protected from creditors of a bankrupt estate where the annuitant had designated a beneficiary. In the other, the Supreme Court of Canada found that an RRSP in Quebec was available for creditors where the funds were not sufficiently “alienated” by the annuitant, despite the assurances of the financial institution in the contract.

Creditor protection on death

The Ontario Court of Appeal, in a unanimous judgment in *Amherst Crane Rentals Limited v. Perrin* (released June 16, 2004), confirmed the availability of creditor protection for RRSPs in Ontario in certain situations. Prior to this decision, the law in Ontario was not settled: it was far from clear whether and under what circumstances RRSPs that were not purchased from an insurance company would be protected from creditors of a deceased annuitant’s estate where a beneficiary was designated in the contract. Until now, such protection was only clearly in place in legislation in British Columbia and Prince Edward Island, and in Manitoba, based on caselaw arising in that province.

In the case of an “insurance RRSP,” that is, an RRSP (or RRIF) purchased from an insurer, the Ontario Insurance Act provides protection from creditors on the death of the annuitant where there is a named beneficiary (i.e., not the “estate”), as do most, if not all of the other common-law provinces. Subs. 196(1) of the *Insurance Act*, provides:

Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

There is no provision in Ontario’s *Succession Law Reform Act*, which governs non-insurance RRSPs, that is identical to this clear statement of protection for insurance proceeds where a beneficiary is designated. Section 53 of the SLRA states:

53. Where a participant in a plan has designated a person to receive a benefit under the plan on the death of the participant,

(a) the person administering the plan is discharged on paying the benefit to the person designated under the latest designation made in accordance with the terms of the plan, in the absence of actual notice of a subsequent designation or revocation made under section 51 but not in accordance with the terms of the plan; and

(b) the person designated may enforce payment of the benefit payable to him under the plan but the person administering the plan may set up any defence that he could have set up against the participant or his or her personal representative.

In *Amherst Crane*, the appellant company was owed some \$53,000.00 by the estate of Mr. Perrin, which was bankrupt. Mrs. Perrin, the respondent (in both her capacity as executrix of the estate and personally) was the named beneficiary of Mr. Perrin’s RRSPs (approximately \$107,000) and his life insurance (\$1.4million). The creditor company sought to attach the RRSP proceeds.

The Court of Appeal judges, in a unanimous opinion, upheld the reasoning of the judge who heard the original application. Cameron J., did not permit the attachment but relied on s. 53 of the SLRA to find that the RRSP did not form part of the deceased's estate. Consequently, the RRSP was not caught by subs. 2(1) of the *Estates Administration Act* dealing with the payment of debts by a personal representative. Further proof of this reasoning, according to Cameron J., and upheld by the Court of Appeal, was that the legislature was required to specify that RRSP proceeds (along with life insurance, trust property and property held in joint tenancy) could be deemed to be part of an estate for purposes of making a dependants' relief order. Other than in that circumscribed situation, once the RRSP was paid to a beneficiary outside the estate, it could not be attached by creditors of the estate.

The lesson of this case bears repeating to those who may have a concern about creditors, however remote. It is critical to ensure beneficiary designations have been executed properly and, in particular, that, except in certain circumstances, a beneficiary other than the estate is named. These designations may be made directly with the financial institution or as a separate provision in a Will.

Creditor protection during lifetime

The Amherst Crane case distinguishes between creditor protection for RRSPs on the death of the annuitant and during lifetime. With an insurance policy (or insurance RRSP), subs. 196(2) provides protection during the lifetime of the insured or the annuitant as follows:

192(2) While a designation in favour of a spouse, same-sex partner, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the rights and interests of the insured [*i.e., the policyholder*] in the insurance money and in the contract are exempt from execution or seizure.

A non-insured RRSP would generally not be protected from creditors during the lifetime of the annuitant, as there is no analogous legislative protection. The recent decision of the Supreme Court of Canada in *Bank of Nova Scotia v. Thibault*, [2004] 1 S.C.R. 758, emphasizes that not all RRSPs and RRIFs are similar. While this case may be interpreted narrowly based on relevant sections of Quebec legislation, it should come as a warning to consumers to look closely at the products they are purchasing if creditor protection is a concern.

Mr. Thibault had purchased a self-directed RRSP that was marketed as exempt from seizure because it was held in a trust. However, as the Court noted, "exemption from seizure does not result from the mere intent of the parties." Despite the fact that the terms of the RRSP were set out in a "Declaration of Trust," the manner in which the alleged trust operated did not adhere to the legislative requirements for protection from creditors. Specifically, the annuitant, Mr. Thibault, maintained control over his account; he did not "alienate" the capital that he deposited. Consequently, the funds in the RRSP were subject to seizure by his creditors.

While creditor protection for RRSPs may be available during the lifetime of the annuitant, the consumer must be aware of the circumstances of how and when protection would be extended. In Quebec, the RRSP must be characterized as an annuity or trust; in other provinces, the RRSP must be considered insurance under the Insurance Act.