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Marmer Penner Inc. Newsletter

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The *Murray* Effect

In the March 2019 issue of *Money & Family Law*, Adam Black wrote about the Alberta decision in *AMW and BW* (2018 ABQB 518) on BW's income pursuant to the *Federal Child Support Guidelines* ("the *Guidelines*"). We found the decision interesting to say the least.

The support-payer, BW, was a one-third shareholder in two companies, 101142979 Saskatchewan Ltd. and 1869909 Alberta Ltd., with two other arm's length shareholders. During the years in question, BW received no salary from these companies and instead was paid by way of dividends. According to these arm's length business partners, and accepted by the court, BW's dividend was determined by the three shareholders as the aggregate of the value of the services BW provided plus any other amount if the three shareholders agreed thereon. The court accepted this and the following:

a) "…in an uncertain economy, it is prudent business practice to retain a level of earnings in the company as a hedge against falling revenues in subsequent years…"; and

b) "BW cannot by himself declare a higher dividend".

Based on the foregoing, many of us would expect the court to calculate BW's income as his actual dividends (not the taxable dividends which include a 17% gross-up when they appear in Line 150 income) plus an additional amount added pursuant to paragraph 19(1)(h) of the

Guidelines to reflect that the spouse derives a significant portion of income from dividends that are taxed at a lower rate than employment or business income.

In 2017, for example, BW received $74,000 of actual dividends from the two corporations. Due to the 17% gross-up on ineligible Canadian dividends, the taxable dividends that appeared in his Line 150 totaled $86,580.

AMW had argued that the court should start with the $86,580 which includes the 17% gross-up notwithstanding paragraph 5 of Schedule III of the Guidelines that reads “Replace the taxable amount of dividends from taxable Canadian corporations received by the spouse by the actual amount of those dividends received by the spouse”. In addition, AMW argued that BW’s income should include all or a portion of the undistributed pre-tax corporate income. Accordingly, the court was required to consider paragraph 18(1)(a) of the *Guidelines* which reads “Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse’s annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse’s annual income to include all or part of the pre-tax income of the corporation”.

Once again, many of us would expect the court to conclude that Section 18 does not apply where the spouse does not control the corporation by himself or as part of a related family group. And, we would be wrong, once again. Tearing a page from the decision of Madame Justice Croll in *Murray and Murray* (2003 CanLII 64299 ON SC), the Alberta court added 50% of BW’s one-third share, or one-sixth, of undistributed income. For those who don’t remember, *Murray* featured two 50% shareholders of a company with undistributed income. At the time, the view was that without at least 50% plus one vote, a shareholder could not cause a corporation to distribute to him his share of available income. The fly in the ointment in *Murray* was that the 50% partner was Mr. Murray’s brother. So, the question became “Do these brothers act in

concert?" Mrs. Murray argued that they did and Mr. Murray argued that his brother was adamant that undistributed income needed to be reinvested in the company. The court split the difference and added 50% of Mr. Murrays one-half share, or one-quarter, of undistributed income. For the many years since that decision, we have considered the *Murray* decision in cases of undistributed income where family members may not agree on distributing available income.

AMW and BW is an Alberta decision and time will tell if it is the harbinger of a greater *Murray* effect on income determination in Ontario cases.

This newsletter is not intended to substitute for proper professional planning. It is intended to highlight areas where professional assistance may be required or enough to discuss at the next hoedown. The professionals at Marmer Penner Inc. will be pleased to assist you with any matters that arise. Please feel free to visit our website at ***www.marmerpenner.com***.