



Spring 2017

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BUDGET | Shots across the bow **2017** – and *some direct hits...*

The lead-up to the March 22, 2017 Federal Budget (“Budget”) was filled with fear and trepidation that the Trudeau Liberal Government (“Government”) would use the Budget to grab more taxes from Canadians to pay for their platform promises. In particular, in advance of the Budget, there was concern

that capital gains inclusion rates were likely to increase significantly from the 50% inclusion rate to 75% or possibly even more.

The good news for taxpayers...at least for now... is that the Budget did not make any particularly significant tax rate changes at all.¹ Unfortunately, that is not to say that the Budget was a tax non-event.





Shots across the bow

Tax professionals are always worried about something. It seems to be an occupational hazard or perhaps a deeply ingrained socialized character flaw. Perhaps it is that we've adopted Bruce Cockburn's song "The Trouble with Normal (is it always gets worse)" as our theme song – or maybe that's just me. In any case, it appears this Budget has left us with reason to be worried.

Contained deep in the Budget papers² under the heading "A Tax System That's Fair for Middle Class Canadians", is a discussion about "Tax Planning Using Private Corporations", setting out the theme that high-income individuals are using corporations to avoid paying their fair share of taxes. Some of the variety of strategies that the government notes it is concerned about include using private corporations to:

- 1) allow high-income individuals to shift income to lower income family members or other non-arm's length persons that can reduce (or even eliminate) overall taxes in a non-arm's length group;

¹The Budget does contain significant tinkering with various credits and other tax attributes that will impact individuals and corporations. In addition, although for now services such as Netflix have dodged the bullet, a new *Uber* tax has scored a direct hit by extending GST/HST to ride-hailing services so that they are treated in a manner similar to traditional taxi services.

²See page 199 of the *Budget Plan*.

- 2) cause passive income to be taxed at much lower tax rates than if the income had been earned personally; and
- 3) convert regular income into capital gains, which because of the high tax rates on dividend income can significantly reduce the integrated tax rate in connection with earning income through a corporation as opposed to if such income had been earned personally.

In short, the Government is not amused. Stay tuned for more developments – which may be coming in the form of a report in the next few months.

Some other shots fired in the Budget include commitments made to collaborate with the provinces to ensure transparency regarding beneficial ownership, which is in keeping with broader anti-money laundering initiatives carried on by the Government. In addition, as if taxpayers didn't have enough to worry about, the Budget proposes investments of more than

half a billion dollars in the Canada Revenue Agency – which the Budget projects will result in revenue of \$2.5 billion over five years.

Direct Hits

Some of the direct hits fired in the Budget, while disappointing, were at least foreseeable.

A number of strategies used by taxpayers to manage their tax situations and/or to benefit from certain fact patterns took direct hits in the Budget. For example, the use of straddle transactions (“straddles”)³ to manage a taxpayer's taxable income appear to have been effectively eliminated in respect of straddles entered into on or after the date of the Budget. Also, the “*de facto* control” test, a test that is critical to causing a number of provisions in the *Income Tax Act* (Canada) (“Act”) to become applicable, including the association rules,⁴ is proposed to be broadened significantly. The change to this test is intended to legislatively override recent case law that the Government obviously did not agree with.⁵

³Straddles generally involve a taxpayer taking opposing positions (short and long positions) and managing them in a manner that will result in one position being in a gain position and the other in a nearly identical loss position. The taxpayer can then choose to time the realization of losses in a manner that would allow those losses to offset current year income and move the gain position into a subsequent taxation year. Similar transactions can be put in place year after year. The proposed changes are intended to defer the ability to realize the loss position to the extent that the gain remains unrealized.

⁴Association has a number of consequences, including causing associated corporations to have to share certain Canadian controlled private corporation benefits such as access to the \$500,000 small business deduction limit and SR&ED benefits. The association rules are found in section 256 of the Act.

⁵*McGillivray Restaurant Ltd. v. R.*, 2016 DTC 5048.

On the other hand, I don't know any advisors who foresaw the elimination of the so-called "billed-basis accounting" deduction available to professionals who elect to defer the value of their work-in-process ("WIP"). Assuming that this proposal is enacted, professionals will be required to determine the lesser of the cost and fair market value of their WIP each year ("WIP Amount") and, beginning in the taxation year ending after the particular professional's current taxation year, the professional will be required to take into account 50% of the WIP Amount at year-end into income for that taxation year (for professionals with calendar year-ends, the relevant period for this first inclusion will be the taxation year-ended December 31, 2018). Thereafter, the professional will be required to include the full year-end WIP Amount in income, subject to claiming deductions for the WIP Amount included in the preceding year.⁶

The government has touted this change as being capable of raising nearly half a billion dollars of tax revenues over the next three

years.⁷ Sadly, I can't imagine that in the current political/class warfare environment the general public will have much sympathy for the professionals being forced to pay these additional taxes.

While the elimination of billed-basis accounting is likely to impact all professionals to a certain degree, it would appear to especially hurt lawyers and accountants, who often carry large WIP balances at year-ends. This is particularly the case for any professionals who work on a contingency basis.

Assuming the billed-basis accounting proposals are enacted, the future battle ground for professionals seeking to defer taxation of their WIP will shift to the valuation of WIP, since it is the lesser of the cost and fair market value of the WIP that will be taxable. However, that is an article that can be written⁸ on another day.



Michael Goldberg*
mgoldberg@mindengross.com

* partner through professional corporation.

⁶Assuming WIP Amounts are constant over the first two post-Budget taxation years of the professional, effectively 50% of the WIP Amount will be included in income in each year. Subsequent increases or decreases in year-end WIP Amounts will give rise to net income inclusions or deductions, as the case may be.

⁷It has been noted that this change may lead to many more professionals incorporating their practices, which generally appears to be sound advice. However, given the potential for ongoing changes to the taxation of corporations (not just corporations earning passive income – we tax advisors worry about there being further changes to the taxation of professional corporations too!), it is unclear whether such a strategy will be appropriate for all professionals in the long run.

⁸By someone else.



Obtaining Licenses and Permits
Under the *Cannabis Act*:

What We Know So Far

While

there is much to be said in the yet-to-be-drafted regulations, the overall framework for the procedure for obtaining licenses and permits under the *Cannabis Act* is in place. Today we take a look at what we know so far.

What Licenses and Permits May Be Available?

The *Cannabis Act* gives the Minister the power to

“Issue, renew, or amend licenses and permits that authorize importation, exportation, production, testing, packaging, labeling, sending, delivery, transportation, sale, possession or disposal of cannabis or any class of cannabis.”

In order to carry out this power, the *Cannabis Act* gives the Minister permission to:

- Establish different classes of applications;
- Establish conditions, by class of application or otherwise, that must be met before or during the consideration of an application;
- Establish an order, by class of application or otherwise, for the consideration of applications; and
- Provide for the disposition of applications.

Interestingly, the *Cannabis Act* specifically provides that if the Minister changes the rules that it applies to applications then the new rules will apply in respect of any existing application where no final decision has been made.

What Information will be Required in the Applications?

Much of this is still yet to be determined. The *Cannabis Act* provides that an application must include all of the information required by the Minister. Since the government has not yet set out the information that will be required in respect of each different kind of application, we do not yet know the full specifics. However, we do know that:

- The Minister will prescribe the form and manner by which applications must be submitted and all applications will need to comply with the directive(s);
- The Minister is specifically authorized to seek financial information from the applicant which would include, in the case of organizations, information about its shareholders or members as well as who controls the organization (whether directly or indirectly); and

- The Minister is authorized to request any additional information that pertains to the information contained in the application that is necessary for the Minister to consider the application.

Successful Applications and Fees

If an application is successful any license or permit given will be subject to the conditions that will be set out in the still-to-be-drafted regulations. The Minister also has the power to impose any additional conditions on a license or permit, over and above what is prescribed in the regulations, that the Minister deems appropriate.

Getting a feel for what the fees might ultimately be is challenging. Canvassing fees in some other jurisdictions does little to assist.

In Victoria, B.C., a municipal cannabis business license can be had for as little as \$500. A hundred kilometers away in Vancouver, a business license from the municipality can cost up to \$30,000 per year. Down south in Arkansas, permit fees can be \$100,000 per year.

Reasons for Rejection

Applications can be rejected either as a class or on an individual basis.

Class Rejections

The *Cannabis Act* allows the Minister to fix a date for the termination of a class of applications after which time every application of that class is terminated if a final decision has not yet been made in respect of an application. If an application is terminated as part of a class rejection, then the application fee must be returned to the applicant and the applicant has no right of recourse against the government for its failure to consider the application prior to the date fixed by the Minister.

Rejections on an Individual Basis

The *Cannabis Act* sets out specific reasons by which the Minister may refuse to issue, renew, or amend a license or permit. Those reasons include if:

- doing so is likely to create a risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity;
- there are reasonable grounds to believe that false or misleading information or false or falsified documents were submitted in, or in support of, the application;

- the applicant has contravened in the past 10 years a provision of the *Cannabis Act*, the *Controlled Drugs and Substances Act* or the *Food and Drugs Act* or any regulation made under any of those Acts;
- there are reasonable grounds to believe that the applicant has contravened in the past 10 years; (a) an order made under the *Cannabis Act*, the *Controlled Drugs and Substances Act* or the *Food and Drugs Act*, or a condition of another licence or permit issued to the applicant under any of those Acts;
- the applicant is: (a) a young person (under 18); (b) an individual who is not ordinarily resident in Canada, or (c) an organization that was incorporated, formed, or otherwise organized outside Canada
- a security clearance in respect of the application has been refused or cancelled;

- the Minister is of the opinion that it is in the public interest to do so; or
- any prescribed grounds for refusal exist.

Unlike a class rejection, if a license or permit is refused on an individual basis then the *Cannabis Act* requires the Minister to send written reasons for the rejection to the applicant. Rejection of an application could therefore be challenged in the courts on the basis of judicial review.

There is still a long way to go before we will know the intricacies of the various permits and their application processes. Keep checking my blog at canadacannabislegal.com for updates on federal regulations and provincial and municipal legislation and regulations.



Matt Maurer
mmaurer@mindengross.com

Firm News

Minden Gross LLP welcomes back **Christina Kobi** as a Senior Partner in the Commercial Leasing Group. Christina specializes in all aspects of commercial leasing (including retail, office, and industrial) and in areas such as development agreements for rooftop solar leases/licenses, telecommunications license agreements, and tenancy matters.

Minden Gross LLP was recognized by Progress Place for its support of the Progress Place Transitional Employment Program.

The 2017 *Canadian Legal Lexpert Directory* acknowledged our lawyers as leaders in their fields. The firm received leading ranking in Property Leasing and Property Development and congratulates **Eric Hoffstein**, **Joan Jung**

(Estate & Personal Tax Planning); **Howard Black** (Estate & Personal Tax Planning – Estate Litigation); **Steven Pearlstein**, **Reuben Rosenblatt, QC, LSM** (Property Development); and **Michael Horowitz**, **Christina Kobi**, **Stephen Messinger**, **Adam Perzow**, and **Stephen Posen** (Property Leasing). The firm also congratulates **Yosef Adler** who ranked as a 2017 Rising Star - Corporate Lawyer to Watch.



Christina Kobi

Professional Notes

Samantha Prasad published three articles on *The Fund Library* including “Important Tax-Filing Changes to be Aware of” on April 20 and her article co-authored with **Ryan Chua** “Changes to the Principal Residence Exemption: Home Sweet Home?” She was Mondaq’s “Contributor with Most Popular Article in Canada” for January and February. *Delta Optimist* republished her article “Should you borrow to invest in your RRSP?” on February 8.

Irvin Schein published seven articles on *irvinschein.com* including “Arbitration Dilemma - What if You Do Not Have a Willing Dance Partner?” on March 24.

Matt Maurer published five articles on *Slaw.ca*, including “Canada’s Cannabis Act: A High Level Overview” on April 18 and four articles independently including “Canadian Government

Affirms Commitment to Legalize Cannabis by June 1, 2017” on March 10. **Matt** and **Whitney Abrams** published “Nova Scotia Human Rights Board Orders Employee Insurance Plan to Cover Medical Marijuana Expenses” on *Cannabis Law Journal* on March 1. They also posted “Open for Cana-(Da)-Business?” on Canada Cannabis Legal at canadacannabislegal.com.

Michael Goldberg hosted the third session of Tax Talk: Year 4 on February 8. His article “Budget 2017 – Shots across the bow – and some direct hits...” was published in *Tax Topics* on April 13. He also co-chaired the Annual International Meritax Meeting held in Washington, DC, on April 21.

Catherine Francis published “Solicitor-Client Privilege in Bankruptcy” in the Spring/Summer 2017 issue of CAIRP’s *Rebuilding Success*.

Howard Black presented a paper to STEP Canada Toronto on “Discretionary Trusts in the Family Law Context” on January 28. He also presented to investment advisors with the RBC Wealth Management Group on “Is My Client Capable of Instructing Me? Danger Signals, Duties & Responsibilities” on February 9. He was a panelist on “Essential Update on Estate Litigation Costs” sponsored by the OBA on February 28.

Danna Fichtenbaum presented a case commentary at the OBA’s Estates’ Judges Dinner on April 6.

Ben Bloom was quoted in “Everything you need to know about using a dash cam in Canada” in *Autofocus* on February 28 and in “Canadian recreational drone users have basically been grounded” on *mobilesyrup* on March 25.

Ken Kallish spoke on “Fraud in Insolvency” at the CAIRP Insolvency & Restructuring Exchange on May 15.

Ken, Irvin, Samantha, and Ryan Gelbart attended the Meritas Annual Meeting held in Washington, DC, from April 19 - 21. Over 300 lawyers from 54 countries and 156 firms attended the meeting.

Joan Jung co-chaired and was a presenter at the LSUC seminar “The Annotated Discretionary Trust and Alter Ego Trust” on February 24. She was appointed to the Program Committee for the Canadian Tax Foundation’s 2017 Ontario Tax Conference and became a member of the editorial board of *Personal Tax and Estate Planning*.

Melissa Muskat published “Municipal Tax Law Update - Deadlines, Market Trends, and Changes to Vacancy Rebate Program!” on February 9.

The Commercial Leasing group attended the ICSC Whistler Conference from January 29 - 31. **Stephen Messinger** was on the program planning committee and spoke at the session “Retailers Only: Landlords & Brokers Need Not

Apply - Retailers’ Special Industry Group”. The group also attended the ICSC Canadian Law Conference on April 27-28. **Stephen Messinger, Michael Horowitz, Ian Cantor, Christina Kobi, Adam Perzow, Melissa Muskat, Enzo Sallese, Benjamin Radcliffe, and Angela Mockford** were session and roundtable leaders. They spoke on topics from dealing with difficult legal professionals to leasing litigation fundamentals, options to renew and extend leases, property taxes, and drafting lease clauses that allow dogs into commercial buildings. **Benjamin** presented **Stephen Posen’s** paper on technical aspects of assignments of lease. **Christina** and **Angela** were both on the program planning committee.

Christina presented “Drafting Fair Market Rent for Renewals”, **Stephen Posen** spoke about “Consent to Transfer: Procedure; what is Reasonable?”, and **Michael Horowitz** covered “Issues in Leases to Health Clubs and Gyms: Make Sure Your Lease is in Good Shape!” at The Six-Minute Commercial Leasing Lawyer hosted by the LSUC on February 22. **Christina** also spoke at the 7th Annual Business Law Summit on “Drafting Landlord Waivers: Issues to Consider from Both Sides” on May 11.

Stephen Posen presented Landlord and Tenant remedies for Defaults at Springfest on May 3.

Sepideh Nassabi posted “Making Demands on a Guarantee?” on January 19.

Minden Gross LLP acted on behalf of Assure Holdings, Inc. in closing financing in advance of a previously-announced merger and TSX venture exchange listing, with a team that included **Andrew Elbaz** and **Sasha Toten**. They also acted for the underwriters in connection with a \$20 million completed bought deal of common shares and flow-through shares for Denison Mines and acted for the underwriters connected to AcuityAds Holdings Inc.’s closing of a \$11.7 million bought deal financing and acquisition of Boston-based Visible Measures Corp.



BARRISTERS & SOLICITORS
145 KING STREET WEST, SUITE 2200
TORONTO, ON, CANADA M5H 4G2
TEL 416.362.3711 FAX 416.864.9223
www.mindengross.com



Sasha hosted an interactive session for Young Women in Law on January 23. She also spoke on a panel of lawyers at the Women Grow event on April 6.

Eric Hoffstein presented a paper on “Defensive Note-Taking Skills” at the Canadian Association of Gift Planners National Conference on Strategic Philanthropy on March 31. He presented his paper “Harmonizing the Sometimes Discordant Duties of Fiduciaries who Act as Corporate Trustees” as part of a panel at the American Bar Association Real Property, Trust & Estates Sec-

tion Spring Symposia in Denver, CO, on April 21. Eric also presented “Construction Liens 101” for the Association of Architectural Technologists of Ontario on April 28.

Hartley Nathan and **Ira Stuchberry** presented at LawPro on “Solicitors Obligations in Commercial Transactions” on April 5. They also presented for the ACC on “Corporate Governance Basics for Corporate Counsel” on April 25. Together they published “Advisory Committees” in the May 2017 edition of *The Directors’ Briefing*.

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