

KEEPING CURRENT

February 16, 2024

Trust Reporting Season is Here: Your Primer on the New Requirements for 2023

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Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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On December 15, 2022, Bill C-32, the *Fall Economic Statement Implementation Act, 2022*, S.C. 2022, c. 19 ("**Bill C-32**"), received Royal Assent. Bill C-32 amended the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "**Act**"), to expand the trust filing and reporting requirements for trusts with tax years ending on or after December 31, 2023.

While these changes were originally intended to be implemented two years ago, they are now officially in full force and effect.

Filing Requirements

For taxation years ending prior to December 31, 2023, a trust was only required to file a T3 Trust Income Tax and Information Return ("**T3 Return**") if any one of the following criteria was met, including:

- a) the trust had tax payable;
- b) is resident in Canada and realizes a taxable capital gain or disposes of capital property in the year;
- c) is non-resident throughout the year and has a taxable capital gain or disposes of taxable Canadian property;
- d) is a deemed resident trust;
- e) holds property that is subject to the reversionary trust rule under the Act;
- f) has provided a benefit of more than \$100.00 to a beneficiary for the upkeep, maintenance, or taxes for property maintained for the beneficiary's use;
- g) has total income of more than \$500.00;
- h) has allocated more than \$100.00 to a beneficiary;
- i) makes a capital distribution to a beneficiary; or
- j) allocates any portion of its income to a non-resident beneficiary

New Filing Requirements

A T3 Return is now required for all Canadian resident (including deemed resident) express trusts that do not meet the criteria of one of the “listed trusts”. The new filing requirements also apply to trusts with an arrangement where the trust can reasonably be considered to act as an agent for its beneficiary(ies) with respect to all dealings in all the trust’s property (i.e., bare trusts, as described below).¹

It should be noted that the new filing requirements supplement the old requirements, they do not replace them. Where a trust is not caught by the new requirements but would be required to file under the old requirements, the trust is still required to file.

The “listed trusts” are excluded from these additional filing requirements.² The definition of “listed trust” includes, but is not limited to, an **express trust** that:

- has been in existence for less than three months at the end of the year;
- qualifies as a nonprofit that is a club, society, or association described in paragraph 149(1)(i) of the Act or is a registered charity;
- holds certain assets³ that do not exceed

¹ Income Tax Act, ss. 150(1.3) [Act]

² Act, ss. 150(1.2).

³ CRA Technical Interpretation 2023-0968091C6 provides greater details on the types of assets that can make up the \$50,000 limit. Generally the assets include:

- a) money,
- b) a debt obligation described in paragraph (a) of the definition fully exempt interest in subsection 212(3),
- c) a share, debt obligation or right listed on a designated stock exchange,
- d) a share of the capital stock of a mutual fund corporation,
- e) a unit of a mutual fund trust
- f) an interest in a related segregated fund trust (within the meaning assigned by paragraph 138.71(1)?(a)), and
- g) an interest as a beneficiary under a trust, all the units of which are listed on a designated stock exchange.

Additionally, the CRA noted (i) that “money” does not include a

a fair market value of \$50,000.00 throughout the year;

- is a lawyer’s general trust account⁴;
- is a registered charity or no-profit club, society or association;
- is a graduated rate estate⁵;
- is a mutual fund trust, master trust, segregated trust, graduated estate trust, qualified disability trust, employee life, or a health trust;
- is governed by a Deferred Profit Sharing Plan (DPSP), Employee Profit Sharing Plan (EPSP), First Home Savings Account (FHSA), pooled registered pension plan, Registered Education Savings Plan (RESP), Registered Supplementary Unemployment Benefit (SUB) plan, Registered Pension Plan (RPP), Registered Retired Income Fund (RRIF), or a Registered Retirement Savings Plan (RESP).

Reporting Requirements

For taxation years ending prior to December 31, 2023, there was no requirement that a trust report personal information about a trustee, beneficiary, settlor or individual who has the ability to exert influence over trustee decisions regarding income or capital distributions from the trust.

Section 204.2 of the *Income Tax Regulations*, C.R.C., c. 945 was added to require trusts that are subject to the T3 Return filing requirements (other than “listed trusts” that are required to file) to report:

- the identity of, and include certain

gold or silver coin often used as a trust settlement object; and (ii) that declared but unpaid dividends cannot be considered one of the assets listed above.

⁴ This exception does not include trust accounts set up for specific clients, however specific trust accounts may be exempted due to solicitor-client privilege under subsection 150(1.4) of the Act.

⁵ A graduated rate estate must designate itself as such in its first T3 Return, so at least one T3 Return must still be filed.



prescribed information for, all trustees, beneficiaries, and settlors⁶ of the trust;

- any person who may, under the trust terms or a related agreement, exert influence over trustee decisions regarding the allocation of trust income or capital in a year, such as a “protector” of a trust.

This information is to be provided by filing a new Schedule 15 Beneficial Ownership Information of a Trust (“**Schedule 15**”) form, which includes the following:

Identification of Reportable Entities

- name;
- address;
- date of birth (for individuals other than a trust);
- jurisdiction of residence; and
- Taxpayer Identification Number(s).

Beneficiaries Unable to Be Listed

Information must be included, using “reasonable effort” regarding any beneficiaries or unknown beneficiaries that cannot be listed by name, including unborn children and grandchildren.

It’s important to note that for Quebec tax purposes, express trusts are also required to file an annual Quebec TP-646-V Trust Income Tax Return for taxation years ending after December 30, 2023.

Bare Trusts

The term “bare trust” is not defined in the Act. However, it is generally considered to be an arrangement under which a trust can reasonably

⁶ The definition of “settlor” for the purposes of the new reporting requirements is found in subsection 17(15) of the Act and includes “any person or partnership that has made a loan or transfer of property, either directly or indirectly, in any manner whatever, to or for the benefit of the trust at or before that time, other than, where the person or partnership deals at arm’s length with the trust at that time,

- a) a loan made by the person or partnership to the trust at a reasonable rate of interest; or
- b) a transfer made by the person or partnership to the trust for fair market value consideration.”

be considered to act as an agent for all the beneficiaries under the trust with respect to all dealings with all of the trust’s property.

The CRA has said that a trustee can reasonably be considered to act as an agent for a beneficiary when the trustee has no significant powers or responsibilities, the trustee can take no action without instructions from that beneficiary and the trustee’s only function is to hold legal title to the property.

Bare trusts were previously not required to file an annual T3 Return, however, as noted above, bare trusts are specifically included in the new trust reporting rules, even though they do not have beneficial ownership of the property to which they have legal title. Bare trusts will have to file a T3 Return unless an exemption applies.

Bare trusts are commonly used in many types of personal and commercial arrangements. There are many instances where a bare trust arrangement may exist, including:

- bank accounts – examples may include:
 - two spouses contribute, but only one is listed on title; or
 - accounts held “in trust for” a child;
- real estate – example may include:
 - nominee corporations used to hold title;
 - addition of a child to title for estate planning purposes;
 - addition of parent to title in order to qualify for a mortgage;
- corporate assets legally owned by a shareholder; and
- lawyers’ specific trust accounts (see above regarding lawyers’ general trust accounts).

Where a bare trust is a corporation, the corporation will be required to file both a T3 Return as well as a T2 Corporation Income Tax Return.

Filing Issues for Bare Trusts

Generally, bare trust arrangements are not evidenced by a trust deed. This complicates T3 Return filing for two reasons. First, in order to file a T3 Return, a trust must obtain a trust number from the CRA. However, in order to receive a trust number, the trustees must submit the written trust deed to the CRA. A second complication is that, where there is no written deed, a bare trust does not have a legal name.

Both of these issues can likely be solved with one suggestion. Many law firms and accounting firms are now drafting “Bare Trust Agreements”, which are short summaries of the bare trust, including a name (e.g. “[Name of beneficiary] Bare Trust”). This should enable the trust to receive a trust number and have a legal name to use when filing the T3 Return.

Administrative Relief for Charities’ Internal Trusts

As noted previously, registered charities that are themselves trusts are considered “listed trusts” and are exempt from filing a T3 Return under the new filing requirements. However, it was not immediately clear to the charitable community whether internal trusts held by registered charities were also exempt.

On November 10, 2023, the CRA’s Charities Directorate announced that it will provide administrative relief under the new requirements to express internal trusts held by registered charities. An internal trust is created when a charity receives property as a gift that is subject to certain legally enforceable terms and conditions, as well as holding property as the trustee of the trust.⁷

Registered charities must already complete a Registered Charity Information Return or a Form T3010 annually and submit it within six months of the end of its fiscal period. Within the T3010

⁷ <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/operating-a-registered-charity/t3010-charity-return-before-you-file.html>.

Return, charities are already required to report on all property, including internal trusts.

To date, the CRA has not announced any administrative relief for non-profit organizations that hold internal trusts but are not trusts themselves. These non-profit organizations must still file a T3 Return for internal trusts.

Filing Deadline

Generally, a trust that is required to file a T3 Return must do so within 90 days of the taxation year end.⁸ This year, where the tax year of the trust ends on or after December 30, 2023, the filing deadline of March 30, 2024, has been extended until **April 2, 2024**.

Non-Compliance Penalties

The recent amendments have implemented stricter penalties for failing to submit a T3 Return, including a Schedule 15, particularly if the omission was intentional or can be found to amount to gross negligence.

Late or Failure to File Penalties

The T3 Return is considered a “return of income” and, where taxes are owing by a trust, the trust is subject to a late or failure to file penalty. This penalty is equal to 5% of the outstanding amount at the filing deadline plus 1% times the number of complete months late (to a maximum of 12 months).⁹ If there is a repeated failure to file, the rates could be doubled.¹⁰

The T3 Return is also considered an “information return” and, where a trust does not have any taxes owing, the trust is subject to a separate late or failure to file penalty.¹¹ This penalty is equal to \$25.00/day for a maximum of 100 days, with a maximum penalty of \$2,500.00.

The CRA will provide penalty relief to bare trusts that miss the filing deadline for the 2023

⁸ Act, para. 150(1)(c).

⁹ Act, ss. 162(1).

¹⁰ Act, ss. 162(2).

¹¹ Act, ss. 162(7).



tax year given that bare trusts were previously not required to file T3 Returns. The CRA has decided to take an “education first” approach to compliance with the new filing requirements for bare trusts.¹²

The penalties noted above are mutually exclusive and cannot both apply to the same T3 Return.

New Gross Negligence Penalty

For tax years ending on or after December 31, 2023, and in addition to the late or failure to file penalties, a new gross negligence penalty has been added.¹³ This new penalty is applicable to trusts that fail to file a T3 Return (including a Schedule 15) for the tax year if a false statement or omission is knowingly made in the return or made under circumstances amounting to gross negligence.

This penalty is equal to the greater of \$2,500.00 or 5% of the highest total fair market value of all property held by the trust in the year. If the trust is in Quebec, the amount of the penalty will be equal to \$1,000.00, plus \$100.00 for each day the failure to file continues, for a maximum of \$5,000.00.

To note, the relief for bare trusts only applies to the late or failure to file penalties but does not apply to the new gross negligence penalties.

Next Steps

The new filing and reporting requirements for trusts will have significant impact on trusts and tax preparers and filers. If you are not sure if a trust relationship exists, please do not hesitate to seek professional advice. The penalties for non-compliance are burdensome but entirely preventable.

We suggest reaching out to a licensed accountant as soon as possible to avoid any

¹² <https://www.canada.ca/en/revenue-agency/services/tax/trust-administrators/t3-return/new-trust-reporting-requirements-t3-filed-tax-years-ending-december-2023.html#toc2>

¹³ Act, ss. 163(5) and 163(6).

potential non-compliance with these new requirements.

If you have any questions about the above information, please contact a member of the Gardiner Roberts LLP’s experienced Tax and Estates Planning Group.

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