

“BARE TRUSTS” NOT SUBJECT TO NEW REPORTING REQUIREMENTS FOR TRUSTS

Following changes to the trust reporting requirements, for taxation years ending after December 30, 2023, certain trusts, that were previously deemed not to be trusts for the purposes of the Income Tax Act^[1] (“ITA”), will be required to file a T3 Trust Income Tax and Information Return (“T3 Return”) even though they were not required to do so for previous taxation years.

Most notably, “Bare trusts”, which were not required to previously file a T3 Return, will now be required to do so. According to Common law, a Bare trust is a fiduciary relation where the trustee does not have any authority and cannot act without the consent of the settlor or must act based on the settlor’s instructions. The settlor effectively retains beneficial ownership of the property, and the only function of the trustee is to hold legal title. The Bare trust reporting requirement results from the inclusion of subsection 150(1.3) of the ITA. **Most notably, a Bare trust does not need to be constituted through a legal document and can exist irrespective of any written document.**

In Québec, and through the application of the Code Civil du Québec, which determines the applicable private law for the province of Québec, a trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer^[2]. Most notably in Québec, a trust is established by contract, by a will, or in certain cases, by law^[3]. While the concept of Bare trusts exists in all provinces that apply Common law as their private law, it does not exist in Québec, given that a written legal document must establish the creation of a trust in Québec. In Québec, the concept of a nominee agreement or a “prête-nom”, while analogous to a Bare trust in practice, is a legally distinct concept whereby the two cannot be assimilated for trust reporting purposes. A “prête-nom” agreement or “simulation” exists where the parties agree to express their true intent, not in an apparent contract, but in a secret contract, also called a counter-letter^[4]. Through a “prête-nom” agreement, a person would retain true ownership of property, while another person would appear as the owner in the eyes of the public for all intents and purposes.

In a technical interpretation^[5] released by the Canada Revenue Agency (“CRA”) on February 27, 2024, CRA stated that their position is that arrangements which are not considered to be trusts under the applicable private law, would not be required to file a T3 return under the new trust reporting requirements. Therefore, any arrangements governed by Québec private law which are not constituted in a legal trust document are not subject to the new trust reporting requirements.

If you are unsure about whether or not this impacts you, consider contacting your tax advisor at PSB BOISJOLI for more information.

[1] Income Tax Act, R.S.C. 1985, c.1. (5th Supplemental)

[2] Article 1260 C.c.Q.

[3] Article 1262 C.c.Q.

[4] Article 1451 C.c.Q.

[5] Technical interpretation – TI 2024-100668, released on February 27, 2024.