



What is the Value of an Interest in an Inter Vivos Discretionary Trust?

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Tax for the **Owner-Manager**

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The recent decision in *Lang-Newlands v. Newlands* (2024 ONSC 6285; under appeal)—covered in the [April 2025 issue](#) of this newsletter—dealt with, among other things, the valuation of a discretionary interest in an inter vivos trust, in the context of a claim for equalization under the Family Law Act (Ontario) (“the FLA”). This case serves as a reminder of the complex and arguably uncertain question of the value of an interest in a discretionary trust under the ITA.

In *Lang-Newlands*, the Ontario Superior Court of Justice held that an interest in a family trust (settled by way of gift) was excluded property for FLA purposes. Under the FLA, “excluded property” refers to property that does not form part of a spouse’s net family property or, in general terms, is not subject to equalization upon separation, divorce, or death. In obiter, the court—assuming it were not bound by the Ontario Court of Appeal’s decision in *Shinder v. Shinder* (2018 ONCA 717)—opined on the value of such an interest and found the value to be material. The attribution of value to a discretionary trust interest in the family law context is not new; see, for example, *Black v. Black* (H.C.J.) (1988 CanLII 4756 (ONSC)) and *Sagl v. Sagl* (1997 CanLII 12248 (ONSC)).

In an income tax context, the valuation of a discretionary interest in a trust can have important implications—including because subsection 70(5) of the ITA deems a taxpayer to have disposed of capital property immediately before death for proceeds equal to the property’s fair market value (FMV). Under the ITA, an interest in a trust may be a “capital

interest” (which should be capital property) or an “income interest.” (Both terms are defined in subsection 108(1) of the ITA.)

Typically, under an inter vivos family trust, the trustees have the discretion to distribute income and capital in such manner as they decide. This power is likely a fiduciary power. A discretionary beneficiary has a right to enforce the trustee’s obligation to give appropriate consideration to the exercise of the power and to enforce the obligation of the trustee to properly administer the trust. However, it is uncertain what (if anything) a discretionary beneficiary will receive from the trust.

When valuing such interests in a family law context, courts have adopted a “value to owner” approach, which—roughly speaking—can be defined as the present adverse value of the loss that the owner of property might be expected to suffer if he or she were deprived of the property. (See the SCC’s decision in *Diggon-Hibben Ltd. v. The King*, 1949 CanLII 50 (SCC) for the canonical use of this valuation concept.) In other words, this standard, in valuing the trust interest, considers the circumstances peculiar to the object of the discretionary power.

“Value to owner” can be distinguished from “fair market value,” which the CRA defined in *Information Circular IC89-3*, “Policy Statement on Business Equity Valuations” (August 25, 1989) as “the highest price, expressed in terms of money or money’s worth, obtainable in an open and unrestricted market between knowledgeable, informed and prudent parties acting at arm’s length, neither party being under any compulsion to transact.” Another commonly cited meaning given to FMV is from Cattanach J in *Henderson Estate and Bank of New York v. MNR* (73 DTC 5471, at 5476 (FCTD)), where it is defined as

the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm’s length and under no compulsion to buy or sell.

FMV is, in other words, an objective standard.

There has been little direct commentary on the FMV of a discretionary interest in a trust in an income tax context. In 2003, however, the CRA noted in document no. 2003-0181465 (April 3, 2003) that at a round table discussion held during the 1992 BC Tax Conference, it had been asked whether the FMV of an interest in a discretionary trust would be nil. The agency, while it did not agree that the value would be nil, did acknowledge that the value would be very difficult to determine.

In the same document, the CRA noted that the “difficulty in establishing the value of an interest in a discretionary trust was acknowledged in the case of *Sagl v. Sagl* (1997-31 RFL 4th 405).” The CRA also stated: “[I]n that case, it was held that a reasonable approach would be to value the interest as if the trust assets were fully distributed equally among all the contingent beneficiaries on the valuation date. In [the CRA’s] view, this would be a reasonable approach to take in many cases involving the valuation of an interest in a discretionary trust.” However, the CRA also concluded that when the terms and conditions of the trust are such that the approach taken in *Sagl* does not yield an appropriate result, “it may be necessary to apply a discount factor in recognition of the uncertainty caused by any condition precedent or condition subsequent that could affect the value of the beneficiary’s interest in the trust.”

The CRA reiterated a similar position in document no. 2004-0062291E5 (March 30, 2004), which dealt with discretionary interests in non-resident trusts. In that document, it further noted that “[t]he CRA does not have a general valuation position or policy with respect to the valuation of an interest in a discretionary trust.” The CRA also stated that, “[g]iven that trusts are established through legal documents that can materially differ from one trust to another, each situation must be judged on its own merits. The valuation of an interest in a trust involves an analysis of all relevant information, and the exercise of judgment in determining the appropriate method of valuing such an interest.”

In attempting to determine the FMV, as opposed to the “value to owner,” of a discretionary trust interest, a number of factors have been suggested as being relevant.

These factors include the fiduciary powers of the trustees, the relationship between the beneficiary and the trustee(s), the trustees' obligation to maintain an even hand, and the possibility of a change of trustee(s). (See Richard M. Wise, "Current Challenges by the CRA Involving Fair Market Value," in *Report of Proceedings of the Sixty-Eighth Tax Conference, 2016 Conference Report* (Toronto: Canadian Tax Foundation, 2017), 30:1-39.) The valuation factors cited as being relevant when considering the FMV of a discretionary trust interest appear directed at ascertaining the likelihood of a distribution if an arm's-length party were to become the object of the discretionary power.

Almost 40 years ago, it was stated, in the context of discussing the assignment of a discretionary interest in a trust, that "the position of an assignee of a discretionary interest is precarious and, therefore, only a nominal amount would be paid for such an interest." (Douglas P. Hayhurst, "Transactions in Income and Capital Interests in Trusts," in *Report of Proceedings of the Fortieth Conference, 1988 Conference Report* (Toronto: Canadian Tax Foundation, 1989), 38:1-24, at 38:23). That said, until a court finally weighs in on this question in an income tax context, this view is open to dispute.

It is important to note that the aims of family law legislation are different from those of the ITA, and the approach adopted by the family law courts reflects considerations that are not relevant to an income tax context. Furthermore, the term "fair market value" is used throughout the ITA, and adopting a valuation approach based on "value to owner," taken from a different legislative context, would be inconsistent with the approach generally taken in the ITA. Nonetheless, judging from previous experience, it seems unlikely that a court will provide a definitive answer to the question of the FMV of a discretionary interest in a trust any time soon.

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