



FINANCIAL AND ESTATE PLANNING COUNCIL
OF MONTREAL

November 19, 2012

Recent developments in trusts and estates

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AGENDA

- Estate freeze and Price adjustment clause
- 21-year deemed disposition rule
- Rollover and Universal market integrity rules
- Asset protection trust re: *Levasseur*
- Shareholders' agreement to be signed at a later date: *Giroux v. Langlois*
- Potpourri



Estate freeze and Price Adjustment Clause (PAC)

- Issues:
 - Does a PAC expire for the purposes of subs. 152(4) ITA?
 - Where the valuation method is not fair and reasonable, would that make the PAC non-operating and prohibit any adjustment?
 - In presence of a bona fide error when evaluating common shares, will the value of the preferred shares be automatically adjusted to their FMV?
 - RE: 2011-0429991E5, May 24, 2012



Estate freeze and Price Adjustment Clause

- Estate Freeze done in year 1
- Taxpayer dies in year 16
- Estate requests a clearance certificate
- CRA considers that the common shares were valued below FMV in year 1



Estate freeze and Price Adjustment Clause

- The CRA will recognize a PAC if the agreement reflects a bona fide intention of the parties to transfer property at FMV; a fair and reasonable method is used
- The CRA refers to the *Gurberg* case



Estate freeze and Price Adjustment Clause

- If PAC is valid
 - FMV of freeze shares is adjusted retroactively to year 1
 - 152(4)(a) and 86(2) ITA do not apply
 - Under 70(5) ITA the deemed proceeds of disposition = the FMV as adjusted
- If PAC is not valid
 - No adjustment in year 1
 - 152(4)(a)(i) ITA could apply
 - 86(2) ITA could apply
 - 110.6(7)(b) ITA could apply



21-year deemed disposition rule

- Often a testamentary spousal trust will be created in a will with the residu being transferred to family trusts upon death of the surviving spouse
- The 21-year deemed disposition rule does not apply to the spousal trust, but applies to the family testamentary trusts



21-year deemed disposition rule

- Testator dies on October 20, 1991 – his assets are transferred to a spousal testamentary trust
- Spouse dies on March 1st, 2010
- Assets are transferred to a family testamentary trust on April 1, 2010
- Under common law, the 21-year deemed disposition would occur on March 1st, 2031



21-year deemed disposition rule

- Under civil law, the 21-year deemed disposition would occur on October 20, 2012 (TI 9226315)
- Under 1264 CCQ, “a trust is constituted upon the acceptance of the trustee ... in the case of a testamentary trust, the effects of the trustee’s acceptance are retroactive to the day of death.”
- The CRA will seek advice from the Minister of Finance as to whether or not this result is in line with the underlying tax policy
 - APFF Annual conference 2012- Federal Round Table Q: 5



Rollover and Universal Market Integrity Rules (UMIR)

- Taxpayer wants to transfer his stock portfolio to his corporation on a rollover basis under 85(1) ITA
- Under the UMIR, if there is no change in beneficial and economic ownership, trades must be executed off the marketplace
 - Example: Mr. X transfers the portfolio to his corporation in which he owns 100 % of the shares




Rollover and Universal Market Integrity Rules (UMIR)

- However, if there is a change in beneficial and economic ownership, trades must be executed on a marketplace
- As such, there is a sale transaction and a buy transaction
- No possibility to transfer the portfolio on a rollover basis
 - Example: Mr. X transfers the portfolio to a corporation in which he owns shares with a spouse or a trust



Rollover and Universal Market Integrity Rules (UMIR)

- The rollover should be available where the transfer is in favour of a self-benefit trust
- See APFF Annual Conference 2012, Financial strategies Round Table, Q: 11



Asset protection trust – *Levasseur* – 2012

QCCA 45

- Mr. Lenoir buys shares from Mrs. Levasseur in December 2000 for \$332,000
- Mr. Lenoir does not pay the purchase price
- Mr. Lenoir creates, in 2002, an asset protection trust and a family trust, had a POA to sign the cheques
- Lenoir transfers his principal residence to the trust in 2006 – becomes insolvent
- The court declares Lenoir liable to pay \$325,000 to Levasseur in 2008



Asset protection trust - *Levasseur*

- Mrs. Levasseur claims that the trusts were not validly constituted
- The court indicates that nothing shows that Lenoir created the trust to avoid paying his creditors
- He had asset protection considerations at the time
- The CCQ allows an individual to act as settlor, trustee, and beneficiary of a trust as long as 1275 CCQ is complied with



Asset protection trust - *Levasseur*

- However, the transfer of his principal residence in 2006 and other actions made him insolvent
- The court indicates that the transfer of the principal residence is ineffective with respect to Mrs. Levasseur
- Trustees have to inform Mrs. Levasseur 48 hours in advance if they are to pay income to Lenoir
- Otherwise, the trust and its separate patrimony is recognized



Giroux v. Langlois 2012 QCCS 4200

- PE Giroux died on July 26, 1996
- Under his will, he transferred shares of private companies to a testamentary spousal trust
- Upon death of the surviving spouse, the shares are to be remitted to three testamentary trusts
- However, the remittance of the shares is conditional upon the signing of a shareholders' agreement; otherwise the trustees may transfer the shares as they wish



Giroux v. Langlois 2012 QCCS 4200

- The court refers to 1280 CCQ: “To receive, the beneficiary of a trust shall meet the conditions required by the constituting act.”
- The court cannot impose a shareholders’ agreement
- What the father was requesting was for the three children to enter into a shareholders’ agreement – this was mandatory under the will



Giroux v. Langlois 2012 QCCS 4200

- The other question was whether or not the trustees could implement an estate freeze in favour of a trust that would be identical to the spousal trust
- The powers of the trustees under the will do not specifically include this power
- Could potentially be done under 1294 CCQ- request to the court – the court may then amend the constituting act



Potpourri

- 75(2) ITA and a PAC – APFF Annual Conference 2012 – Federal Round Table Q:1
- *Sommerer* – 75(2) ITA does not apply to a FMV sale – 2012 FCA 207
- *Triad Gestco* 2012 FCA 258 and *1207192 Ontario Limited* 2012 FCA 259 – GAAR applies to capital loss generator transactions involving trusts
- Life insurance and testamentary spousal trusts