Telemark • Volume 22 • Issue 4

April 2017

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**News**

**The expenses incurred in setting up a corporation are now deductible expenses!**

Good news for all those involved in corporate law, isn't it?

Section 20(1)b) allows a deduction for incorporation expenses not exceeding $3,000 for the person who incurred them, whether the corporation or a shareholder (it may be assumed that the term "incurred" means expenses incurred by the taxpayer). See David SHERMAN, *Practitioner's Income Tax Act 2017*, 51st Edition, Toronto, Carswell, 2017, section 20(1)b).

Indeed, since January 1, 2017, section 20(1)(b) of the *Income Tax Act* ("I.T.A.") allows a maximum annual deduction of $3,000 from expenses incurred "in respect of a shareholder or the corporation that committed them".

Indeed, since January 1, 2017, section 20(1)(b) I.T.A.[1] allows a maximum annual deduction of $3,000 from "expenses incurred in respect of the incorporation of a corporation to the shareholder or the corporation that engaged them"[2].

Pursuant to section 248 (1) I.T.A. the term "corporation" includes an incorporated company.

Here is the section in question:

**Deductions permitted in computing income from business or property**

**20 (1)** Notwithstanding paragraphs 18(1)(a), 18(1)(b) and 18(1)(h), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto

**Capital cost of property**

**a)** such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

**Incorporation expenses**

**b)** the lesser of

**(i)** the portion of the amount (that is not otherwise deductible in computing the income of the taxpayer) that is an expense incurred in the year for the incorporation of a corporation, and

**(ii)** $3,000 less the total of all amounts each of which is an amount deducted by another taxpayer in respect of the incorporation of the corporation; ;

However, Interpretation Bulletin IT-143R3[3] gives examples of incorporation expenses:

**13.** Incorporation expenses include all the expenses necessarily incurred by the incorporators to bring a corporation into existence, including:

a. fees required by the appropriate government agency (federal or provincial);

b. cost of affidavits;

c. advertising expenses in those jurisdictions where applicants are required to give notice of their intention to apply for a charter;

d. legal fees;

e. costs of preparation of articles of incorporation and of bylaws;

f. expenses incurred by applicants in attending preliminary meetings; and

g. accountant's fees associated with the incorporation.

If incorporation expenses exceed $3,000, the excess amounts will be included in Class 14.1 for future capital cost allowance. This measure was announced in the 2016 federal budget and was incorporated into Bill C-29, which was assented to as S.C. 2016, c. 12 on December 15, 2016.

Prior to 2017, capital expenditures could be deducted on eligible capital property, generally at a rate of 7% per annum based on a cumulative eligible capital amount ("CEC"), which included 75% of eligible capital expenditures.

New section 20(1)(b) applies to incorporation expenses incurred after 2016.

**The Quebec legislation**

On May 6, 2016, the Government of Québec announced that it would harmonize the respective provisions of its *Taxation Act* to "incorporate some of the income tax measures proposed in the 2016 federal budget"[4]. Measures related to eligible capital were one of the selected measures.

Now that Quebec's jurists, through a special law, have returned to work, harmonization measures should be integrated soon.

**What it means for you**

It remains to be determined how far the notion of "incorporation expenses" extends.

As noted above, IT-143R3 provides examples. We know that government disbursements are included (*fees required by the appropriate government agency (federal or provincial)*).

Probably the *costs of preparation of articles of incorporation and of bylaws* include the fees of the lawyer or notary who completed the application. There are costs associated with the drafting and preparation of these documents.

Let us push the reasoning further. Since a corporation is required by law to maintain books containing a series of mandatory records and documents as soon as it is constituted, does the purchase of a Book of the corporation following receipt of the certificate of incorporation, for example, qualify as an incorporation expense? Is this expense included in the *costs of preparation of articles of incorporation and of bylaws*? Or in the *legal fees*?

Good question, isn't it? To which we will not answer. It will be up to the one who incurs these expenses to consult his or her expert so that together they determine what is included in the "incorporation expenses". Or wait for precise guidelines from the CRA in this regard.

But for what we already know, and for the amount at stake – $3,000 maximum – let's admit that this change to I.T.A. is great news for all of us.

Spread the word!

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1 *Income Tax Act*, R.S.C. (1985), c. 1 (5th Supp.).

2 The I.T.A. does not specify what constitutes an expense "incurred in the year for the incorporation of a corporation".

3 Canadian Revenue Agency, Interpretation bulletin, IT-143R3 ARCHIVED - Meaning of Eligible Capital Expenditure, 29 August 2002. This information is archived and provided for reference, research or recordkeeping purposes.

4 QUÉBEC, Ministère des Finances, Bulletin d'information 2016-5, « Harmonisation à diverses mesures annoncées dans le budget fédéral du 22 mars 2016 », 6 mai 2016. ---

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**Communication from the Enterprise Registrar**

The Enterprise Registrar sent this communication to its intermediaries and we are sharing its content with you. We have already informed you about these changes in previous editions of the Telemark. Please note that this communication is only available in French.

**3 avril 2017**

**Changements liés à l'intégration des activités du Registraire des entreprises à celles de Services Québec et mise à jour de certains services en ligne**

Nous désirons vous informer qu'à la suite de l'intégration de nos activités à celles de Services Québec (qui est sous la responsabilité du ministère du Travail, de l'Emploi et de la Solidarité sociale) le 1er avril dernier, des changements ont été apportés à nos documents, conformément au projet de loi 116.

Voici les principaux changements :

1. Tous nos documents comporteront dorénavant la mention « Services Québec ».
2. Dans les articles 59 et 66 de la *Loi sur la publicité légale des entreprises*, le mot « arrêté » a été remplacé par « avis ». À titre d'exemple, l'expression « arrêté de radiation » a été remplacée par « avis de radiation ».
3. Les montants des amendes liées aux sanctions pénales ont été modifiés. Pour connaître les nouveaux montants applicables, consultez la page **Les sanctions** de notre site Internet.

4. Une nouvelle version (soit la version 2017-04) de tous nos formulaires papier, de tous nos guides et de toutes nos publications est maintenant disponible. Nous vous demandons d'utiliser, s'il y a lieu, la nouvelle version de ces documents dès maintenant.

**Changements liés aux services à la clientèle**

Les numéros de téléphone que le grand public devait utiliser pour communiquer avec le service à la clientèle de Services Québec ont été remplacés par le numéro unique 1 800 644-0075 (sans frais). De plus, l'adresse pour les envois par messagerie à Montréal a été modifiée. Pour plus de détails à ce sujet, consultez la page **Nous joindre**.

Notez également que l'adresse courriel **comm-registraire@revenuquebec.ca**, utilisée pour la transmission des formulaires, a été remplacée par l'adresse **comm-registraire@req.gouv.qc.ca**.

Enfin, la procédure liée à l'ouverture d'un courriel sécurisé a été modifiée. Vous recevrez la marche à suivre lors de votre prochaine communication par courriel avec un de nos agents.

**Changement lié aux services en ligne**

Les services en ligne relatifs à la déclaration initiale comportent maintenant une mention selon laquelle une entreprise s'expose à des sanctions administratives et pénales si elle ne produit pas cette déclaration.

Pour tout renseignement supplémentaire au sujet de ces modifications, vous pouvez joindre notre personnel en composant le **1 855 208-3361**, un numéro réservé aux intermédiaires.

**Article**

**Is a right of ownership acquired by prescription but that has not been the subject of any legal claim, be set up against the new owner of the building who registered his title in the land register?**

Good question that has gone as far as the Supreme Court. For once, this article will focus not on a subject in corporate law, but rather on the acquisition of the right of ownership and the role of the publicity of rights. A very interesting case that we are sure, will interest you greatly.

**Summary:**

Between 1994 and 2011, the respondent, "A", and her family used one parking space situated on the property of their then neighbour in full view of everyone, and there was no objection to their doing so. They had peaceful, continuous, public and unequivocal possession of this parking space located on their neighbour's lot. Between 2004 and 2011, after the space had been acquired by 10-year prescription, the respondent did not bring legal proceedings to have her right recognized. In 2011, the appellants, "O and S", purchased this neighbouring lot. A few months after taking possession of their property, they applied for an injunction to stop the respondent from parking on it. The respondent replied that she had acquired the two parking spaces by 10-year prescription. The trial judge agreed with her in part and the majority of the Appeal Court agreed completely with her.

The appellants raise a question of law on which this appeal is based: Can acquisitive prescription be set up against a new owner whose title was registered in the land register before the possessor's right was asserted in court?

Appeal dismissed.

The *Civil Code of Québec* (the "Code" or C.C.Q.) has not changed the process of acquisitive prescription, which may be set up against the registered owner regardless of when his or her right was registered. This conclusion is based on the legislative history of the provisions at issue and reflects the need for consistency between the relevant books of the Code.

In the Code, acquisitive prescription is recognized as a “means of acquiring a right of ownership, or one of its dismemberments, through the effect of possession” (art. 2910 C.C.Q.). The possessor must prove the exercise in fact of the right in question and the intention of exercising it as the holder of the right, which intention is presumed (art. 921 C.C.Q.). His or her possession must be “peaceful, continuous, public and unequivocal” in order to produce effects (art. 922 C.C.Q.). They must also obtain a judgment confirming the right so acquired (art. 2918 C.C.Q.)

Unlike prescription, the publication of rights plays no part in the process of creating rights. The role of publication is limited to allowing rights to be set up against third persons. In short, as regards the role of the publication of rights, the current version of the Code essentially restates the law as it stood under the *Civil Code of Lower Canada* ("C.C.L.C.").

It can be seen from the foregoing analysis that, on the one hand, acquisitive prescription remains a recognized means of acquiring immovable real rights in Quebec civil law and that on the other hand, the publication of rights system provided for in the Code retains the limited role it had under the C.C.L.C. The effect of these distinct roles is that rights validly acquired by prescription apply regardless of the rights registered in the land register.

This solution is consistent with article 2885 C.C.Q. which requires publication of the renunciation of the acquired right of real property rights.

This solution is also consistent with the repeal of section 2962 C.C.Q., which had the effect of no longer allowing third parties to rely entirely on the entries contained in the land register.

This solution is equally consistent with article 1724, para. 2 C.C.Q. which preserves the rights of all parties involved. This article provides that the seller is liable to the buyer "for any encroachment which, to the best of his knowledge, a third party has commenced to exercise before the sale". Thus, although in this case "O and S" are partly deprived of the right of ownership which the deed of sale purported to transfer to them, because of the acquisitive prescription set up against them by "A", it is nevertheless possible to claim the corresponding loss from the authors if they can prove that they were aware of the encroachment exerted by "A" before the sale and that they failed to mention that to them.

Finally, the nature of the judgment under article 2918 C.C.Q. is not decisive in resolving the question submitted to the Court.

It follows that the fulfillment of the prescription depends on proper possession, not the obtaining of a judgment. It is the acquisitive prescription which assigns the right and not the judgment. In reality, the latter observes the existence of the pre-existing right: It does not create a new right. In this respect, the requirement of article 2918 C.C.Q. is more a procedural than a substantive condition. However, these various characteristics are more of a declarative than of an attributive or constitutive nature.

Ultimately, the solution adopted in this case does not weaken the land register and introduces no more uncertainty than before in the real estate transactions in Quebec. Rather, it recognizes the unavoidable effect of acquisitive prescription, an important institution of Quebec civil law, which seeks to confer legal consequences on a possession that is already peaceful, continuous, public and unequivocal.

***Ostiguy* v. *Allie***, April 6, 2017, Supreme Court of Canada, EYB 2017-278053

**Jurisprudence**

***Debbih c. Sarrapuchiello***

January 25, 2017, Superior Court, EYB 2017-275787

- APPLICATION for damages based on failure to comply with a suretyship clause contained in a share purchase agreement. REJECTED.
- CROSS-APPLICATION and forced intervention. REJECTED.
- CROSS-APPLICATION by the defendant for forced intervention. REJECTED.

The buyer of the shares of a daycare centre that closed following the sale did not discharge his duty to due diligence before concluding the deed of sale. He did not take reasonable steps to understand the important issues and the facts that could influence his decision. There is no evidence that the representations made by the vendors are false. There is therefore no need to annul the deed of sale and to grant damages to the buyer.

As for the shareholder's undertaking to personally assume the surety of the seller's husband of the loans granted by the bank to the corporation, it cannot be classified as a suretyship, taking into account the terms used, and is conditional to the bankruptcy or dissolution of the daycare centre. As this condition has not been met, no amount is repayable by the shareholder.

***4312678 Canada inc. c. 7295979 Canada inc.***

February 2, 2017, Superior Court, **EYB 2017-275854**

- Did the director breach his duty of loyalty?
- Is the claim on reputation as a business founded?
- Does the director have to reimburse part of his remuneration?
- Is the director entitled to his counterclaim for termination of employment?

By concluding a sublease on behalf of the plaintiff with another corporation in which he was also the majority shareholder and principal officer, for a ridiculous price and just before the arrival of new shareholders of the corporation, the director improperly favored the subtenant and breached his duty of loyalty to the plaintiff. He is, together with the subtenant, jointly and severally liable for the loss sustained by the plaintiff, for $88,671.51.

The plaintiff did not, however, demonstrate that the director had infringed his reputation, or that he unduly retained his mail. However, he used the applicant's Dicom courier account without right and is required to reimburse the amount of $742.80. He is also ordered to pay the plaintiff $380 for appropriating the reward points of the plaintiff's credit card.

Moreover, even if the director was not working full-time as stipulated in his contract of employment, he is not required to repay part of the remuneration received. The evidence demonstrates that this situation has been known since 2014, without the applicant taking disciplinary action against him. However, the director is not entitled to the termination indemnity stipulated in his contract of employment, since he was not dismissed but had rather resigned.

***Société de construction Gératek ltée c. 8375615 Canada inc.***

February 7, 2017, Superior Court, **EYB 2017-275861**

- Which of the defendants are required to pay for the work?
- What is the plaintiff's claim for the work?
- Did the plaintiff cause damage to one of the defendants due to delays and deficiencies in the work?

The evidence does not show that, at the time of signing a contract with the contractor, the defendant's 8375615 Canada inc. (837) consent was vitiated and it was the defendant 8411867 Canada inc. (841), now bankrupt, who should in fact have signed the contract. The fact that the contractor indicated the name of 841 as client from his second invoice is not sufficient to release 837. It is rather a delegation of payment by 837. 837 and 841 are jointly and severally responsible for payment of the work, i.e. $191,845.88.

On the other hand, the sole shareholder and director of 837 and 841 cannot be held liable, as the legal personalities of these corporations have not been used to conceal fraud, abuse of right or contravention of a rule of public order. His refusal to pay because he disagreed with the sum claimed does not engage his personal responsibility.

The counterclaim is rejected, as evidence does not establish that the delay in the work is attributable to the contractor or that there is a causal link between the delay and the alleged damage.

***Letendre c. Québec (Registraire des entreprises)***

October 12, 2016, Administrative Tribunal of Québec — Economic Affairs division, EYB 2016-276047

The enterprise registrar rightly struck off the registration of the name of the mis en cause Michot as a director of the corporation. Under the *Business Corporations Act* ("QBCA"), the will of the shareholders to elect and remove the directors can only be expressed by a resolution recorded by minutes of meetings or by a written resolution signed by all shareholders. None of these documents was produced. Prior summary of the meeting, which is not certified by the chairman or by the secretary and whose content is partly contradicted by certain testimonies, does not constitute valid minutes of meetings. The

fact that the applicant, who was a director and legal counsel for the corporation, had entered different dates in the corporate records and in the directors' ledger concerning the commencement of Michot's term as a director demonstrates the inconclusive nature of these entries.

Since it is not a matter of deciding whether Michot was a *de facto* director of the corporation, but rather of verifying whether the legal process leading to the declarations and entries in the register of enterprises was respected, the evidence relating to the exercise of the decision-making control of the corporation is irrelevant. The fact of having signed checks does not make Michot a director.