Some Aspects of the Revised Bare Trust Reporting Rules

Adam Friedlan

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SOME ASPECTS OF THE REVISED BARE TRUST REPORTING RULES

The legislative proposals relating to the ITA and the Regulations, released by the Department of Finance in August 2024 ("the draft legislation"), contained significant revisions to the reporting regime for bare trusts. This article aims to provide an overview of those changes and to highlight some technical issues raised by the proposed amendments.

How the Revised Bare Trust Reporting Regime Works

Paragraph 150(1)(c) of the ITA requires an estate or trust to file an income return, in the prescribed form, within 90 days of the end of its taxation year. Subsection 150(1.1) then provides that, in the case of a trust, the obligation to file a return under subsection 150(1) will not apply if certain conditions are met, including but not limited to the following: (1) no tax is payable by the trust for the year, (2) the trust has no taxable capital gains, and (3) the trust does not dispose of capital property during the year (collectively, "the filing exemption conditions"). Typically, a bare trust will satisfy these conditions because a trust of this kind is essentially disregarded for purposes other than tax reporting. In the case of "express trusts" resident in Canada, however, this exemption from filing cannot be claimed unless the trust is one of the trust arrangements listed in subsection 150(1.2) ("listed trust arrangements"). In general terms, an "express trust" is one created by an intention to create a trust rather than by the operation of law.

Under the currently enacted bare trust reporting regime, subsection 104(1) ("the general bare trust carve-out rule") provides, among other things, that a reference to a trust is deemed not to include an arrangement under which the trust can reasonably be considered to act as agent for all of the beneficiaries under the trust with respect to all dealings with all of the trust's property. However, that deeming rule (as currently enacted) does not apply for the purposes of section 150, which governs the reporting obligations of trusts. The draft legislation removes this carve-out to the application of subsection 104(1) to section 150 for taxation years that end after December 30, 2024. In addition, the draft legislation proposes to repeal existing subsection 150(1.3). This provision, described in simplified terms, deems bare trusts to be express trusts for the purposes of the reporting rules in section 150 and regulation 204.2 for taxation years that end after December 30, 2024. Regulation 204.2 specifies which trusts must provide enhanced reporting in respect of beneficial ownership information.

The draft legislation, in order to bring bare trusts back into the reporting regime in section 150, introduced new subsection 150(1.3). This provision ("the bare trust deeming rule"), among other things, deems any arrangement to be an express trust for the purposes of section 150 and regulation 204.2 if it meets the following criteria (1) one or more persons ("the legal owner") have legal ownership of property that is held for the use of, or benefit of, one or more

persons or partnerships; and (2) the legal owner can reasonably be considered to act as agent for the persons or partnerships who have the use of, or benefit of, the property. The bare trust deeming rule also provides that each "legal owner" is deemed to be a trustee of the trust, and that each person or partnership that has the use or benefit of property is deemed to be a beneficiary of the trust. This deeming rule is effective for taxation years that end after December 30, 2025.

The draft legislation also introduced new subsection 150(1.31), a rule ("the specific bare trust carve-out rule") that carves out a list of arrangements that would otherwise be deemed to be express trusts by the bare trust deeming rule. In other words, the specific bare trust carve-out rule exempts certain bare trusts from reporting.

Finally, amendments to the listed trust arrangements will expand the scope of arrangements that can benefit from the filing exemption under subsection 150(1.1).

In terms of timing, bare trusts will not be reportable at all for the 2024 calendar year. This is because the repeal of the reference to section 150 in the general bare trust carve-out rule, along with the repeal of existing subsection 150(1.3), is effective for taxation years ending after December 30, 2024, while the other referenced amendments are effective for taxation years ending after December 30, 2025. Accordingly, bare trusts that are reportable under the amended regime will only become reportable starting with calendar year 2025. The CRA announced on October 29, 2024 that bare trusts will not be required to file the T3 Trust Income Tax and Information Return for the 2024 taxation year. Unfortunately, understanding how these complicated rules work is quite difficult. To simplify, a bare trust will start being reportable in calendar year 2025 only if (1) it does not fit within the specific bare trust carve-out rule and (2) it is not a listed trust arrangement or is a listed trust arrangement but does not satisfy the filing exemption conditions.

Noteworthy Specific Bare Trust Reporting Exclusions

It will be important for the tax advisers of owner-managers to be aware of certain critical exclusions from reporting for bare trusts under the specific bare trust carve-out rule and in respect of listed trust arrangements.

Noteworthy exclusions from reporting under the specific bare trust carve-out rule include those in paragraphs (a), (b), and (c) of subsection 150(1.31). Paragraph (a) provides an exclusion in respect of bare trusts where each person or partnership that is deemed to be a beneficiary under the bare trust deeming rule at any time in the year is also a legal owner of the property at that time and there are no legal owners that are not deemed to be beneficiaries.

Paragraph (b) provides an exclusion in respect of arrangements where the legal owners are individuals that are related persons, and the property is real property that would be the principal residence of one or more of the legal owners for the year if those legal owners had designated the property for the year under the definition of "principal residence" in section 54.

Paragraph (c) provides an exclusion in respect of arrangements where the legal owner is an individual and the property is real property that is held for the use of or benefit of the legal owner's spouse or common-law partner during the year and would be the legal owner's principal residence for the year if the legal owner had designated the property for the year under the definition of "principal residence" in section 54.

Changes to Listed Trust Arrangements

The amendments to the listed trust arrangements now provide for, among other things, an exclusion from reporting (provided that the filing exemption conditions are satisfied) for (1) express trusts holding assets whose total fair market value (FMV) does not exceed $50,000 throughout the year and (2) trusts in which (a) each trustee is an individual, (b) each beneficiary is an individual and is related to each trustee, and (c) the total FMV of the trust's property does not exceed $250,000 throughout the year and the trust holds only certain types of assets (which may include money, GICs, shares of a publicly traded company, or personal-use property).

Resulting Trust Arrangements and Bare Trusts Involving Principal Residences

I now want to highlight two especially notable technical issues raised by these rules. First, I would like to highlight that, as established by the SCC in *Pecore v. Pecore* (2007 SCC 17), it is possible for an account to be transferred into joint tenancy with a right of survivorship, but where the beneficial interest is held by the added joint tenants on resulting trust for the transferor and, following the death of the transferor, for the transferor's estate. This type of trust arrangement is often used to mitigate estate administration taxes in Ontario. It is not uncommon for property owned by a parent to be transferred into joint ownership (with the right of survivorship) with an adult child, with the beneficial interest held by the adult child on resulting trust for the parent and the parent's estate. It is important to note that the exclusion from reporting provided for in paragraph 150(1.31)(a) does not appear to apply to such resulting trust arrangements because, arguably, such adult children are not deemed to be beneficiaries under subsection 150(1.3) because they may have only contingent use of the property as potential future beneficiaries of the estate of the transferring parent.

With respect to arrangements excluded from reporting under paragraphs (b) and (c) of subsection 150(1.31) relating to "principal residences," I note that the language in both paragraphs indicates that the exclusion is available for a taxation year only if the specific real property would qualify as a principal residence, assuming that it had been so designated.

Conclusion

The proposed revisions to the bare trust reporting regime will narrow the circumstances in which bare trusts require reporting. However, the draft legislation used to implement these changes is extremely complex. Practically speaking, I anticipate that it will be extremely challenging for taxpayers to obtain accurate and cost-effective advice regarding whether a bare trust arrangement is reportable. Therefore, advisers may be well served by warning their clients that they should review their existing bare trust arrangements well before the first filing deadlines. Failure to do so could leave taxpayers unable to comply with their filing obligations within the applicable deadlines.

Adam Friedlan
Friedlan Law, Richmond Hill, ON
adam.friedlan@friedlanlaw.com

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