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Seasons Greetings!

Welcome to the Winter 2012 edition of our Client Update Newsletter.

With the holiday season around the corner and the end of 2012 in sight, we look forward to spending time with loved ones, celebrating our personal and professional successes, and looking for opportunities for improvement in the year to come. This is what makes this time of year so exciting. While we can appreciate what we've achieved, rather than look behind us, we look forward – to a New Year and new possibilities.

To help us all prepare for what's in store in 2013, we have compiled this newsletter with information and updates that will impact you and your business in the New Year.

On behalf of WeirFoulds, we wish you a very Happy Holidays, and a Happy New Year!

Lisa Borsook
Managing Partner



What You Need to Know: Changes to Ontario's Estate Administration Tax Act

Lori Duffy

The holiday season offers a rare opportunity for family members to come together to discuss important issues, including the often uncomfortable topic of estate planning. This year, it is important for testators and those they will appoint as their estate trustees to broaden that discussion to include Bill 173 (*Better Tomorrow for Ontario Act (Budget Measures), 2011*) and its impact on estate administration. Amendments introduced by Bill 173 were incorporated into the *Estate Administration Tax Act* (the "**Act**"), with some significant changes coming into force on January 1, 2013.

Background

In Ontario, when a person dies, an estate trustee is usually appointed to administer the deceased's estate. This includes, among other things, gathering the deceased's

assets, paying his or her debts, and distributing the balance of the estate to beneficiaries.

The estate trustee may be required to apply for a Certificate of Appointment of Estate Trustee ("**Certificate**") from the Ontario Superior Court of Justice to provide evidence of authority to deal with the estate's assets. Upon such application, estate administration tax ("**EAT**") must be paid on the value of the assets in the deceased's estate that are included in the application. If the value is based on estimation, it is now customary that the estate trustee provide a signed undertaking to file a sworn statement of the actual total estate value when determined, and to pay additional EAT if the value was underestimated.

Changes to Estate Administration Tax Act Effective January 1, 2013

The jurisdiction for the collection of EAT will now lie with the Ministry of Finance, rather than the Ministry of the Attorney General. For applications made on or after January 1, 2013, estate trustees applying for a Certificate may be required to provide the Minister of Revenue with information about the deceased's assets as prescribed by the Minister of Finance.

It is not clear what this information will be as regulations are not yet available, but it is possible that an inventory of assets owned by a deceased person, as well as valuations and appraisals, may be required. The estate trustee will need to provide such information within the time, and in the manner, as decided by the Minister of Finance.

The Minister of Revenue now has the power to assess and reassess an estate, in respect of its EAT payable under the Act, within four years after the day the tax becomes payable.

What does this mean?

The job of administering an estate is becoming more difficult and it is now more crucial than ever for estate trustees to obtain accurate information and supporting documentation proving an estate's value. If false or misleading statements are provided, the estate trustee may be fined and/or imprisoned for up to two years.

To help ease this process, testators may want to start thinking carefully about who to appoint for this difficult task, and keep records and documentation about their assets to assist in providing an accurate valuation.

Perhaps more importantly, greater attention should be given to estate plans to try and avoid the need for a Certificate at all. An estate lawyer can help. WeirFoulds would be pleased to assist.

TSX Toughens Rules for Director Elections

Ian Mitchell and Kim Lawton

For companies listed on the Toronto Stock Exchange ("TSX"), the New Year will bring new rules for director elections. Effective December 31, 2012, the TSX will be strengthening corporate governance standards by incorporating changes to the TSX Company Manual (the "Manual") which will, among other things, require the election of directors to occur on an individual basis. The changes will also mandate disclosure of all voting results and whether a majority voting policy has been adopted.

Electing Directors Individually

The TSX believes that the election of directors on an individual basis provides insight into the level of support that each director enjoys. Slate-style voting permits the election of a fixed group of directors on an all or none basis, which considerably circumscribes voter choice. At the same time, slate-style elections ensure that there is an appropriate total number of directors elected as well as an appropriate number of directors with particular qualities (i.e. Canadian resident status, Audit Committee qualified, etc.).

Disclosure of Director Voting Policies in Management Information Circulars

Issuers will also now be required to disclose their adoption or non-adoption of a majority voting policy in their Management Information Circulars. The TSX is also considering adopting a rule requiring Issuers to formally adopt a majority voting policy. The current version of the amendments was open for comment until November 5, 2012, and the proposed effective date for adopting a mandatory majority voting policy could be as early as December 31, 2013.

Advising the TSX if a Director Receives a Majority of "Withhold" Votes

According to the TSX, majority voting policies support good governance by (i) providing a way for security holders to signal their support for each individual separately and (ii) requiring Issuers

to examine directors that do not have the support of the majority of security holders. Under the current rules, when an uncontested election is held, even if a director receives a majority of "withhold" votes, that individual is validly elected. The Amendments will require that, in such a situation, the TSX be notified and a discussion between the Issuer, director, and regulator will take place.

Promptly Issuing a News Release Providing Detailed Disclosure of Voting Results

Following each meeting of security holders at which there is a vote on the election of directors, Issuers will be required to disclose the detailed results of the vote in a news release. Securities laws already mandated non-venture reporting Issuers to file a report of voting results that discloses the outcome of each vote at a meeting of security holders, so the change will have minimal effect.

Personal and Ethical Use of Work Computers

John Wilkinson and Albert Formosa

Computers dominate the workplace. And, with increasing use comes increasing computer-related workplace issues. Recent case-law in Canada suggests that employers should be reviewing or instituting a number of policies to address these issues.

Policies for Personal Use

Does your workplace have a policy regarding the personal use of work computers? The recent case of *R. v. Cole* suggests that such a policy should be in place and should address the extent to which an employee can reasonably expect privacy of personal information stored on a work computer. The *Cole* case involved a teacher who stored inappropriate material on his work laptop computer. This material was discovered during a school board check of his saved computer files, and was then the subject of a police search of the computer.

In the Supreme Court of Canada's consideration of the validity of the

Leadership Speaker Series - Coming up in 2013!

WeirFoulds brings you a brand new speaker series in 2013 focusing on leadership.

Here are the details for the inaugural Leadership Speaker Series event.

Date: Tuesday, January 8, 2013

Time: 7:30 a.m.

Location: The National Club, Toronto

Featuring: Paul Godfrey, President and CEO, Postmedia Network;
Chair, Ontario Lottery and Gaming Corporation

Look for your e-mail invitation in the coming weeks! To RSVP now, e-mail events@weirfoulds.com

police search and of the teacher's reasonable expectation of privacy of files on the work computer, the Court determined that a factor (albeit not a determinative factor) to be considered was the existence of a workplace policy regarding employer monitoring of the employee's work computer. The Court provided that workplace policies may diminish an employee's expectation of privacy in the work computer, but that they do not remove them entirely. The employee may still have a reasonable but "diminished" expectation of privacy.

The Court concluded that the totality of the circumstances, including the policies, practices, customs and "operational realities" of the workplace, must be considered in order to determine whether privacy is a reasonable expectation in the particular situation. Accordingly, an employer may wish to review the policies, practices and operational realities regarding personal use of work computers to ensure that they are consistent with the employer's goals.

Intrusion Upon Seclusion

Another recent case has highlighted the need for employers to consider the implementation or review of a 'Code of Conduct' or a 'Systems Use Policy'. Specifically, *Jones v. Tsige* involved a bank employee who, against her employer's 'Code of Business Conduct and Ethics', looked at the banking information for her ex-husband's partner 174

times. In its decision, the Ontario Court of Appeal determined that the employee's surreptitious viewing of that information amounted to a legal wrong which the Court dubbed "intrusion upon seclusion". The Court specifically mentioned the employer's 'Code of Business Conduct and Ethics' and that the employee had admitted that her actions were contrary to it. The Court also noted (as an aside) that the "rogue" employee's actions contrary to the bank's Code might have provided the bank with a complete answer to a complaint made under the federal privacy legislation, the *Personal Information Protection and Electronic Documents Act (PIPEDA)*.

Given these two cases, employers should introduce, or review existing, policies, codes, practices and operational realities concerning both the personal use of work computers and proper and ethical conduct related to work computers and systems. In this context, care should be taken so that new or amended policies, practices and procedures are effective, practical and understandable, so that they can be relied upon when needed.

The Retail Sales Act Still Has Some Teeth Under HST

Diana Yeung

Effective July 1, 2010, Ontario harmonized its retail sales tax (RST) with the federal goods and services

tax (GST) to form a harmonized sales tax (HST). However despite harmonization, some rules in Ontario's *Retail Sales Tax Act (RSTA)* continue to have application today.

Bulk Sales - Agreements on or before March 29, 2011

Section 6 of the RSTA requires each person who disposes of "stock through a sale in bulk to which the *Bulk Sales Act, Ontario* applies" to obtain a Clearance Certificate from the Ministry of Finance before the disposition, where the sale is pursuant to a written agreement entered into on or before March 29, 2011. In most cases, the sale of all or part of a business will trigger the application of the *Bulk Sales Act, Ontario*.

The purpose of section 6 is to ensure that all RST collectable or payable by the seller is remitted to the government before the sale or closure of a business. To achieve this, section 6 requires the purchaser to obtain a copy of the Clearance Certificate from the seller. Failure to do so will cause the purchaser to be liable for any RST owing by the seller at the time of the sale.

If RST is owed by the seller, the Ministry of Finance may require funds to be held back from the proceeds of the sale prior to issuing the Clearance Certificate. Alternatively, the seller may be asked to agree in writing to a condition being placed on the Clearance Certificate.

Despite the foregoing requirements, the seller and the purchaser may agree to proceed with the sale without obtaining a Clearance Certificate from the Ministry of Finance. Doing so, however, puts the purchaser at risk of being liable for any RST owing by the seller as of the date of the sale and should be avoided if possible.

Taxable Insurance Premiums

Insurance premiums are exempt from GST and consequently, receive the same treatment under HST. However, since RST applied to premiums for certain types of insurance prior to harmonization, the Ontario government decided to continue applying RST at a rate of 8% to premiums on the same types of insurance (e.g. group insurance, benefit plans, insurance schemes/compensation funds established under any Act of Canada or Ontario).

Insurance that was previously exempt from RST, such as automobile insurance premiums, continue to be exempt from RST after harmonization. Certain costs and fees, such as administration fees for benefit plans, are exempt from RST since they are taxed under HST.

Private Sales of Specified Vehicles

While HST now applies to purchases of specified vehicles (e.g. motor vehicle, off-road vehicles, motorized snow vehicles, aircrafts or vessels) from a GST/HST registrant, RST at a rate of 13% continues to apply to purchases of specified vehicles from a person who is not a GST/HST registrant, with some exceptions (e.g. transfers between family members, etc.).

CONTRIBUTORS



Lori Duffy heads the firm's Estates, Trusts and Charities practice. She has been named by *Best Lawyers®* as one of the best lawyers in Canada in her practice area.



Albert Formosa practises in the area of commercial litigation with a particular interest in copyright, trademark, and information technology.



Kim Lawton's practice focuses on corporate finance, securities, mergers and acquisitions, and corporate governance.



Ian Mitchell's practice is focused on corporate finance and securities, with an emphasis on public and large private company transactions and advice.



John Wilkinson practises corporate and commercial law for businesses and not-for-profit institutions. His experience spans the healthcare sector, IP/IT and privacy, education and sports law.



Diana Yeung is a lawyer with the firm's corporate practice where she provides advice on a broad range of income and commodity tax matters for domestic and international clients.



We would love to hear from you!

We invite your feedback, and welcome ideas for topics that may be of interest to you. Please contact Colleen Harasymchuk at charasymchuk@weirfoulds.com.

ABOUT THIS NEWSLETTER

For over 150 years, the lawyers of WeirFoulds have been proud to serve our clients in their most difficult and complex matters. We are the firm of choice for discerning clients within our core areas of practice: (1) Litigation; (2) Corporate; (3) Property; and (4) Government Law. Within these core areas, as well as key sub-specialties, we address highly sophisticated legal challenges. We have acted in some of Canada's most significant mandates and have represented clients in many landmark cases. Reflecting the firm's focus, our lawyers are consistently recognized as leaders in their chosen areas of practice and in the profession at large. To learn more about our firm, visit www.weirfoulds.com.

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