RATIO

No. 9, SEPTEMBER 2010

Quarterly legal newsletter intended for accounting, management, and finance professionals

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NEW DEVELOPMENTS CONCERNING INSIDER REPORTING REQUIREMENTS

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This coming October 31, 2010 will mark a major milestone regarding insider reporting, as the deadline for filing insider reports will from now on be accelerated. We are providing herein the highlights of the new insider reporting regime.

These new requirements apply to insiders of corporations which are reporting issuers in the Canadian provinces (that is, mainly, but not exclusively, corporations whose securities are listed on a stock exchange).

Just as a quick reminder, an insider report is the report filed by an insider of a reporting issuer (an "**insider**") with the securities regulatory authorities to inform the public of the control or change in the control of an insider over the securities of an issuer. A "change in control" generally refers to the acquisition or disposition of newly issued securities, acquired on a market, through a private transaction or upon the exercise or conversion of a convertible security. A convertible security coming to maturity also constitutes a change in control. In practice, insider reports are filed electronically through the System for Electronic Disclosure by Insiders ("**SEDI**"). It is also through SEDI that the public may examine the reports of an issuer's insiders.

Introduction of a new concept of "reporting insider"

Insiders who are deemed to be "reporting insiders" are now required to file insider reports. Reporting insiders include, without limitation, the directors and certain officers holding a position with the issuer itself, with a significant shareholder of the issuer, or with a major subsidiary of the issuer.

Reporting insiders also include any individual who, in the ordinary course of his activities, receives or has access to undisclosed material information and exercises, or has the ability to exercise, significant power or influence over the issuer.

For the purpose of the definition of "reporting insider", a subsidiary is deemed to be a "major subsidiary" if it accounts for 30% of the assets (or the consolidated revenue) of the issuer.

Please note that a shareholder is deemed to be a "significant shareholder" when he beneficially owns, or has control or direction over, 10% or more of the voting shares of the issuer. However, in determining this 10% threshold, securities convertible into voting shares within 60 days held by the shareholders of the issuer will now need to be included.

What measures should be taken in response to the new requirements?

In the light of this new definition, issuers should ascertain who their "reporting insiders" are. More particularly, it will be important to identify the individuals who have access to undisclosed material information and can exercise power or influence over the insider.

Accelerated filing deadline for insider reports other than an initial insider report

With effect from October 31, 2010, any insider report other than an initial insider report must be filed within five (5) calendar days. The former 10-day filing deadline still applies to the filing of the initial report of a reporting insider.

Be careful!

In the event of a failure to file, an administrative penalty of $100 may be imposed by the competent securities authorities for each day the insider is in default, up to a maximum amount of $5,000. ◂

REVENU QUÉBEC BARES ITS TEETH AT RESTAURANT OWNERS

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For many years now, Revenu Québec has been grappling with a major problem in the restaurant industry: the sales zapper. This software, which can be installed on the computer system of a restaurant, allows its user to either make an invoice which has already been issued to a customer totally disappear or delete some of the items on the invoice so as to reduce its total amount. This scheme seems to be used by some restaurant owners to minimize their taxable income and retain the Quebec Sales Tax (**QST**) and the Goods and Services Tax (**GST**) paid by the customer. In order to counter the use of sales zappers, Revenu Québec recently implemented two concrete measures specifically aimed at the restaurant sector.

As one of these measures, ever since September 1, 2010, all restaurant owners in the province of Quebec must provide their customers with an invoice containing all of the required information, including the full name and address of the restaurant, a complete description of the customer's purchases, the total price of such purchases, as well as the QST and GST registration numbers of the restaurant owner. There are some exceptions. Particularly, this measure does not apply to establishments where 90% or more of total sales consist of alcoholic beverages, nor to amphitheatres if 90% or more of meals served are consumed in the stands.

As for the second measure, commencing on November 1, 2011, all restaurant owners in Quebec will be required to install a sales recording module (**SRM**) and provide all their customers with an invoice produced using this module. In addition to this requirement, restaurant owners will have to produce, using the SRM, a monthly report containing several items of information concerning the restaurant, including, among others, total sales and sales taxes charged. Restaurant owners will have to send this report to Revenu Québec each month. Revenu Québec will thus be able to compare the information contained in the monthly reports produced by the SRM with the QST and GST reports sent by the restaurant owner. This data will be compiled electronically so as to allow Revenu Québec to react quickly. Restaurant owners who do not comply with these new requirements expose themselves to heavy penalties and fines. It should be noted that restaurant owners who were subject to penalties imposed by Revenu Québec in the past, along with all new restaurant owners, are required to have the SRM installed by September 1, 2010.

At its last annual seminar, Revenu Québec announced that an extensive awareness campaign would be launched. One of the objectives of this campaign is to inform the public of the restaurant owner's obligation to provide customers with an invoice produced using the SRM. For this campaign, Revenu Québec is also banking on restaurant owners' fear of getting caught to get them to comply with the new requirements.

What will happen to restaurant owners whose reported sales dramatically increase when compared to those of last year following the installation of the SRM? Only time will tell! ◂

PLANNING FOR THE UNAVOIDABLE: THE USEFULNESS OF REVIEWING A SHAREHOLDER AGREEMENT'S REDEMPTION PROVISIONS IN CASE OF DEATH

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A shareholder agreement can be a valuable tool for governing the relations between individuals forming a partnership with a view to carry on a business, either directly or through management corporations or trusts. This type of agreement is not only useful for protecting their common and current interests; it can also be useful when a shareholder withdraws, including in the event of his death.

Indeed, when a shareholder dies, is it desirable for the surviving shareholders to have the estate of the deceased shareholder involved in the corporation, and participating in making important decisions, such as electing directors? It seldom is. Another aspect of such a situation – which needs to be thought out in advance – is the tax consequences of acquiring or buying back the deceased shareholder's interest.

Moreover, to avoid having the application of this type of provision put too heavy a financial burden on surviving shareholders, the shareholders of a corporation may agree in advance to take out insurance policies on each other's lives. The benefit of doing so is to make funds available on short notice for redeeming the shares of a deceased shareholder. The agreement may also set forth payout terms for a number of years to lighten the financial burden of the surviving shareholders.

These aspects of the provisions of a shareholder agreement which apply in case of death should be periodically reviewed to adapt to the evolution of a corporation. Have children of a shareholder became involved in the business of the corporation since the shareholder agreement was drafted? How has the value of the corporation's shares progressed? Is the life insurance coverage taken out to acquire or buy back the interest of shareholders sufficient in light of the increase in value of the corporation?

The tax consequences of the purchase/redemption of shares in case of death must also be reviewed and sometimes changes must be made to take into account new developments with regards to the corporation, its shareholders or sometimes amendments to tax laws. In the last few years, the exemption for capital gains increased from $500,000 to $750,000, the taxation of dividends underwent major amendments which introduced two separate regimes depending upon the account from which the dividends originate and various other tax measures which may have an impact on the purchase/redemption provisions have been enacted.

For all these reasons, it may be risky to postpone the review of the provisions pertaining to the purchase/redemption of shares in case of death.

Drafting and reviewing an adequate shareholder agreement is not an easy job and neither is keeping it up-to-date. Consulting legal counsel is essential for determining which structure should be implemented to adequately meet the needs of a corporation. ◂

SPEECH IS SILVER, SILENCE IS GOLDEN... WHAT ABOUT SECRECY?

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In a previous RATIO[1] article, we analyzed the principles to follow in managing tax documentation. However, certain documents may be out of the reach of tax authorities.

The lawyer-client privilege is a bulwark erected by the constitution of our country against the incursion of governmental authorities, particularly tax authorities, in the affairs of both individuals and businesses. This privilege allows taxpayers to freely exchange information with their lawyer to obtain clear advice which takes into consideration all the facts, even those which may be detrimental to the taxpayer. When the lawyer-client privilege is applied to documents, under no circumstances can tax authorities obtain copies of them or have their contents disclosed.

The lawyer-client privilege does not apply to all documents. Generally, it applies to documents which meet the three (3) following conditions:

- It must be a communication between a lawyer and his client;
- The communication in question must be of the nature of a consultation or of legal advice;
- The parties (the lawyer and his client) must consider the communication as confidential.

Many documents coming from a lawyer meet these three (3) conditions and are therefore out of the reach of tax authorities. In the area of tax law, memoranda pertaining to a reorganization as well as legal opinions dealing with one or several tax issues are good examples.

However, there are several exceptions to the lawyer-client privilege. Examples include advice from a lawyer of a non-legal nature, communications which have been disclosed to other persons (therefore not confidential) and communications aiming to facilitate or promote unlawful acts. In the tax area, the disclosure of a document to persons other than the client is one of the most frequent causes for losing the lawyer-client privilege.

The litigation privilege is a concept that is separate from the lawyer-client privilege. This concept generally means that any document prepared by a lawyer, along with communications from a third party to a lawyer, are covered by a confidentiality privilege provided they pertain to preparations for litigation.

The lawyer-client privilege and the litigation privilege may turn out to be very important and even determinant in the event of an audit by tax authorities or litigation pertaining to a tax issue. It is therefore advisable to act in all circumstances in such a way as to retain these privileges, and to rely on the procedures generally provided for in the tax laws to invoke them and ensure that they are respected by tax authorities. This requires taxpayers and their advisers to show a great deal of prudence in their dealings. ◄

1 *Words Vanish: Documents Must be Managed Properly.* Ratio, number 6 December 2009, lavery.ca/upload/pdf/en/RATIO_091202A.pdf.

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