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New in Quebec: Introduction of Private Issuer Exemption

Introduction

On September 14, 2005, a new prospectus and registration exemption regime came into effect in Quebec. Numerous changes have been introduced by the new securities legislation affecting both public and private companies. Our purpose here in this article is to summarize some of the elements regarding the *private issuer* as it relates to articles of incorporation.

How it all began

The initiative began with the Canadian Securities Authorities which published *National Instrument 45-106 Prospectus and Registration Exemptions* ("NI 45-106"). NI 45-106 harmonizes and consolidates in one instrument a number of prospectus and registration exemptions available in the various provinces and territories in Canada. Under the old regimes, most jurisdictions had similar but not identical set of exemptions and companies wishing to effect a multi-jurisdictional exemption distribution in Canada had to comply with the various regimes in the different jurisdictions.

Impact in Quebec

In Quebec, the new regime came into force in the form of *Regulation 45-106 respecting prospectus and registration exemptions* ("Regulation 45-106"). An *Act to amend the Securities Act and other legislative provisions* (S.Q. 2004, c.37) introduced as Bill 72, brought changes to the *Securities Act* (R.S.Q. c. V-1.1) with respect to the various exemptions, and the *Regulation to amend the Regulation respecting securities* proposed amendments in parallel with Bill 72 to reflect the implementation of the new rules.

Private Issuer Exemption

The private issuer exemption introduced in Quebec replaces the closed company exemption. Pursuant to section 2.4 of Regulation 45-106, a company is considered a private issuer and thus exempt from filing a prospectus if:

- 1) its securities, other than non-convertible debt securities, are subject to restrictions on transfer that are contained in the constating documents or security holders agreement;
- 2) its securities are beneficially owned by not more than 50 persons; and

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Charles Dickens

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3) it has distributed securities only to a select group of persons described in section 2.4 of Regulation 45-106.

Proposed Amendments

Following our discussions with other legal professionals in corporate law, undoubtedly there will be a number of ways to modify the schedules, each client adopting his or her own model. We have amended our standard Schedule 3 (Other Provisions) or Schedule 4 (for IncoWeb® users) in a way that we believe best meets the needs of our clients as a whole. For instance, the second and third conditions are not required to be in the articles but removing them altogether may leave a false impression to some that these conditions no longer apply. Quite the contrary, a company must comply with all three conditions to be considered a private issuer and thus take advantage of that exemption.

We dealt with each condition as follows:

Restrictions on transfer of securities

Section 2.4 of Regulation 45-106 refers to the term *securities* which is broader in scope and includes shares. We decided to leave as is our Schedule 2 pertaining to restrictions to the transfer of *shares* and not combine the terms *shares* and *securities* in the same schedule for the simple reason that both federal and provincial articles of incorporation forms and the corresponding provisions in the *Canada Business Corporations Act* and the *Quebec Companies Act*, refer specifically to *shares*. Nonetheless, as this first condition is the only one required in the articles, we decided to add the provision with respect to the restrictions on the transfer of *securities* in Schedule 3.

Limit of security holders to 50

We adapted the original text by conforming to the new language of section 2.4 such as “security holders” instead of “shareholders”. As mentioned before, this condition is not required in the articles of incorporation, but it may be useful to have it in Schedule 3 as a reminder that a company must respect this condition too if it is to be considered a private issuer.

Limitation to distribution of securities

Gone is the provision on the prohibition of public distribution of shares and replaced by the distribution of securities made to a select group of persons listed in section 2.4, such persons not considered members of the public. Again, this limitation is not required in the articles, but it serves as a reminder to a company when comes time to issue shares or other securities.

This condition was cause for additional discussion – how to ensure it is observed when the company issues shares? Without placing the burden on the board of directors, we elected to add a statement to our standard subscription letter in which the subscriber declares and identifies himself or herself to be one of the persons among those mentioned in section 2.4 of Regulation 45-106.

Conclusion

To obtain a copy of Regulation 45-106, we refer you to the web site of the *Autorité des marchés financiers* at <http://www.cvmq.com/fr/publi/bulletin.asp?no=329&affBulletin=true>

We invite all our clients to take this opportunity to review their own schedules and all other corporate documents to ensure that they comply with the new securities legislation now in effect in Quebec and to advise their own corporate clients on the impact of such legislation.

Should you wish to discuss this matter further or have any questions, please feel free to contact Ms. Franca Sucapane (ext. 328) or Mr. Richard Gareau (ext. 338).



New Service in IncoWeb®: Declaration of Registration and Initial Declaration Online! *

You can now fill out a declaration of registration or an initial declaration online and then send it to CRAC via IncoWeb®. This new service is added on to the services already available in IncoWeb®: federal and provincial incorporations as well as TaxExpress™ service (obtaining tax numbers).

Here is a list of the advantages this new service gives you:

- ❖ Eliminate double data entry: If you have incorporated through IncoWeb® and wish to fill out a declaration online, you eliminate double data entry as the system will duplicate information that is relevant for the declaration, thus saving you precious time.
- ❖ Automatic validation: The system performs an automatic validation of the minimum data requirements before sending to CRAC, thus avoiding any unnecessary delay.
- ❖ Review the declaration before transmitting: You can review your declaration to ensure it is complete and print a copy for your records in PDF format.
- ❖ Save your declaration: Files can be saved, retrieved and modified as many times as you would like.
- ❖ Fast filing: After transmitting to CRAC, your declaration is verified by one of our qualified technicians and filed promptly with the Registrar's office.
- ❖ Savings: You save \$10 on our service fees when you send us your declaration online for filing.

Client Assistance

If you require assistance in our system IncoWeb®, you can reach us between 8:30 a.m. and 5 p.m. by calling 514-861-2722 or toll-free 1-800-361-5744. Any e-mail requests can be sent to crac@crac.com

(*)Note: Currently, our system only allows for registration of legal persons (companies). Declarations of registration for other entities (i.e.: sole proprietors and partnerships) will be available shortly.

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