Minden Gross LLP

Winter 2014

TOPICS:

3 Smart Ways to Tap Into Your RRSP

It's a new year, and with it, the RRSP catch-up season begins. The holiday decorations will soon be replaced with reminders to get your RRSP contributions ready for the 2013 year. But some of you may be thinking the opposite – maybe you've decided to buy a house and need to get some extra funds into your hands. Or perhaps you've decided to go back to school this year and wonder how you're going to pay for tuition. Well we all know the cardinal rule relating to RRSP withdrawals before maturity: DON'T DO IT! The tax hit on withdrawals from your RRSP has always been a huge obstacle to a source of cash. However, there are three strategies that effectively allow your RRSP to make a "loan" to you, rather than an actual withdrawal: the **Home Buyers' Plan**, the **Lifelong Learning Plan** and the **RRSP Mortgage**. These strategies may not always make sense; however, when compared to an out-and-out withdrawal, they usually do, since you have a chance to restore the withdrawal to your RRSP without penalties.

The Home Buyers' Plan

If you need money from your RRSP because you are buying a home, this plan is the alternative to an out-and-out withdrawal. A tax-free withdrawal of up to $25,000 can be made under the "Home Buyers' Plan." Basically, the withdrawal is designed to apply only if you - and your spouse, if married legally or common-law - are "first-time" home buyers (a five-year look-back rule applies - see below). The withdrawal must be repaid in equal installments over 15 years - to the extent that a minimum repayment for a year is *not* made, the shortfall is taxed in your income. The 15-year repayment period commences in the second calendar year following the calendar year of the RRSP withdrawal, but payments made in the first 60 days of a year count as repayments for preceding year. For example, if you make a withdrawal in 2011, you must commence making RRSP repayments under the Home Buyers' Plan by March 1, 2014.

There's no specific restriction on "doubling up" on the withdrawal e.g., where a home is held in co-tenancy. For example, a husband and wife may together withdraw up to $50,000 (i.e., up to $25,000 from each spouse's plan).

You're generally eligible for the plan provided that:

- you've never participated in the program before;
- you've signed an agreement to build or purchase a qualifying home;
- the home (or a replacement property) is bought or built by October 1 of the year following the year in which you've received the funds from the RRSP (extensions are available in some instances); and
- you intend to occupy the home as your principal place of residence within one year of buying or building the home.

Finally, a "look-back" rule prohibits ownership of an owner-occupied home by you or your spouse (including a "common-law" spouse) for a period of five years or so.

Is a Home Buyers' Plan withdrawal a good idea?

The big problem with the home buyer's plan is that you could be caught in a cash-flow crunch that could lead to tax penalties down the road. Firstly, the cash-flow drain due to repayments to the plan may impinge on your ability to make your regular - tax-deductible - RRSP contributions in the future. So, without the RRSP write-off, your tax bill could go up. Worse still, if the required Home Buyers' Plan repayment - which is not deductible - is not made on a timely basis, then you'll suffer a further taxable benefit. Even harsher rules may apply if you pass away or cease to be a Canadian resident. (Note: Restrictions apply to deductions for ordinary RRSP contributions if made less than 90 days before the withdrawal.)

If you or your spouse are about to drop into a low tax bracket (e.g., there are plans to retire from the workforce), the Home Buyers' Plan may make more sense. For example, the taxable benefit resultant from non-repayment may result in little or no adverse tax consequences under these circumstances.

Having said this, participating in a Home Buyers' Plan is usually a better bet than an outright withdrawal from your plan, which is a straight add-on to your taxable income in the year of withdrawal.

The Lifelong Learning Plan

Tax-free withdrawals from RRSPs are also allowed to support what the government calls "lifelong learning." Taking a page from the "Home Buyers' Plan," you can withdraw up to $10,000 per year from your RRSP, to a maximum of $20,000 over a 4 year period, if you or your spouse is enrolled in a qualifying educational or training program (normally full-time for at least three months during the year).

Withdrawals are repayable to the RRSP over a period of 10 years in equal installments; otherwise there will be a taxable benefit. Repayments must normally commence in the year following the last year of full-time enrolment, or in the sixth year after the first withdrawal, if earlier.

Is a Lifelong Learning withdrawal a good idea?

The answer is fairly similar to the Home Buyers' Plan. Having to fund RRSP repayments will, no doubt, interfere with your ability to make regular - *tax-*

deductible - RRSP contributions. This problem could come at a time when you're in a higher tax bracket than when the RRSP withdrawal was made. If this is the case, it may often make sense to "pass up" the "lifelong learning" opportunity and make an *ordinary* taxable withdrawal from your RRSP to fund education, then make a regular *tax-deductible* contribution when the workforce is re-entered. The basic personal exemption will now cover off $11,138 (for 2014) of taxable income, not to mention tuition and education tax credits which may also be available to shelter the withdrawal.

The RRSP Mortgage

The Home Buyers' and Lifelong Learning Plans are not true loans (instead, tax penalties apply if you don't restore the funds to your RRSP within applicable time limits) - but the RRSP mortgage is. You can take out a loan from your RRSP provided that it is insured by the CMHC or a public mortgagor insurer (such as Genworth Financial Canada or AIG United Guaranty Canada). This is an exception to the rule that an RRSP cannot hold the mortgage of the plan-holder or a family member.

You might use your loan to pay down your mortgage. So instead of paying mortgage interest to the bank, you pay yourself. In this case, your benefit is largely based on the difference between the interest rates you'd otherwise pay on your mortgage (i.e., this is what you "save") and the return you'd make on your RRSP if you didn't follow this strategy. In addition, if you are paying more into your RRSP than the return you would make on a conventional investment, you will have more money compounding in your plan on a tax deferred-basis.

There is no tax rule that you have to use your RRSP loan to pay down your mortgage, or even put the money into your home, for that matter - the tax rules require that the loan must be *secured* by Canadian real estate. So the loan might be used, for example, to provide financing for a new business (the mortgage insurer must approve of the use, though). What's more, if the money is used for business or investments, the interest should generally be tax-deductible to the borrower. (The CMHC does not allow these "equity take out" loans, though; so when it comes to this sort of thing, you're better best is to go with Genworth or AIG.)

According to CanRev, the "RRSP mortgage" - which must be secured by Canadian real estate - must have normal commercial terms, including market interest rates.

Tax Tip # 1. One interesting use of an RRSP mortgage could be to make a catch-up contribution to your RRSP - that is, if you haven't maxed out on your RRSP contributions in the past. It works like this: your RRSP makes you a mortgage loan. Then you put the proceeds right back into your RRSP - as a catch-up contribution, that is - and you get a tax deduction based on the amount of your catch-up contribution.

Tax Tip # 2. It's possible to make an RRSP mortgage loan to another family member. It is also possible (theoretically, at least) to do the RRSP mortgage manoeuvre based on a second mortgage or even a vacation or rental property. However, it may not always be possible to get mortgage insurance in these circumstances.

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Top Ten Must-Haves *for Employment Agreements*

Employment agreements are now an essential tool for employers. A written employment agreement allows the employer and the employee to negotiate terms at a time when they are most optimistic about their relationship and, therefore, more likely to be fair with one another. The written agreement will provide answers to questions that often plague employment relationships. However, badly written employment agreements can cause more harm than good. To keep you focused on your agreements, here are the Top Ten items you must have:

Number Ten: Consideration
The agreement must be agreed to and signed BEFORE the first day of work. For candidates in existing employment relationships, the agreement should be provided BEFORE they resign. The candidate should be sent the offer and be given the opportunity to review it away from your office and obtain advice, legal or otherwise, before signing the agreement. Don't allow the candidate to sign the agreement in an interview.

Number Nine: Meet Statutory Minimums
If you don't know what the requirements are, Google the applicable statute or better yet, get a lawyer to tell you. Here are some common mistakes:

> ***"The Company can terminate your employment at any time with one month of notice."***
> ***"You are not entitled to any overtime pay."***

If the agreement does not meet the minimum requirement, it will be set aside and you will be starting from scratch.

Number Eight: Probation

A probationary period is an excellent way to ensure that the candidate is right for the position. The agreement must use clear language that sets out the concept of and the length of the probationary period. It is not enough just to say "the employee is on three months of probation." The agreement must also say what happens if the employment relationship is terminated during the probation period. We suggest a six month probationary period. The agreement should indicate that the employer may terminate the employment during the first three months without notice and without termination pay. If an employer terminates the employment during the next three month period, the agreement must provide for at least one week's notice or one week's pay in lieu of notice in the absence of cause.

Number Seven: Duties

Often ignored, but essential to an agreement. The employment agreement should detail the employee's duties, either in the body of the document or attached as a schedule. A schedule is recommended if the employee's duties will frequently change. Instead of signing a new agreement each time the duties change, the parties can initial a new schedule. Job descriptions are easily attached as a schedule.

If properly drafted and the term is reasonable, the employer can negotiate the right to amend the employee's duties, territory, or customers even if the amendment reduces the employee's remuneration. The employee should agree that such changes will not amount to constructive dismissal even if his/her remuneration is affected.

Number Six: Clear Language

The agreement must use language that clearly sets out the parties' entitlements and obligations. Agreements that are ambiguous will be interpreted by judges against the party who has drafted it (which is usually the employer). Prepare your agreement on the basis that a judge will review it in the future. This is the time to get into the details. Ambiguity will result in the loss of any benefit you thought you gained.

Examples of ambiguous language:

> *"You will be paid for all commissions to your last day of work."*
> *"You can be terminated on two weeks."*
> *"You will have a three-month probation period."*

Number Five: Fixed Term Vs Indefinite

Unless hired for a specific job or for a specific time period, employees should be hired for an indefinite time period. In many cases, employers are too busy to ensure that fixed term agreements are renewed. If the agreement lapses, and is not renewed, the employee's legal rights may be greater than those which were initially negotiated.

Number Four: Time Off

Vacation entitlement, restrictions on annual carry-over of unused vacation days (use it or lose it), approval of requested vacation times, sick day entitlements, requirement for doctor's certificate and submission to medical examination should be addressed.

Number Three: Back Up Documents

The candidate should receive the applicable policy manual and be told to read all the documents prior to the first day of work. The signed agreement and the acknowledgment of having read the manual and agreeing to abide by its terms should be collected before the employee commences work on the first day. Check and update these policies - it is essential to have policies that cover Non-Discrimination, Harassment/Bullying/Violence in the Workplace, Technology (in particular, privacy) and Social Media.

Number Two: Entire Agreement

The written agreement will be the essence of the employer-employee relationship. It must clearly state that any previous verbal or written representations are replaced by the written employment agreement. This point is particularly important if the employer enters into an employment agreement with a candidate who is leaving secure employment. This also helps to defend against claims of a non-contractual nature.

Number One: Confidential Information and Who Owns What?

Employers should include provisions that will protect them after the employee leaves. Every agreement should include a confidential information clause that establishes the employee's duty not to disclose or use confidential information. Confidential information should be defined to fit the workplace and the type of information available to the employee. Perhaps for the employee in question, you also have to include trade secrets or inventions developed by the employee in the course of their employment. A clear statement that any such invention remains the property of the employer may be appropriate.

Another common problem is shared information - for example, contacts saved in Outlook, a sales employee's cellular telephone number. These points have to be addressed at the beginning of the relationship not after the employee leaves.

Number One, Did I Say That Already? Restrictive Covenants

A non-solicitation obligation is another essential clause if employees have access to customers and suppliers. This clause protects the employer if the employee leaves to work for a competitor. The clause will give the employer a remedy against the former employee and his or her new employer if the former employee approaches employees, customers and/or suppliers. Many employers make the mistake of asking employees to sign non-solicitation clauses AFTER the employee has been hired. Remember, it is easier to enforce these terms if they are signed BEFORE the employee is hired.

Non-competition clauses are complex and will not be discussed in detail in this article. Non-competition clauses (prohibiting a departing employee from competing with the employer in any manner for a period of time within a specified territory) are rarely enforced against mere employees.

Number One, I Mean It This Time: Termination

All types of termination should be covered - resignation, cause and without cause. The agreement should provide that an employer may terminate the employment of an employee at any time, without notice or payment in lieu of notice, for any cause recognized at law.

For terminations without cause, what will be paid and what benefits will be provided should be properly described. Properly drafted agreements that limit obligations on termination to termination and severance pay in accordance with minimum employment standard provisions are enforceable. This is true regardless of the employee's position and length of service. However, judges will look for ways around the agreement so the clauses have to be properly drafted. An employer should also anticipate that there may be amendments to these laws. Accordingly, future amendments to these minimum standards should be accommodated.

By limiting exposure to specified amounts of notice equal to or greater than the employment standards provisions, an employer can eliminate the problems associated with determining the length of the reasonable notice period at the time it decides to terminate an employee's employment. With a proper agreement, the employer simply has to review the agreement and provide payment/notice and benefits which it had agreed to provide.

Don't forget to review and refresh your agreements annually or on a promotion. Significant changes to the employee's duties, benefits, salary, place of employment, etc., may result in an old agreement becoming outdated and therefore, unenforceable.

Written employment agreements can enhance the employment relationship, create certainty in that relationship, limit the exposure of employers and provide flexibility.

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Firm News

Brian Levett (Business Law) and **Cheryl Berger** (Commercial Leasing) joined the firm.

Follow us on Twitter @MindenGross or on LinkedIn at www.linkedin.com/company/minden-gross-llp.

Professional Notes

The **Commercial Leasing Group** participated in the ICSC 2014 Whistler Conference on January 26-28, 2014.

Eric Hoffstein spoke on "Financial Abuse of the Elderly" on January 21, 2014 at a conference on Elderly Clients hosted by Federated Press.

Ian J. Cantor gave a presentation on landlord's remedies to a regional meeting of Bentall Kennedy property managers on January 16, 2014.

Hartley R. Nathan, Q.C., and **Ira Stuchberry** published "Directors' Duties in the Spotlight Once Again" in the January 2014 edition of *Directors' Briefing*.

The *2014 Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada* recognized **Stephen Posen** and **Stephen J. Messinger** as two of the country's top practitioners in Property Leasing.

Litigation lawyers **Irvin Schein** and **Matt Maurer** had the #3- and #7-ranked articles in the Toronto Lawyers Association (TLA) *Weekly Verdict*'s "Top 20 Articles of the Year". Irvin's "The new world of summary judgments: Are the courts going too far?" ranked #3 and Matt's "Update: Lawyer does not check fax machine and costs client $100,000" ranked #7. Enjoy **Irvin Schein**'s litigation blog at http://irvinschein.com/ and Matt Maurer's blog at www.slaw.ca/author/maurer/.

Hartley R. Nathan, Q.C., published the 10th edition of *Nathan's Company Meetings for Share Capital and Non-Share Capital Corporations*. He also hosted the webinar "Nathan's Company Meetings: Contentious Issues at Board, Members and Shareholders' Meetings" on December 5th, 2013.

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Professional Notes *(Continued)*

Howard Black's second edition of his text entitled *Wills and Estates: Cases, Text, and Materials* was published in December 2013 by Emond Montgomery Publications Limited.

Samantha Prasad's articles "'Tis the season...for taking tax losses" and "High net worth year-end tax tactics" were published by The Fund Library in November and December. She also published five articles in *The TaxLetter*: "The Missing Link - A Unanimous Shareholders' Agreement can be useful tool in succession planning" (November), "Year End Tax Tips" (December), "Trim your bill" (December), "Tap into your RRSP" (January), and "What's In, What's Out – A Refresher Course on RRSPs for Investors" (January).

Michael Goldberg hosted the second of four Tax Talks on November 20, 2013. He also presented "Family Business Succession Planning: An almost real life Case Study" to the Professional Advisory Committee of the Jewish Foundation of Greater Toronto on November 27, 2013. Michael published Part I and Part II of "Not Quite Chicken Soup - Are Powers To Add And Remove Beneficiaries Safe For Canadian Family Trust Precedents?" in *Tax Topics* in November. These articles were republished in *The Estate Planner* in December and January.

Steven Pearlstein presented "Adding a Parent to Title - Be Careful" at *The Six-Minute Real Estate Lawyer 2013* seminar hosted by the Law Society of Upper Canada. He also published "The Dangers of a Minority Interest" in the November 20, 2013 edition of *The Lawyers Weekly*. The *Toronto Star* quoted Steven on November 30, 2013 in the article "The Perils of Helping Kids Buy a Home: Weisleder".

Reuben Rosenblatt, Q.C., spoke on "Warranties, Conditions, Innocent, Negligent and Fraudulent Misrepresentations and the Disclaimer Clause" at the *Six Minute Real Estate Lawyer*. He also spoke at the *Safeguarding Real Estate Transactions* program on the topic "Why Bad Things Happen to Good Lawyers." Both were hosted by the Law Society of Upper Canada on November 13, 2013.

Joan Jung, **Michael Goldberg**, **Samantha Prasad** and **Matthew Getzler** of the Tax Group presented "Implementing Estate Freezes Part I" as part of the Expert*Edge* Webinars by CCH in November.

Joan Jung was the opening speaker for the Canadian Tax Foundation's Ontario Tax Conference held on October 28-29, 2013.