Test your trust

K Thomas Grozinger outlines the requirements to create a valid *inter vivos* trust in Canadian common-law jurisdictions

What requirements must be met to effectively create an *inter vivos* trust in Canada? The Ontario Court of Appeal, in *White* v *Gicas*,[1] held that 'for a trust to be validly created, it must be properly declared and constituted. Declaration of a trust requires certainty of intention, subject matter, and objects. Constitution of a trust requires transfer of title to the trust property to the trustee'.[2]

Note that the reference to a 'declaration' here does not necessarily refer to the 'form' of the trust instrument, but rather to the fact that a settlor agrees to a particular trust relationship. In some cases, an individual who owns assets will 'declare' themselves trustee of those assets for others. The document setting out the terms of the trust may be described as a trust 'declaration'. In other cases, an individual (a settlor) will gift or deliver assets to another (a trustee) to hold pursuant to certain terms of trust to which the settlor and the trustee agree. The document that declares the terms of the trust in these cases is typically given the title of 'trust agreement', 'deed' or 'settlement'. These descriptions might be used by some drafters interchangeably, regardless of the form of trust.

WHEN PHYSICAL TRANSFER IS NOT REQUIRED

Whether the trust is in the form of one settled by the same individual who becomes trustee, or one in which an individual transfers assets to another who becomes the trustee, the substance of the requirements to create a valid trust remains the same – namely, satisfaction of the three certainties and proper constitution.

However, where an individual declares themselves trustee of assets that the same person owns, constitution would not generally involve a physical transfer of the assets, as they will remain in the same person's possession. It will be necessary, though, to confirm that the trust declaration clearly describes the assets held by that individual in the trust relationship. Also, as far as possible, any re-registrations of title to assets into the name of the individual as trustee should be completed.

SETTLOR AS SOLE TRUSTEE AND BENEFICIARY

If the settlor wants to be a trustee of the trust, it is important that they are not the sole trustee and sole beneficiary. If one individual fulfils all these roles without any other person being either a co-trustee or potential beneficiary, there will be no trust.[3] Generally, the terms of a trust will provide for multiple beneficiaries, so this will not be a concern. Also, while a settlor may want to retain control over trust assets by being a trustee, the settlor will want to obtain advice to understand the potential tax consequences of retaining such control (e.g. in Canada, attribution of income and taxable capital gains to the Canadian resident settlor under s75(2) *Income Tax Act*).

CHOICE OF TRUSTEE FOR PERPETUAL TRUSTS

In many situations, appointing an independent, corporate trustee either as sole trustee or co-trustee can prove beneficial. Corporate trustees offer the benefit of being experienced in trust administration, as well as not being subject to death or illness, unlike a family member or friend. In those Canadian provinces that no longer have the rule against perpetuities, namely Manitoba, Saskatchewan and Nova Scotia, settlors can create *inter vivos* trusts that have the potential to last indefinitely. Having a corporate trustee will no doubt be a major consideration when contemplating who to appoint as a trustee for such perpetual or dynastic trusts.

1 2014 ONCA 490 (CanLII)
2 At paragraph 37
3 HAJ Ford and WA Lee, *Principles of the Law of Trusts*, volume 1 (LBC Information Services, 1996), paragraphs 5010 and 5012

K THOMAS GROZINGER TEP IS A PRINCIPAL TRUST SPECIALIST AT RBC WEALTH MANAGEMENT, ESTATE AND TRUST SERVICES, PROFESSIONAL PRACTICE GROUP, ROYAL TRUST CORPORATION OF CANADA