

Marmer Penner Inc. Newsletter

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Disclosure From Third Parties, Part II – “All In The Family”

In the October 2012 edition of our newsletter, we addressed the challenges that are often encountered in seeking disclosure from third party professionals who, although not directly involved in the litigation at hand, may have previously acted for one of the litigants. An example of such disclosure would include items such as working papers in connection with tax and estate planning for the purposes of substantiating a litigant’s claim for an exclusion. This was the case in *Elgner v. Elgner*.

Another area in which third party disclosure issues often arise is when one of the litigants is involved in a family-controlled business. As a result of the non-arm’s length nature of the relationship between the litigant and the remaining business owners, concerns sometimes arise over income shifting and transferring of assets between the litigant and his or her family members. It is not uncommon for family members to align themselves and/or act in concert in order to support and protect a family member who is defending a support or property claim.

In cases where a litigant’s business interest is part of a family-controlled enterprise, certain disclosure from the family members who are not part of the litigation is sometimes warranted. This disclosure would include items such as remuneration details for each family member, including but not limited to T4 slips and both regular and capital dividend amounts paid from corporate interests. Furthermore, details of all family members’ shareholder or director loan accounts may also be necessary in order to analyze the parity, or lack thereof, of non-taxable amounts received by each party. To address the

issue of asset transfers between family members, items such as shareholder registers and resolutions are required for analysis. Inevitably, strong resistance is often encountered upon requesting such third party disclosure, citing lack of control and confidentiality concerns.

This issue was recently dealt with in *Loeb v. Loeb* (2013 ONSC 1730). In *Loeb*, the applicant wife sought third party disclosure which included T4 and T5 slips of all members involved in the family-controlled enterprise, as well as all shareholder loan details for all family members. The respondent husband argued that certain documents could not be produced, as he lacked control over the business entities and the items requested were irrelevant to the determination of his income.

In his endorsement, Justice Kane ordered most of the third party disclosure that was sought, providing some of the following reasons for the endorsement:

“Mr. Loeb has access to all the information sought and more. He has an information and accessibility advantage over Ms. Loeb in this action where the very issue is his past and current level of income. If there is shifting of income to limit the exposure of Mr. Loeb, it is most likely to involve his father and two brothers. To the extent Mr. Loeb does not control a corporation or trust, he is a Director and/or Officer of several of these entities which entitles him to access information beyond the access rights of a minority shareholders (sic) in a corporation. It is unlikely that Mr. Loeb’s father or brothers would deny him access to the books and records of these entities.”

In summary, in cases where family members and business ownership are intermingled, a review of third party disclosure is often necessary for conducting proper due diligence. Without it, understanding the pattern and flow of income from a business to the end owners would become extremely challenging.

This newsletter is intended to highlight areas where professional assistance may be required. It is not intended to substitute for proper professional planning. 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.