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Contents

ERRATUM

In Ratio no. 12, June 2011, in "Foreign Reporting: a Costly Oversight", under the heading "Beware of the penalties!", "T1135" should have been "T1134".

ENGAGING IN ACTIVITIES AS A DEALER OR ADVISER: AM I REQUIRED TO REGISTER?

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In Quebec there are many complex registration categories for acting as a securities representative. According to the type of securities involved, these obligations are found in various statutes (particularly the *Securities Act*, the *Act respecting the distribution of financial products and services* and the *Act respecting insurance*) and supervised by various bodies (the Autorité des marchés financiers, the Investment Industry Regulatory Organization of Canada, the Chambre de la sécurité financière and the Mutual Fund Dealers Association of Canada). This range of often complex and voluminous statutes, regulations and policies multiplies the risks for a professional to be deemed to act as a securities representative in violation of applicable regulations.

On September 28, 2009, in order to harmonize the registration categories across Canada, the Canadian Securities Administrators (CSA) adopted *Regulation 31-103 respecting Registration Requirements, Exemptions and Ongoing Registrant Obligations* (Regulation 31-103). Since Regulation 31-103 came into force, the registration requirement is defined based on the activity carried out by a person rather than on the transaction conducted, as was the case under the former regime.

To determine whether to register, a natural person or a corporation must consider whether they engage in trading or advising activities. According the CSA, a professional must particularly consider the following factors in determining whether he engages in trading or advising activities: (i) engaging in activities similar to a registrant; (ii) intermediating trades between a seller and a buyer; (iii) carrying on the activity with repetition (the activity does not have to be the sole or primary endeavour); (iv) receiving a compensation, particularly if it allows the person to make a profit; and (v) soliciting.

The CSA also indicated upon adopting Regulation 31-103 that accountants who may provide advice on securities in the normal course of their professional activities are generally not considered to be advising on securities for a business purpose because (i) they do not regularly advise on securities; (ii) they are not compensated separately for providing such advice; (iii) they do not solicit clients on the basis of their securities advice; and (iv) they do not hold themselves out as being in the business of advising on securities.

In other respects, referral arrangements, (i.e. an agreement in which a person who is not registered refers a client to a registrant (or vice-versa) for which he receives a fee) being increasingly used by the professional of the industry, the CSA decided to regulate them for the first time across Canada when adopting Regulation 31-103. Although the CSA are concerned by the existence of referral arrangements where only one party is a registrant, this way of doing business seems to interest certain professionals such as accountants.

It is important to know that the content of these agreements is henceforth regulated, even if they were entered into prior to Regulation 31-103 coming into force. Therefore, under the regulation,

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the agreement must: (i) be established in writing; (ii) indicate the nature of the services; (iii) indicate the conflicts of interests and (iv) indicate the method for calculating the fee[1]. A copy of the agreement must be provided to the client. Lastly, the person referring a client must also ensure that the person receiving the referral is appropriately qualified to provide the services and, where required, duly registered for doing so.

Therefore, an accountant straying from his traditional role must be prudent and make sure he does not contravene regulations. ◂

1 It must be noted that certain professional corporations forbid their members to pay reference fees for obtaining new clients. Such is particularly the case for certified accountants and certified general accountants.

A CORPORATION'S UNANIMOUS SHAREHOLDER AGREEMENT NOW AVAILABLE TO ITS CREDITORS

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The coming into force of the *Business Corporations Act* (Quebec) (the "**BCAQ**") on February 14, 2011 constitutes without a doubt a major step in the modernization of corporate law in Quebec. Changing the entire legal environment of Quebec corporations, certain new features introduced under the BCAQ, however, raise issues.

Greatly inspired by the federal model, the BCAQ now allows the creditors of a corporation to consult any unanimous shareholder agreement. It should be noted that under the BCAQ, all the shareholders of a corporation may agree in writing among themselves or among themselves and one or more third persons to restrict the powers of the board of directors to manage, or supervise the management of, the business and affairs of the corporation, or to withdraw all such powers from the board. As corporations are required to declare to the enterprise registrar of Quebec the existence of a unanimous shareholder agreement entered into in accordance with the laws of Quebec or a Canadian jurisdiction other than Quebec, that restricts the powers of the directors or withdraws all powers from the directors, a corporation's creditors may henceforth become aware of the existence of such an agreement by consulting the enterprise register.

According to the comments issued by the Minister of Justice in the context of the work surrounding the coming into force of the BCAQ, the adoption of such a measure in Quebec's corporate law is justified by the importance for the creditors of a corporation to be aware of a document which may give to shareholders powers and responsibilities which are generally entrusted to the board of directors. Indeed, restricting or withdrawing the powers of the board of directors pursuant to a unanimous shareholder agreement transfers the statutory liability of the directors to the shareholders.

However, this change to corporate law raises issues for both those who are already parties to a unanimous shareholder agreement and those who contemplate entering into such an agreement. Unanimous shareholder agreements generally contain both provisions restricting and withdrawing the powers of the board of directors and provisions governing the relationship of shareholders among themselves, particularly clauses dealing with the death of a shareholder and rights of preference. Although it may be justified that creditors be advised of the transfer of the powers and responsibilities of the board of directors or a corporation to its shareholders, such is not necessarily the case for the other provisions of a unanimous shareholder agreement, which may be of a confidential nature. The question then arises as to whether creditors may consult all the provisions of a unanimous shareholder agreement or only those withdrawing or restricting the powers of the board of directors.

Of course, it is possible to split the unanimous shareholder agreement into two separate documents. An autonomous agreement containing the clauses which restrict or withdraw the powers of the board of directors could be consulted by the creditors while another separate agreement, which would not be accessible to the corporation's creditors, could contain provisions dealing with other matters. However, this way of doing things is not necessarily practical or essential. Indeed, depending upon the contents of the unanimous shareholder agreement and the level of sensitivity of the information set out in the agreement, other avenues are possible.

If you wish to review your unanimous shareholder agreement in the light of the new legislative provisions described above, we invite you to contact us before your creditors invoke them! ◂

INVOICES OF CONVENIENCE AND ACCOMMODATION

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You probably noticed that the Quebec Revenue Agency ("**QRA**") intensified its audits in order to detect schemes involving invoices of convenience and accommodation. According to the QRA, these schemes consist in a taxpayer registered under the *Québec Sales Tax Act* ("**QSTA**") and the *Excise Tax Act* ("**ETA**") (the "**Issuing Corporation**") issuing an invoice to another taxpayer who is also registered under the QSTA and the ETA for services that were never rendered by the Issuing Corporation. The Issuing Corporation receives the payment of the invoice by cheque and, in most instances, makes no remittance of GST/QST to the QRA. Thereafter, the Issuing Corporation makes a cash payment to the other corporation or its management for the value of these fictitious services. The presumed benefit for the Issuing Corporation is that it keeps the amount of the taxes it collected and, for the other corporation, the benefit is to presumably pay undeclared compensation to employees or benefits to its shareholder.

Such a scheme assumes that the officers of both corporations are conniving. However, a corporation doing business legitimately may unwittingly grant a subcontract to an "accommodating" corporation. In such a case the QRA may deny the legitimate corporation input tax credits ("**ITC**") and/or input tax rebates ("**ITR**"), alleging its involvement in the scheme or the fact that the services were not actually rendered. It may then be very difficult for the legitimate corporation to demonstrate that the services have been rendered by the "accommodating" corporation since the legitimate corporation does not necessarily possess all the relevant information on the "accommodating" corporation or the "accommodating" corporation's officers can no longer be found on account of the time elapsed between the transaction in question and the time when the QRA informs the legitimate corporation.

In this context, we want to bring to your attention a recent decision of the Tax Court of Canada ("**TCC**") which has been appealed before the Federal Court of Appeal ("**FCA**") in the case of *9005-6342 Québec Inc.* v. *The Queen*. In this case, 9005-6342 Québec Inc. ("**9005-6342**") filed an interlocutory motion before the TCC seeking the issuance of an order to have the QRA communicate, in its capacity as agent of the Canada Revenue Agency, the audit files of various subcontractors who dealt with 9005-6342, as well as the details and various tax documents filed by the subcontractors with the CRA. The purpose of this motion was to obtain the documents on which the Minister was relying to establish the new assessment against 9005-6342, respecting which the latter had filed a notice of objection. In fact, the CRA had relied in part on these documents to allege that 9005-6342 had participated in a scheme involving invoices of convenience and accommodation. The TCC ruled that 9005-6342 was entitled to obtain the documents requested in its motion, particularly since they were necessary to refute the allegations of the CRA that 9005-6342 had participated in transactions involving invoices of convenience and accommodation.

The TCC decision was confirmed in part by the FCA, which ruled that 9005-6342 was entitled to obtain the audit files of the subcontractors. However, the FCA denied 9005-6342 the right to obtain the details of the directors, shareholders and officers of the subcontractors on the ground that it had not conducted prior reasonable searches to find them, also mentioning that it would have granted this right if 9005-6342, through its employees, had done so. This decision is significant since it is very difficult to trace defrauding subcontractors in this type of situation. ◂

THE IMPORTANCE OF WRITTEN CONTRACTS RESPECTING INTELLECTUAL PROPERTY OR THE ART OF LEAVING TRACES

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A business leader will usually pay attention to the legal documentation prepared by his legal counsel respecting the intellectual property of his concern only if he thinks that such documentation will protect his interest against abuse or damages which may result from the actions of a third person. However, the contract or legal document may play more than a defensive role. It can even become essential to evidence the existence of a transaction and prevent significant tax costs.

To illustrate this, we may consider transactions involving intellectual property transfers between related corporations. Although the registration of such intellectual property with the Canadian Intellectual Property Office may facilitate the determination of the identity of its owner, there are many types of intellectual property which generally are not registered (copyrights, trade secrets, knowhow). It is therefore crucial for a corporation to properly document the transfers of this type of assets, whether between subsidiaries or affiliates or unrelated persons. The same applies respecting the assignments of rights between an inventor or an author of intellectual property and his employer. Appropriate documentation allows for being able to demonstrate at any time who is the true owner of the intellectual property.

Taxes may be payable in the context of a transfer of intellectual property and their amount depends upon the value of the transferred intangible asset. Royalties may also have to be paid between affiliates. To the extent that the transfer is not sufficiently documented, a doubt may possibly occur as to the identity of the owner of a specific item of intellectual property.

If this doubt exists on account of the absence of documentation providing clear evidence of the property right transfer, the true owner of the item of intellectual property may be unable to demonstrate that it truly owns such item or to sufficiently substantiate ownership. Such may particularly be the case in the context of an unregistered intellectual property right which would have been assigned by the inventor or author to his employer under vague wording in an employment contract signed many years ago. Subsequent transfers or corporate reorganizations may render the title chain of the item of intellectual property impossible to follow. This may make the true owner vulnerable if it becomes the subject of a tax audit, as a tax authority could maintain that a transfer occurred after the time where it actually took place. One rapidly realizes the consequences of such an allegation if, on the date at which the authority maintains that the transfer occurred, the value of the asset was significantly higher than at the time the transfer actually took place, bringing about costly tax consequences for the corporation in question.

In order to prevent this type of situation, it is therefore advisable, even in the context of transactions between affiliates, where no dispute is anticipated or conceivable and the contract is not defensive in nature, to properly document all intellectual property rights assignments in order to be able to easily demonstrate the existence of a transaction pertaining to these rights. Legal counsel should be involved, not only in the context of a transaction with a third person, but also in any internal transaction which may result in legal and tax consequences. ◂

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