

## INTERNATIONAL INTERESTS

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# Asset Protection Planning Using an Offshore Asset Protection Trust

If you are a business owner, have a professional practice, or earn a high income, there is a good chance that sooner or later, you will be sued. The sad truth is that as Canada becomes more like our US cousins, where litigation has become a popular sport, the chances of being sued in one's lifetime are much greater today than even 10 years ago.

The United States is the world's most litigious society and it appears that the trend is catching on here in Canada. As we witness more and more frivolous lawsuits and catastrophic jury awards, business owners and those in high-income, high-risk professions will need to put in place a proper creditor or asset protection plan or risk losing assets that they have worked so hard to accumulate.

An offshore **Asset Protection Trust (APT)** is a trust established offshore in a country that has strict laws protecting trust assets from creditors. With proper planning, an offshore APT can be a very effective asset-protection tool as well as an efficient estate-planning vehicle.

This article is intended to be a source of general information on offshore Asset Protection Trusts and not a substitute for independent legal, tax, or other professional advice.

### What is a Trust?

A trust is essentially a formal agreement where the legal owner (called the settlor)

transfers assets or property to a trust to be managed by a trustee for the benefit of a beneficiary or beneficiaries. A trust is an extremely flexible tool that can be used for a number of purposes such as asset protection, estate planning, tax planning, and investment purposes.

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All trusts contain the following.

- The **Settlor**: the person or entity who creates the trust and who settles (transfers) his or her assets into the trust
- The **Trustee(s)**: the named individual, individuals, or company appointed by the Settlor to administer his wishes according to the Deed of Trust. The Trustee has absolute control over the trust assets.
- The **Beneficiary**: the person or persons who will receive the benefit of the assets held in the trust. Beneficiaries can be entitled to the income, capital, or both of the trust.
- The **Deed of Trust**: the legal trust agreement that contains and outlines

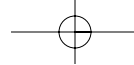
the purpose of the trust, the Settlor's instructions and wishes, the Trustee's powers, and circumstances in which the beneficiaries will receive the trust assets

### The Need for Asset-Protection Planning

The use of offshore trusts for asset-protection planning has increased significantly in recent years. Frivolous lawsuits are becoming more commonplace. A few years ago, a woman was awarded US\$2.3 million after she spilled hot coffee on herself at McDonalds. These and other similar runaway jury awards highlight the need to protect one's assets.

Advances in information technology and the use of the Internet have added to the growing problem of financial privacy. Today, confidential financial information—including your income, bank account records, real estate holdings, net worth, credit history, and other business interests—can all be obtained relatively easily for a small fee by firms specializing in conducting comprehensive asset searches.

What this means is that anyone with substantial assets is an easy target for disgruntled former employees, partners, spouses, clients, or customers with an axe to grind. To level the playing field, holding your assets legally in an offshore



jurisdiction outside the control of the courts in your home country will make your assets a much more difficult target for potential creditors.

### **Who is Most at Risk?**

Anyone who is a high-income, high-net-worth individual whose profession, business, investment, or other activities expose him or her to potential litigation is at risk and a potential target. These would include doctors, lawyers, chiropractors, architects, stockbrokers, real estate developers, corporate directors, and business owners whose products or services are sold internationally.

Wealthy parents who want to gift assets to their children who are employed in high-risk occupations may also be concerned that those assets are vulnerable to seizure by creditors if their children end up on the losing side of a lawsuit. In such a situation, an offshore asset protection trust that names the children as the income and capital beneficiaries could be used as a strategy to address this potential problem.

One of the key advantages of using an offshore trust as opposed to a domestic trust is that many foreign jurisdictions will not recognize Canadian and US judgments unless there is a treaty in place authorizing such an action. By holding your assets legally in an offshore jurisdiction outside the control of the courts in your home country, you will make yourself a more difficult target for potential creditors.

In many cases, an offshore or foreign Asset Protection Trust will conduct its business through an International Business Company (IBC) or Limited Liability Company (LLC), frequently formed in a different jurisdiction than the trust itself, providing an additional layer of creditor protection. An International Business Company or IBC is a globally recognized legal entity created to conduct international commerce.

The decision to create an offshore Asset Protection Trust requires a thorough review and assessment of one's situation and risk factors. An experienced trust

lawyer who is also familiar with offshore jurisdictions and debtor-creditor laws as well as judgments and remedies should be consulted to create an airtight APT.

The offshore jurisdiction where the trust should be domiciled is of critical importance. Political and economic stability, experienced and well-established trustees, strict secrecy or confidentiality laws, favourable trust laws, and favourable asset protection laws are factors that need to be considered when choosing the most advantaged offshore jurisdiction.

Although there are no specific minimum asset levels required to create an offshore Asset Protection Trust, most experts agree that \$500,000 and probably closer to \$1 million minimum is the amount one should have to make the use of an offshore APT a viable option.

### **Conclusion**

The use of offshore trusts to protect assets from creditors is no longer just for the rich and powerful with names like Bronfman, Reichmann, and Weston. Because of what has become an epidemic in civil litigation, business and professional individuals who face litigation risk and who are known or perceived to have "deep pockets" should consider the use of an offshore Asset Protection Trust as an integral part of proper asset-protection planning and estate planning. ▲

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