

# Retirement plans



# Creditor protection

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## **What investors should know**

On July 7, 2008, federal bankruptcy laws changed. Creditor protection is universally available for a bankrupt's assets held in a Registered Retirement Savings Plan (RRSP), Registered Retirement Income Fund (RRIF) or a Deferred Profit Sharing Plan (DPSP). While these changes are significant, readers should note that provincial and territorial rules take precedence.

# Federal rules level playing field

Many investors, particularly small business owners, professionals, or those in high-risk industries, have real concerns over protecting their assets, including their registered plans from potential creditors. Over the past few years there have been many positive developments in creditor proofing these plans from seizure. This has helped put investors on a more level playing field with those who are members of registered pension plans, which are generally not subject to seizure by creditors (unless the creditor is an estranged spouse or the Canada Revenue Agency).

Under federal bankruptcy law, a bankrupt's property excludes any assets exempt from seizure in the province or territory where the bankrupt resides. Each province and territory is responsible for providing creditor protection laws with respect to pensions. Accordingly, Registered Pension Plan (RPP) assets are protected from claims of creditors. This protection also extends to locked-in plans, including Locked-In Retirement Accounts (LIRAs), Locked-in Registered

Retirement Savings Plans (LRSPs), Life Income Funds (LIFs) and Locked-In Retirement Income Funds (LRIFs). However, any payments or withdrawals from such plans can be subject to creditor claims.

Provincial insurance laws also protect insurance assets, including those held in RRSPs and RRIFs, from the claims of the policy owner or annuitants' creditors, as long as a spouse, child, grandchild or parent of the annuitant is named as the beneficiary. The protection also extends to policies which have an irrevocable beneficiary designated on the policy. In fact, in Quebec the beneficiary must be irrevocable and also be related to the life insurance policy owner. However, Quebec has a wider class of related persons who can be beneficiary that includes not only descendants, but also antecedents, such as grandparents and other ancestors. These laws also apply to life insurance sponsored segregated funds, whether they are held in an RRSP/RRIF or not. Therefore, segregated funds also provide creditor protection.



## A summary of federal and provincial rules

**For non-insurance, non-pension registered plans, such as RRSPs and RRIFs, the following factors play a role in determining whether the plan is protected from creditors:**

- Whether you are formally bankrupt or not;
- The province in which you reside;
- Who the creditor is and;
- Whether the creditor's claim is made while you are dead or alive.

### Federal rules

In July 2008, the federal government amended the federal Bankruptcy and Insolvency Act to provide creditor protection to retirement assets of registered plan investors across Canada. The new law now universally exempts investments held in RRSPs, RRIFs and DPSPs from the claims of creditors in cases of bankruptcy. This protection is effective for all bankruptcy claims initiated on or after July 7, 2008. However, any contributions made to these registered plans within 12 months before the date of the bankruptcy are excluded from this protection. Therefore, creditors can successfully seize any property contributed to an RRSP, RRIF or DPSP within the 12 months preceding the date of bankruptcy.

Since many provinces have laws in place to provide creditor protection for registered retirement plan assets, these new

federal rules apply to those provinces and territories that do not yet have any legislation in case of bankruptcy. That is, provincial legislation will take precedence over the new federal laws. In addition, while some provinces may provide creditor protection in other instances, such as financial hardship, it is important to note that the federal rules only apply in cases of bankruptcy. For an individual that is not bankrupt, creditor protection on non-insurance or non-pension registered plans such as RRSPs may only be available where provincial laws provide creditor protection.

### Provincial rules

The rules affecting non-insurance, non-pension related registered plans vary by province. In addition, creditor protection is affected by the timing of the creditor claim — whether it is made during your lifetime or upon death.

## i) During your lifetime

In certain provinces such as British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, PEI and Newfoundland and Labrador, laws have been put into place that will exempt non-life insurance RRSPs, DPSPs and RRIFs from creditor claims during your lifetime, not only in bankruptcy but outside of bankruptcy as well. It is important to review the laws for each province, as they will differ. In PEI, for example, creditor protection is granted to non-insurance RRSPs and RRIFs where the named beneficiary is a spouse, child, grandchild or parent. Also, exceptions may apply in certain provinces where you are required to pay child support or are subject to matrimonial claims.

Under the federal Bankruptcy and Insolvency Act (BIA), a trustee can seize a registered plan in bankruptcy if a transfer was made to the plan within one year of your bankruptcy, or within five years of transfer if you were insolvent at the time of transfer. And, it's important to note, creditor protection does not generally apply if the creditor is the CRA.

## ii) At death

In some provinces, such as British Columbia and PEI, legislation exists which specifically excludes the value of the deceased annuitant's registered plan from their estate upon death. As a result, the value of the registered plan is protected from creditors of the estate, and any probate or other estate administration fees.

In Ontario for example, while there is no specific legislation to exclude registered plans from creditors of the deceased annuitant, there were court decisions that exempted a deceased annuitant's RRSP from seizure by creditors. The result of the *Amherst Crane Rental v. Perrin* decision by the Ontario Court of Appeal in 2004 provided RRSPs creditor protection on the death of the annuitant as long as the annuitant's estate is not the designated beneficiary of the RRSP. The impact of this ruling may be critical for those in other provinces as well. All other provinces and territories have beneficiary designation legislation that is similar to Ontario and therefore, it is possible, but not certain that the courts in these provinces will apply the same ruling as Ontario.

## Quebec

In Quebec, legislation currently exists which allows for creditor protection in limited circumstances. Unless a registered plan qualifies as a "fixed-term annuity" under Quebec law purchased through an insurance or trust company, it will not be exempt from creditors. Also, a Supreme Court of Canada (SCC) ruling in 2004 (*Bank of Nova Scotia v. Thibault*) made non-insurance RRSPs more difficult to meet the tests required by Quebec law to obtain creditor protection. In essence, the SCC stipulated that an annuity would not exist if the annuitant were allowed to retain control of the annuity capital. Therefore, since most non-insurance RRSPs allow you to make unrestricted withdrawals from the plan, non-insurance RRSPs are generally considered to be subject to seizure by creditors. The Quebec government did enact a provision following this ruling which stated that total or partial withdrawals of capital do not prevent a plan from being considered an annuity contract, provided the annuity is purchased from a trust or insurance company. However, it still may be difficult for non-insurance RRSPs to be considered an annuity under

Quebec law, and thus creditor protection may not generally be available.

## Summary

The following table is a quick synopsis of whether creditor protection for registered plans is possible for the various provinces. Each province is unique and where registered plan creditor protection is possible, will have its own requirements and exceptions to the rule. Consult with your financial advisor to determine whether your registered plan is protected from creditors.

### Is it possible to protect assets in non-insurance registered plans from creditors, outside of bankruptcy?

	Annuitant's lifetime	Annuitant's death
British Columbia	Yes	Yes
Alberta	Yes	Yes
Saskatchewan	Yes	Yes
Manitoba	Yes	Yes
Ontario	No	Yes
Quebec	Yes	No
New Brunswick	No	Yes
Prince Edward Island	Yes	Yes
Newfoundland & Labrador	Yes	Yes
Nova Scotia, Northwest Territories, Nunavut & Yukon	No	Yes

#### Notes:

- 1) All provinces & territories absent any legislation to provide creditor protection in case of bankruptcy are protected from creditors under Federal Bankruptcy & Insolvency Act
- 2) Locked-in plans and pensions are generally protected from creditors, excluding the Canada Revenue Agency (and often former spouses in circumstances of marital breakdown)
- 3) Insurance assets (including segregated funds) and those held in RRSPs / RRIFs may be protected from creditors if provincial insurance legislation conditions are met.

## What does this mean to you?

Protecting your registered plans from creditors may be vital to your retirement strategy, particularly if you are a small-business owner or a professional with greater exposure to creditors. While the new federal laws are excellent news to all investors across Canada, there may be additional creditor protection strategies needed. Working with a qualified professional financial advisor will help you make informed decisions in potentially difficult times.



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## GENERAL INQUIRIES

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