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News

Proposed tax changes at the federal level

The situation has evolved since the publication of the last Telemark.

Finance Minister Bill Morneau confirmed some tax-related changes in his Fall Economic Statement 2017 on October 24th.

Brief Summary:

Lower tax rate for small businesses
The government intends to lower the small business tax rate from 10.5% to 10% effective January 1, 2018 and to 9% from January 1, 2019.

Income sprinkling
The ministry will move forward with these measures, but by January 1, 2018, it will provide more guidance on how to determine the contribution of spouses and family members. The Government will introduce tests for adult family members. They will be asked to demonstrate their contribution to the business based on the following:

- Labour contributions;
- Capital or equity contributions to the business;
- Financial risks of the business taken on, such as co-signing a loan or other debt; and/or
- Past contributions in respect of previous labour, capital or risks.

To follow.

Holding of passive investments through private companies
Private corporations may continue to accumulate a surplus, but the passive income earned on the accumulated surplus after 2017 that exceeds $50,000 per year will be subject to an additional tax.

Lifetime Capital Gains Exemption and Surplus Disposal
The government will not implement these proposals.

You can read the *Economic Statement* at the following address:
http://www.budget.gc.ca/fes-eea/2017/docs/statement-enonce/chap03-en.html

Article

Corporate governance

What does it mean? For the Office québécois de la langue française, it means:

To direct and manage the affairs of a corporation in order to ensure a better balance between the management bodies, the supervisory bodies and the shareholders or members.

When a business becomes public, information obligations are born. These obligations are mainly divided into two:

1. Periodic disclosure obligation (which results from the simple passage of time), and
2. Continuous disclosure obligation (which arises when significant changes in the corporation occur).

There are roughly three relevant regulations specifically aimed at governance:

1. National Instrument 51-102 respecting Continuous Disclosure Obligations
2. National Instrument 52-110 respecting the audit committee
3. National Instrument 58-101 respecting Disclosure of Corporate Governance Practices and
   a. Its Policy Statement 58-201 - Corporate Governance

And three others that gravitate in low orbit around this subject:

1. National Instrument 52-107 respecting Acceptable Accounting Principles and Auditing Standards
2. National Instrument 52-108 Audit Oversight
3. National Instrument 52-109 respecting Certification of Disclosure in Issuers' Annual and Interim Filings

The Form 58-101F1 "Disclosure of Corporate Governance" from National Instrument 58-101 is somewhat in the form of a questionnaire with about 15 internal governance issues, including:

- Board of Directors (its composition, who? why?)
- Position descriptions
- Ethical business conduct
- Nomination of directors
- Policies Regarding the Representation of Women on the Board

Why should you be interested in governance policies adopted by the stock exchanges as well as the Canadian securities regulatory authorities that the AMF is part of, for your private issuers? Simply because when circumstances permit, a private issuer that has put in place concrete measures reflecting good governance is more attractive to investors, creditors or potential buyers than another who completely ignores it. It's as simple as that.

Jurisprudence

Desjardins Hamelin Therrien (DHT) Technologies inc. c. Therrien

12 June 2017, Superior Court, EYB 2017-281025

DHT's claims to recover the excess withdrawals received by the shareholder and expenses, the repayment of which, the shareholder has improperly claimed from DHT do not constitute a request for adjustment of the sale price of the shares or a claim for advances or down payments due, which are excluded by the share purchase agreement. It is rather claims of money illegally withdrawn from DHT by the shareholder. Expert evidence indicates that withdrawals by the shareholder exceed his investment for the period. The shareholder owes $51,125.98 to DHT as such.

With respect to expenditures, the expert has determined the adequacy of these expenditures by making an analogy with eligible business expenses under the Income Tax Act. In case of doubt, the expense was deemed eligible. Thus, the disputed expenses, which are mainly amounts spent in restaurants and for cigarettes, beer and newspapers, were made by the shareholder for personal purposes and not for business development purposes or as business expenses. With respect to expenditures, the expert has determined the adequacy of these expenditures by making an analogy with eligible business expenses under the Income Tax Act. In case of doubt, the expense was deemed eligible. Thus, the disputed expenses, which are mainly amounts spent in restaurants and for cigarettes, beer and newspapers, were made by the shareholder for personal purposes and not for business development purposes or as business expenses. With the exception of a family trip of the two partners in Europe, only the reimbursement of expenses incurred for the development of DHT's business or for its benefit could be validly claimed from DHT. In this regard, the shareholder is required to reimburse DHT the amount of $32,081.85.

Korex inc. c. Poloniato-Lee

29 May 2017, Québec Court, EYB 2017-281203

It is the contractor who has retained the services of the subcontractor and that must pay him the amount claimed of $29,524.61. However, the evidence, including an email, shows that the contractor's directors engineered to avoid paying it. They fraudulently subtracted the entrepreneur's asset for the benefit of other corporations they control. In doing so, they committed an extracontractual fault committing their personal responsibility. They are therefore sentenced jointly and severally with the contractor to pay the amount due. For having abused the procedure, the directors are also required to reimburse the subcontractor the extrajudicial fees she incurred. Indeed, they have produced a defense which is manifestly ill-founded, frivolous and dilatory and therefore abusive.

Agence du revenu du Québec c. Robotec Agri-Innovation inc.

6 June 2017, Québec Court, EYB 2017-281523

The evidence presented by the third party does not reveal the seized assets that may correspond to the invoices it files in support of its third-party opposition to the seizure by the tax authorities of the defendant's assets. Not only do some of the invoices produced by the third party opponent be made on behalf of the defendant, but the mere fact of bundling together a series of invoices and proofs of purchase is not sufficient to establish a right of ownership, unless it appears on the face of these invoices that they have been paid by the opposing third party and that the description of the elements appearing therein is sufficiently clear to identify them among the goods seized. The probative value of

the opposing third party's evidence is weak and does not establish that it owns the seized assets.

Moose International Inc. c. Moose Knuckles Canada Inc.

15 June 2017, Superior Court, EYB 2017-282805

It is not sufficient to allege that the defendant Pohoresky was pressured to sign the shareholder agreement to conclude that it was void; a proof is required, absent in this case, that the agreement was signed as a result of false representations, threats or violence on the part of its co-shareholders. The oppression invoked by Pohoresky, in particular that its financial expectations as a shareholder have not been met, does not have any impact on the validity of the agreement. In addition, since Pohoresky was represented by counsel when negotiating and signing the agreement, he is presumed to have understood and accepted the terms.

However, the validity of the non-competition and non-solicitation clause (the covenant) in the agreement is questionable. On the one hand, with a protected territory covering Canada, the United States, Mexico, Korea, China, Japan, Europe and Russia, the clause is far too broad. Worldwide online sales alleged by the Applicants have not been demonstrated. The period for which the clause applies, that is, for a period of one year after MKCI ceases to be a shareholder of the plaintiff Moose, or that Pohoresky ceases to provide services to the plaintiff, is problematic. The argument that MKCI can sell its shares to a third party if it wishes to compete with Moose can not be accepted. Not only would a new purchaser be subject to existing shareholder agreements, but this litigation is likely to discourage potential buyers. To claim that MKCI has only to surrender its shares in exchange for their book value, even if it means seeking legal redress to recover the difference between that value and the market value, if any, is also not reasonable. In these circumstances, it can not be concluded that plaintiffs have a clear right to an injunction enjoining the defendants to respect the restrictive covenant.

However, it is clear that the plaintiffs will suffer irreparable harm if they lose sales or customers because of the illegal competition that the defendants would give them. As for the balance of convenience, it favors the defendants. Not only has Pohoresky not played a role in the administration of Moose's affairs since the litigation began in July 2015, but MKCI's shares are held by Moose's attorneys, who request that they be transferred to Moose in compensation for the harm it would have suffered. Thus, neither MKCI nor Pohoresky have exercised their rights as shareholders or officers of Moose for more than one year, the period provided by the covenant. There is therefore no need to issue an interlocutory injunction prohibiting defendants from competing fairly with Moose.

Pohoresky and MKCI are not entitled to interim costs under subsection 242 (4) of the Canada Business Corporations Act. When Pohoresky felt oppressed by the other shareholders in Moose, instead of opting for oppression, he decided to counterfeit his merchandise and resell it for his own benefit. The plaintiffs replied by this action for an injunction and damages. By their claim for interim costs, Pohoresky and MKCI seek to finance the costs incurred to defend themselves until now and a possible oppression remedy. However, interim costs are not used to reimburse past expenses, particularly if they have been incurred to defend themselves against claims of illegal competition and trademark infringement.