Blaney McMurtry LLP

PUBLICATION

Personal Real Estate Corporations

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Introduction

Incorporating enables individuals in various industries to employ business advantages that were previously only available to more standard business corporations. A Personal Real Estate Corporation (PREC) gives real estate agents the ability to utilize the benefits of incorporation. In 2008, British Columbia became the first Canadian province to allow for the incorporation of real estate agents. Since then, Quebec, Manitoba, Saskatchewan, Alberta, and Nova Scotia have all moved to allow for the incorporation of PRECs.

In Ontario, incorporation is afforded to many regulated professionals including doctors, lawyers, architects, engineers and accountants. Despite this, Ontario real estate agents are currently prevented by the *Real Estate and Business Brokers Act* (REBBA) from incorporating their businesses through a PREC. In 2008, Ontario legislation was first introduced to amend this condition; however, the proposed legislation failed to pass. Recently, Bill 104, the *Tax Fairness for Realtors Act*, has been introduced to permit a PREC to be registered as a broker or salesperson. Bill 104 passed its First and Second Readings on March 8th, 2017, and March 23rd, 2017, respectively. If Bill 104 is approved by popular vote following a review and Third Reading, it will receive Royal Assent and be passed, thus becoming law.

Bill 104 is designed to amend the *Ontario Business Corporations Act* (OBCA) and REBBA in multiple regards with respect to PRECs. Two facets of REBBA prevent registered salespeople from incorporating:

1. It does not provide for the licensing of salespersons as personal corporations. As such, Bill 104 permits a PREC to be registered as a broker or salesperson, given that incorporation occurs under the OBCA, and the PREC is only authorized to trade in real estate.

2. REBBA does not permit a broker to pay commission to an “unregistered” entity. Consequently, Bill 104 allows a brokerage to pay commission or other remuneration to the PREC of an individual broker or salesperson that it employs.

Conditions

Under the new proposed legislation, a PREC can be considered a broker or salesperson, given that the owner of the PREC's equity shares has the prescribed qualifications to be registered as a broker. Additionally, the PREC, under this definition, must be employed by a brokerage to trade in real estate.

Bill 104 specifies that a PREC must satisfy the following conditions:

1. The real estate agent, defined as an individual, owns all equity shares in the PREC.
2. All PREC non-equity shares, if any, are owned by (i) an individual who owns the equity shares in the PREC, (ii) immediate family members of the individual, or (iii) a corporation of which all equity shares are owned by said same individual or his/her immediate family members.
3. The PREC name includes "Personal Real Estate Corporation" or "société personnelle immobilière," and complies with all rules respecting the names of PRECs.
4. The PREC may only carry on business in the profession of real estate trading.

Advantages

Bill 104 provides many advantages to real estate agents looking to maximize their income by realizing significant savings through paying less income tax. In Ontario, the top marginal personal income tax rate is 53.53% (on income exceeding $220,000). Alternatively, the Ontario small business tax rate is 15% (on the first $500,000 of income, and 26.5% in excess of that amount). PRECs would give real estate agents access to this lower tax rate.

Additionally, a PREC will give real estate agents the opportunity to leave a portion of their profits in their PREC, thereby allowing real estate agents to defer payment of taxes on such portion of income until the money is withdrawn by the real estate agent from the PREC.

Finally, incorporating a PREC allows real estate agents to engage in income splitting with and between family members, as Bill 104 allows non-equity shares to be issued to the family members of a real estate agent.

Administration and Maintenance

As the OBCA is applicable to all Ontario corporations, the OBCA (and regulations thereto) must be considered in respect of PRECs.

Failure to comply with the requirements of the OBCA may result in the Ministry of Consumer and Business Services dissolving the PREC, at which point the subject PREC must immediately cease to exist.

Moreover, complying with Ontario laws pertaining to the maintenance of corporate minute books is necessary to avoid a variety of problems, including both practical implications and legally-imposed penalties. Without a properly maintained corporate minute book, decisions made by the PREC will be barren of legal substance and, therefore, vulnerable to scrutiny from the Canada Revenue Agency and the courts.

A PREC that, without reasonable cause, fails to comply with the requirements of the OBCA to keep current and accurate records will be guilty of an offence, and may be liable to a fine of up to $25,000. The controlling real estate agent may also be found guilty of an offence and, on conviction, liable to a fine of up to $2,000 and, in extreme circumstances, imprisonment for a term of not more than one year.

Liability

The new provisions allowing for the incorporation of PRECs will not affect consumer protection, as PRECs remain subject to all professional and ethical obligations under REBBA. Even though services to clients will be provided through a PREC, the real estate agent will remain liable for said services and will be required to meet all associated obligations and responsibilities. If the PREC commits professional misconduct, the Real Estate Council of Ontario (RECO) may discipline the principal real estate agent and the PREC by way of suspensions, cancellations, or restrictions on either licence.

Conclusion

The T*ax Fairness for Realtors Act* (Bill 104), once passed to allow PRECs, will serve to align the rights of small business realtors with other regulated professions in Ontario. While Bill 104 has the potential to provide real estate agents with significant tax saving opportunities, there are numerous financial considerations that real estate agents will need to take into account before choosing to incorporate a PREC. The application process for licensing with respect to a PREC, while not yet specified, will be quite involved.

Real estate agents who are considering a PREC should seek professional legal advice. Blaney McMurtry LLP can assist real estate brokers who wish to establish a PREC. Blaney McMurtry LLP can ensure that the legal structure of the proposed PREC matches the business objectives of the real estate agent. Additionally, Blaney McMurtry LLP can ensure the PREC complies with all relevant laws and regulations, and takes advantage of all tax-planning opportunities. Subsequent to the passing of Bill 104, Blaney McMurtry LLP would be pleased to assist real estate agents seeking to establish a PREC.

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