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News

Appointment

The Enterprise Registrar, Benoît Lymburner, was appointed on August 28 by the Minister of Employment and Social Solidarity to the position of registrar in the Ministère du Travail, de l'Emploi et de la Solidarité sociale.

http://www.registreentreprises.gouv.qc.ca/en/a_propos/registraire/default.aspx

Corporate Law Conference, 4th Edition (French only)

The 4th edition of the corporate law conference organized by Éditions Yvon Blais and moderated by Marc Guénette, Thomson Reuters – Marque d'or, will be held on November 23, 2017, in Montreal. With new themes and new speakers, this event is a must for all corporate law practitioners.

More details ›

Éditions Yvon Blais is also offering a series of webinars and in-class courses relating to corporate law matters.

View the calendar ›

Article

Are family trusts losing their relevance?

The following is an excerpt in part from the website of the Department of Finance of Canada and was discussed, inter alia, during Éditions Yvon Blais' webinar Les fiducies pour les débutants given by Marc Guénette on September 20, 2017 (available on-demand, French only).

The Minister of Finance is currently holding consultations with these proposals and nothing is absolutely cast in stone yet.

https://www.fin.gc.ca/n17/data/17-066_1-eng.asp

The Government of Canada is consulting Canadians on three tax practices that are being used to gain unfair tax advantages:

1. Income Sprinkling

Income sprinkling (or income splitting) involves diverting income from a high-income individual to family members with lower personal tax rates, or who may not be taxable at all.

Take, for example, an individual living in Ontario, making $220,000 a year, and paying roughly $79,000 in income tax.

Now compare this with that person's neighbour, who makes the same income, but who owns a private corporation and sprinkles the income between himself, his spouse and their adult child. In many cases, the family is involved in the business, and their earning income from it is completely appropriate; the family members are legitimately earning income upon which they are paying personal income tax. However, in other cases, the spouse or child to which income is sprinkled has no role in the business. As set out in the illustrative example of the consultation paper, as a result of the sprinkling, the neighbour operating a corporation is effectively paying roughly $25,000 less tax than his or her neighbour even though the income involved is comparable.

2. Passive Investment Income

Canada's competitive corporate tax system, including a corporate income tax rate that is second lowest in the G7, encourages business investment and economic growth.

However, some individuals gain an unfair benefit by retaining passive investments in a corporation, taking advantage of the fact that corporate income tax rates are much lower than personal tax rates for higher-income individuals. This is a problem when an individual holds money inside a corporation, not to invest it in growing the business, but simply to shield it from the higher personal tax rate.

Since this sort of arrangement is not available to someone who collects a paycheque every two weeks, it can mean gaining an unfair tax advantage over them.

3. Capital Gains

Converting a private corporation's regular income into capital gains can also provide an unfair opportunity to reduce income taxes, this time by taking advantage of the lower tax rates on capital gains.

Income is normally paid out of a private corporation in the form of salaries or dividends to the principals of the corporation, who are taxed at their respective personal income tax rates.

However, if these forms of income are converted to capital gains, this can result in a significantly lower tax rate, providing an unfair tax advantage.

Professionals will be impacted

Let's take the doctors as an example: They invest a lot of money annually in their holdings and share income with their spouse and their adult children. Some doctors thereby "save" every year, tens of thousands of dollars in income tax. That will probably disappear. Same for lawyers, etc.

Family trusts will be impacted

These vehicles are used, among other things, to split income between members of the same family. It is also the vehicle of choice for multiplying the capital gains exemption. This will most likely disappear for them as well.

Jurisprudence

Pièces d'auto économiques inc. c. 9343-6137 Québec inc.

March 3 2017, Superior Court, EYB 2017-276946

(Interlocutory injunction. Name confusion. Granted.)
Applicant Pièces d'auto économiques inc. is entitled to an interlocutory injunction requiring the defendant to cease to use the name "Pièces d'auto écono". The plaintiff has demonstrated a serious appearance of right to the injunction she seeks. The name "Pièces d'auto économiques" has been in use for more than 40 years, while the name "Pièces d'auto écono" has been in use for less than a year. In addition, the two corporations offer the same products, namely tires and automotive parts and accessories; these are businesses of the same nature. As to the degree of resemblance, although it must be admitted that the two names are different in their graphic presentation, it remains that they are very similar in the sound and in the ideas they suggest. The similarity is such that the defendant's use of the name "Auto Parts" may have the effect of making the average consumer believe that he is dealing with the plaintiff. There is a probable cause of confusion here.

The plaintiff has also established that it is likely to suffer serious and irreparable harm if its injunction is denied, namely a potential loss of customers. This is sufficient in itself to accommodate the request. The economic disadvantages which the defendant will suffer if the injunction sought is granted are not sufficient to prevent the plaintiff from being entitled to the injunction sought.

Boyer c. Loto-Québec

June 13, 2017, Court of Appeal, EYB 2017-281040

(Defamation of a legal person established in the public interest. Appeal dismissed.)

The mere fact that the respondents, Loto-Québec and the Société du jeu virtuel du Québec Inc., are legal persons established in the public interest, does not ensure that they do not possess a right to a reputation. The defamation lawsuit brought by the plaintiffs following the presentation of a video and blog posts by the appellants did not violate their right to freedom of expression. This right is not absolute and competes with the right to safeguard the reputation of others. It was not necessary for the respondents to prove that they had suffered a loss of profit in order to be entitled to compensation. The video and the articles damaged the respondents by creating some controversy and a loss of confidence to some of their customers. The $30,000 award for reputation and moral damages is not completely disproportionate or unreasonable, as are the punitive damages of $20,000.

The judge did not err in convicting the appellants personally. However, he erred in condemning them jointly for punitive damages, the Supreme Court instructing that such a conviction is not possible. Punitive damages must be allocated equally among the appellants.

Cuscuna c. Ferrarelli

June 6, 2017, Superior Court, EYB 2017-280898

(Excessive expenses paid by the corporation. Excessive wages. Wages received as a shareholder. Reduction in the value of shares. Breach of duties as a director causing personal loss to the shareholder. Oppressive remedies. Reasonable expectations of shareholders. Order to redeem the shares.)

The parties are the only two shareholders of the corporation, which operates a daycare center. The evidence shows that excessive expenses were paid by the corporation to the defendant. However, the plaintiff also took advantage of the corporation's lax administration and made considerable withdrawals from petty cash, which are difficult to assess due to lack of documentation. As such, the credibility, objectivity, and impartiality of the Applicant's expert, who is the lawyer's father, is seriously questioned as the Applicant has refused to consider benefits granted to the plaintiff. An amount of $50,000 is subtracted from the total amount claimed in this regard, and the defendant is ordered to pay the plaintiff $42,197.72.

It is true that the defendant did not work as assiduously as the applicant at the daycare, but her involvement was of a different nature and deserved a salary. The defendant ensured the growth of the business and made it more profitable. As for her spouse, the latter also provided work, even if it was not equal to the wage paid to her. The amount of wages paid in excess to the defendant is set at $430,000. These excessive wages reduced the value of each share by $52.91, for a total of $264,550. Although it is the corporation that would normally be claiming this loss of value of the shares, the plaintiff's claim in this respect is accepted. Indeed, a claim by the directors would be unrealistic since the parties are the only two shareholders of the corporation. Furthermore, the attempt by the Applicant to act in the name of the corporation was not permitted. It would, therefore, be unfair, in the circumstances, to deprive the plaintiff of her appeal. The conduct of the Respondent and the breach of his duties as a Director have caused a personal loss which the Applicant is entitled to claim. The plaintiff was entitled to expect a management of the corporation that would provide for the 50% of its interest as a shareholder. The defendant's oppressive conduct violated these legitimate expectations. He invented a false debt in order to be reimbursed to the detriment of the plaintiff. There were also several accounting irregularities at the plaintiff's disadvantage for which the defendant is responsible. In addition, he and his family received excessive wages to the detriment of the plaintiff. The Respondent is therefore ordered to pay the Applicant a total of $306,747.72.

Since the parties are unable to re-establish a functional working relationship, the corporation's redemption of the shares of the defendant is ordered, as is the partition of the immovable.

Wilson c. Alharayeri

13 July 2017, Supreme Court of Canada, EYB 2017-282247

(APPEAL from a judgment of the Court of Appeal of Quebec (Morissette, Dufresne and Gagnon JJ.A.), confirming a decision of Hamilton J. Appeal dismissed. Criteria governing the imposition of personal liability on directors of a corporation. Refusal of the board of directors of the corporation to permit the conversion of the preferred shares held by a former director before proceeding with a private investment of convertible notes thereby diluting the portfolio of the former director. Discussions at the board of directors that resulted in the refusal led by a director whose preferred shares were subsequently converted so that he could withdraw a personal benefit from the private investment by

increasing his control over the corporation.)
The trial judge has a broad discretion to "make the interim or final orders that he considers relevant" under s. 241 (3) of the Canada Business Corporations Act. In order to determine whether a director has incurred personal responsibility, a two-part test is required. On the one hand, the misconduct must be truly attributable to the director because of his involvement in the abuse. On the other hand, the imposition of personal liability must be relevant in the circumstances.

In this case, A was president, chief executive officer, important minority shareholder, and director of the corporation. He resigned after the board of directors and W., one of its members, had blamed him for not disclosing a potential conflict of interest. He was also prevented from participating in a private investment following the conversion of preferred shares into common shares. The value of A's shares and the proportion thereof in the corporation thus substantially decreased and the trial judge was right to find the abuse and personal liability of W. W and B, another member of the board, have greatly influenced the decision of the board of directors not to convert A's A and B shares and thus participated in the abusive conduct. In addition, the abuse had the effect of increasing W's control over the company, thereby providing him with a personal advantage, to the detriment of A.

The redress which was equivalent to the value of the common shares prior to the private investment did not provide more than was necessary to remedy the loss of A and was therefore appropriate. It has been adequately set in light of A's reasonable expectations that his A and B Shares should be converted if the Corporation meets the applicable financial tests set out in its articles and the Board of Directors takes account of its rights in any transaction that impacts on his A and B shares.

Finally, the procedural documents in support of A's appeal were sufficient to establish the imposition of personal liability. These documents make specific allegations against the directors and demand that they be personally sentenced to payment of damages.