

BOWLEY LEGAL NEWSLETTER

Number 42

September 2010

Attribution Rules—Our Income Tax scheme is said to be “progressive”. Certainly not because it is enlightened, but because the rates “progress” (increase aggressively as your income increases). The more you earn, the higher the rate. It doesn’t take a rocket scientist to figure out that if you can somehow move income from a high-income family member to a low-income family member, you should be able to reduce the tax burden on the family. If a breadwinner earning \$120,000.00 could spread his income equally amongst his spouse and four children, huge tax savings would ensue. This concept is called “income splitting.”

The old adage “If it sounds too good to be true, it probably is” applies in most such cases. A very large portion of the Income Tax Act is devoted to defeating such schemes, and the favorite approach is the use of “attribution rules”. These say that attempts to income split by moving income or resources around the family are defeated by simply “attributing” the income back to the donor— we just pretend it never happened.

Dr. White, a very successful dentist, owns an apartment building. She transfers the building to her husband, a stay-at-home father with no other income. The Act says that notwithstanding the transfer in name, all of the income and capital gains are attributed right back to Dr. White for taxation in her hands. The scheme fails.

It can get worse. In some cases the income is attributed, but the corresponding expenses are not allowed, making for a double-whammy.

There are ways to income split and still stay onside, but they must be done very carefully. Gifting from grandparents, in some cases, or making genuine repayable loans at “prescribed rates” are examples of ways that smart tax planning can be made to work. Given the vicious bear traps which await the unwary, however, no such activity should be undertaken without getting good tax advice in advance.

Twelve-hour vacation— A little stressed, in need of a complete change of scenery, something a bit exotic and only got a day? Just a couple of hours away is Montreal’s Vieux Port with its cobblestone streets, sidewalk cafes, artists’ boutiques and live music. *Steak & Frites* will set you back less than \$50 for two (including b.y.o.b. wine),

Cirque du Soleil just a little more than that, but worth every penny (book well in advance). You’ll be delighted at what a great vacation you can pack into an afternoon.

Easements— An easement may be described as a right-of-way or right-of-use over all or part of your land in favour of another. These are typically in favour of a utility commission or supplier such as hydro, telephone, gas or cable, and they are normally for the purpose of installing and maintaining lines and equipment so that service may be provided to your property or to neighbouring properties. Occasionally easements take the form of roads or laneways to provide access to some otherwise landlocked parcel.

Most easements are registered against the land, but a few exist by way of legislation (mostly in the case of hydro easements) and in some very rare cases, have come into existence through “long user” or “necessity”.

The most important issue to bear in mind is that you cannot use your land in such a way that it impedes the easement. Thus, if you were to build an in-ground pool over the gas easement, you will find yourself obligated to remove it when the gas company needs to repair its gas lines.

A Cautionary Tale— Some years ago a colleague went down to motions court, her exuberant client in tow. Their case was admittedly pretty good, and after arguments were made, the client began to crow. Everyone in the court room could hear him exulting in expected victory. As a precaution, while the judge was writing the endorsement, my friend turned to her client and hissed, “It ain’t over ‘til the fat lady sings.”

At last, the judge read out his endorsement (which was admittedly pretty favourable). The clerk called out “All rise!”, the judge rose and headed back to chambers. Suddenly, he stopped, turned, walked down to counsel table, leaned over and whispered, loud enough for all to hear, “The Fat Lady has sung!”

The greater the ignorance, the greater the dogmatism.

Dr. William Osler

10 Things To Do With a Dead Horse

1. Appoint a committee to study it.
2. Declare that “No horse is too dead to beat.”
3. Go to Toronto to see how they ride dead horses.
4. Deem the horse to be alive.
5. Hire an outside contractor to ride it.
6. Reclassify it as “living-impaired”.
7. Threaten to fire it.
8. Give it to charity for a tax receipt.
9. Promote it to a supervisory position.
10. Ride it “smarter” not harder.

Speaking engagements— As a matter of public service, our lawyers are always happy to speak publicly, whether on their specialty areas or generally on law, justice and public policy matters. Just ask.

Limitation Periods— In our system we observe the concept that if you have been wronged, you should pursue your remedy in a timely fashion. If not, you will forever lose your cause of action. Generally, the time period begins to run when you knew, or reasonably should have known, that you have suffered the wrong. If you are a minor, or under disability, the limitation may be extended.

In Ontario, in the vast majority of cases a two year limitation period obtains. While there are minor exceptions, it would be unwise to hope that your case falls under one of them. It is also important to note that in certain instances, for example construction liens, the limitation is significantly shorter.

On the other hand, for criminal prosecutions by indictment (i.e. the serious stuff) there are no time limits, except for treason which is three years. (Not many clients need worry about this.)

If there is a moral of the story here, it is that if you have suffered some wrong and think you might have a legal remedy you should speak to counsel at the earliest possible moment, if for no other reason than to find out how long you have to decide what you want to do.

The Henson Trust— Frequently we deal with will drafting situations where a parent or grandparent wishes to make provision for a disabled adult child or grandchild, but has heard that the beneficiary’s government disability support will be “cut off” if they receive an inheritance. At the risk of gross

oversimplification, the device to be used here is the discretionary or “Henson” trust whereby a fund of money is set aside for the benefit of the disabled adult child, but which must always stay *completely* out of the control of the beneficiary. If the disabled beneficiary has any say whatsoever, the scheme fails. In our view, another essential element is the “gift over” to put the trust further into safe territory.

If the trust is of any magnitude, we recommend that care be taken to ensure that it is a “testamentary trust” under the Income Tax Act for tax savings purposes.

The Evolution of Land Registry in Ontario— Ontario’s original land registry system was just that— a simple registration of deeds with no regulation of what was in them. Whether the description made sense or not was of no consequence, and language such as “...from the oak tree by the river, northward more or less to a stone fence...” was not uncommon. Over the years, professional pride and clerical fussiness slowly brought about a more and more accurate and reliable picture of land ownership, but an exacting forty year title search looking for gaps and inconsistencies was still required.

A novel introduction was the Torrens or Land Titles system, derived from an Australian adaptation of marine registries, and brought into Canada from west to east. The concept was that a careful and precise legal description of the property was required by law, and which after careful scrutiny, was guaranteed as to accuracy and completeness. For decades, Ontario had both systems in place on a patchwork basis.

The final phase saw a complete conversion of all titles in Ontario to the Land Titles system, with the further enhancement that all paper registries were converted to electronic format. Currently all searches and registrations are effected online by qualified individuals, typically lawyers and their assistants.

Business Succession— If we harp on about the importance of early and focused succession planning for family businesses, it’s because the rate of failure is so high. It does not need to be that way. The greatest reason for family businesses “fizzling” in the second generation is abdication of leadership in the transition process. Anyone with a healthy business who does not plan to work into his second century needs to come to grips with succession issues today, not someday.

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