

# 2019 BRITISH COLUMBIA TAX CONFERENCE & LIVE WEBCAST

## TOPIC OUTLINE

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### TAX PLANNING CONSIDERATIONS IN SHAREHOLDERS AGREEMENTS

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*Like wills, shareholder agreements are living documents that need periodic review to remain relevant to current circumstances. Changes to the tax system and business climate necessitate a review and potentially changes to various provisions within shareholder agreements. This session will cover a review of recent case law that impact shareholder agreements and updated planning considerations for shareholder agreements taking into account changes to the small business deduction regime, TOSI, and factual control, among other changes, to modernize shareholder agreements and provide optimal results for the parties involved.*

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Our paper will attempt to update the 2012 BC Tax conference paper authored by Mark Chartrand and Carolyn MacDonald by discussing the recent case law impacting shareholders' agreements, along with consideration of the impact of shareholders' agreements to the small business deduction ("SBD") regime and the tax on split income ("TOSI").

#### 1. Introduction to Shareholders' Agreements

- (a) Provide an overview of the purposes and common clauses in shareholders' agreements.
- (b) Discuss the difference between a shareholders' agreement and a unanimous shareholders' agreement.
- (c) Discuss Section 137 of the BCBCA.

#### 2. Voluntary and Involuntary Share Sales

- (a) Detailed review of buy-out mechanisms.
- (b) Updated discussion on capital gains vs. deemed dividends, including updated rates.
- (c) Updated discussion on management of tax issues on buy-out, including the capital gains deduction for QSBC shares and changes to subsection 55(2).
- (d) Review new case law regarding share valuation & shareholders' agreements.

#### 3. Control Considerations for Shareholders' Agreements

- (a) Relevancy of control (e.g., CCPC status).
- (b) *De jure* control: Review of recent case law and considerations for shareholders' agreements.
- (c) *De facto* control: Review of *McGillivray Restaurant Ltd*, 2016 FCA 99 and the statutory response in subsection 256(5.11) expanding the narrow *de facto control* test. Review of the

- pre- and post-*McGillivray* case law examining the relevant factors and considerations for shareholders' agreements.
- (d) Review of recent case law and CRA positions on paragraph 251(5)(b)/ subsection 256(1.4).
  - (e) SBD regime: overview of the SBD regime and a summary of recent changes.
    - i. Review of associated party rules and impacts – business limit, taxable capital employed in Canada, adjusted aggregate investment income, etc.
    - ii. Recommended updates to shareholders' agreements.
  - (f) Control and shareholders' agreements in other contexts (e.g., controlled foreign affiliate status).

#### **4. Impact of TOSI rules on Shareholders' Agreements**

- (a) Provide an overview of the TOSI rules and recommended updates to shareholders' agreements (e.g., distribution considerations).

#### **5. "Illegal" Shareholders' Agreement Clauses**

- (a) Focusing on recent decisions which discuss the effect of "illegal" provisions in a shareholders' agreement.

#### **6. Payments for Waiving Rights in a Shareholders' Agreement**

- (a) *Pangea One*, 2018 TCC 158 decision regarding the taxation of restrictive covenants in shareholders' agreements.