

Quarterly legal newsletter intended for accounting, management and finance professionals

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THE TRUST: AN EFFICIENT ASSET PROTECTION TOOL?

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In the last few years, trusts have been growing in popularity among business people, including as an asset protection mechanism. Since a trust is a patrimony by appropriation, neither the settlor nor the beneficiaries have any ownership rights in the property transferred, and therefore the property cannot, in theory, be seized by their creditors.

A tangible proof of the growing popularity of trusts? In the past year, Quebec courts have rendered two decisions involving trusts that may have been constituted for the purpose of asset protection (although other objectives may have been simultaneously achieved, including tax objectives).

In each of these cases, a creditor brought an action to obtain a declaration that certain transactions executed between his debtor and a trust may not be set up against him, in order to seize the property transferred to the trust as debt repayment.

In the case *Empire, compagnie d'assurance-vie c. Thibault*¹, the Superior Court allowed the action, declared that several legal instruments could not be set up against the creditor, authorized the creditor to seize all known trust assets and ordered trustees not to compromise certain trust assets. It is worth mentioning that the settlor of the trust had been, at the time of the transactions, crippled by debt and subject to legal actions (existing and threatened). In its decision, the court observes the apparent fraudulent nature



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of the transactions and further observes that the debtor had no intention of repaying his debts.

In *Levasseur c. 9095-9206 Québec inc.*², the Court of Appeal declared the inoperability of only a few transactions. With respect to the operations that led to the creation of the trusts, the Court concluded that the creditor failed to establish on a balance of probabilities that such acts were committed in fraud of his rights nor that the defendant rendered himself insolvent or attempted to render himself insolvent. However, with regards to transactions that occurred four years after establishing these trusts, at a time when the parties were referred to arbitration by the Superior Court, the Court of Appeal accepted to declare that these transactions could not be set up against the creditor, after having noted that they jeopardized the chances of the creditor to ever be reimbursed. In addition, the validity of these trusts was analyzed by the Court, which upheld them. However, the Court ordered the trustees to report to the creditor twice a year on the use of trust property and to inform the creditor in writing 48 hours before making any payment in favour of the debtor. The money thus received by the debtor, as beneficiary of the trusts, may be seized by the creditor.

These two decisions illustrate the trust's limitations as an asset protection tool. They also demonstrate the importance of the facts and circumstances surrounding the establishment of a trust and the transfer of property in its favour. The debtor's intent and its financial situation at the time of the transactions will be scrutinized by the court. The trust will be maintained and the property transfer will be set up against the creditors of the assignor, if the court concludes that, at the time of the transfer, the assignor was not insolvent and that by this same transfer he did not render himself insolvent or attempted to render himself insolvent. ◀

¹ 2011 QCCS 3556 (in appeal).

² 2012 QCCA 45.

AMENDMENTS TO THE OBLIGATIONS OF EMPLOYERS HIRING FOREIGN WORKERS – ONE YEAR LATER: ARE YOU READY FOR SERVICE CANADA'S VERIFICATION?

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In April 2011, regulatory changes that significantly alter the Temporary Foreign Worker Program came into force. Each employer hiring foreign workers is subject to these changes and must since abide by the new standards.

The growing importance of this workforce on the labour market and the vulnerability of some of these workers have led to the amendments. To make sure that the competent authorities have the means to protect the integrity of the Temporary Foreign Worker Program and thus ensure that employers do not commit abuse, the regulatory changes include a new step in the work permit issuance process: the assessment of the genuineness of the job offer.

Unless he benefits from an exemption, the employer who wants to hire a foreign national must first obtain a labour market opinion (LMO). Even though technically the assessment of the genuineness of the job offer occurs when the work permit application is submitted, the officer's decision is based upon the opinion of the department of Human Resources and Skills Development Canada (Service Canada). It is therefore the LMO application processed by Service Canada that will most of the time trigger a more thorough verification by the authorities.

When assessing the genuineness of the job offer, the authorities make sure, among other things, that the employer has complied with the federal and provincial laws that regulate employment, or the recruiting of employees,

in the province where the foreign national will be employed. Employers who have been sanctioned for certain offences regarding occupational health and safety, labour standards or infringement of rights and freedoms, among others, may be deemed ineligible to hire foreign nationals, even if that offence is not related to a foreign worker.

It is important to point out that this restriction also applies to a recruiter acting on behalf of the employer. The use of third party recruiters with regards to foreign workers is increasingly common. Considering that a past violation by the recruiter could result in a work permit denial, one needs to be cautious when choosing a recruiter and should provide for a verification and compensation mechanism.

In addition, before issuing a work permit, the authorities will verify if the employer, during the two years prior to filing the application, has complied with the working conditions (including wages and occupation) set out in the job offer to the foreign nationals he employs. The verification powers of the authorities in this respect apply to all foreign nationals employed and not only to those for whom he has obtained a LMO. Consequently, any change in the working conditions during the validity of the work permit should be brought to the attention of the Canadian authorities before coming into force. If not, the employer faces sanctions, even if the new working conditions are more advantageous to the foreign worker. These sanctions include a two-year prohibition from hiring temporary foreign workers and the publication of the name of the non-compliant employer on the Citizenship and Immigration Canada website.



To this end, a possible preventive approach could be to include, in any job offer made to a potential foreign worker, a provision providing that working conditions can be modified from time to time, including based on an employee's job performance. This way, it would be possible to make wage adjustments and other changes considered to be common practice. The wording of such a provision should be carefully drafted.

The employer targeted by a verification or an inquiry conducted by federal authorities will be required to prove, with proper supporting documents, that he has complied with his commitments to foreign workers he hired and that all representations to competent authorities with respect to LMO applications and work permits are truthful.

A record should be kept for every foreign worker. In addition to a copy of a valid work permit, this record should include the documentation submitted to the authorities and proof of a thorough follow-up regarding compliance with working conditions.

A cautious employer will keep a copy of all notices and communications forwarded to the authorities in order to demonstrate, in the event of a verification, that he has complied

with the requirements of the Temporary Foreign Worker Program.

To sum up, each employer using foreign workers must establish and maintain internal processes for verification and tracking, to be ready in the event of an inquiry conducted by the authorities or when making representations to the authorities with regards to a work permit or LMO application. In order to hire a foreign worker, an employer must now have clean hands, keep them clean and be able to prove it. ◀

DID YOU KNOW? TRUSTEE'S TAX LIABILITY

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In recent years, many trusts have been created for tax planning purposes. A trust is a patrimony created by an individual who donates property (the settlor). When a trust is constituted, one or several trustees are appointed to administer the affairs of the trust and hold its assets. Quite often, a professional will agree to act as a trustee of a trust created for their client. The involvement of this professional trustee in the day-to-day business of the trust is sometimes limited, which can have serious consequences for the professional trustee.

In a recent criminal case, *Sous-ministre du revenu du Québec c. Roy Gordon Harris*, Mr. Harris was charged with at least 18 counts of fraud by the sous-ministre du revenu du Québec, under the *Tax Administration Act* ("TAA"), for having willfully fail to file the returns of several trusts. Mr. Harris acted as the trustee of these various trusts (the "Harris Trustee") and it is in this capacity that he was charged by the Attorney General of Québec.

In summary, the tax avoidance scheme in which the Harris Trustee appears to have played a role consisted of a first transfer of real property between beneficiaries and trustees followed not long after by a second transfer of property between the trustees

involved and a third party. Subsequently, the proceeds from the sale, after the second transfer, was distributed between the beneficiary or beneficiaries of the trust and the Harris Trustee.

It would seem that no tax returns were filed by the trusts involved in the scheme and that, consequently, the proceeds of the sale of property were not reported to the Agence du revenu du Québec (the "ARQ"), as provided for in Québec's applicable tax laws. In addition, searches were conducted by the ARQ in the offices of the notaries implicated in these transfers of property. On February 22, 2012, Mr. Harris pleaded guilty to only one count of fraud and was fined \$37,218 as a result. All other counts were dropped for unknown reasons, possibly after an agreement was reached between the parties.

In this particular case, the Harris Trustee appears to have been closely involved in the affairs of the trust. What would happen if a professional was in fact a silent trustee and the tax return preparer of this trust? Could that professional be subject to legal action for the trust's tax debts or be criminally charged for negligence? What is the extent of a professional trustee's tax liability?

We increasingly recommend that trustees set up an internal control system for the trust, similar to the one that currently applies to business corporations. However, it is preferable that a trustee regularly monitors the affairs of a trust, so as to avoid any future problem with tax authorities. ◀



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