LEGAL UPDATE

February, 2007

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IN THIS ISSUE...

HERE WE GROW AGAIN

We are pleased to announce further growth at Macdonald Sager Manis LLP.

Effective January 1, 2007 Sean Zaboroski will be joining the firm. Sean practices corporate/commercial and securities law, advising and working in both the public and private market context. He has acted for companies at various stages of development, including owner-operated businesses, Canadian public companies and foreign entities setting up to do business in Canada. He has assisted with the listing and the maintenance of publicly traded companies, asset and share acquisitions (both cross-border and domestic), equity and debt financings, and corporate restructurings, as well as general corporate governance matters.

Sean has also been involved with the incorporation, registration and maintenance of non-profit and charitable entities and he is presently active with several charities, including Foundations for Education, a Canadian based charity which raises funds to provide educational scholarships to Mayan students in rural Guatemala.

Sean has a working knowledge of Spanish and has spent time working for a business law firm in Mexico City. He has also completed several Canadian Securities Institute courses and is currently in the process of completing a Masters of Laws (Securities) at Osgoode Hall (York University).

We are also pleased to welcome Doron Noah to the firm. Doron practices in the areas of general commercial and residential real estate. His real estate practice includes secured financing, both institutional and private; the acquisition, disposition and leasing of real property, as well as mortgage enforcement.

Doron obtained his law degree from the University of Cardiff, U.K. and was called to the Bar in 2005. He is a member not only of The Law Society of Upper Canada but also of the Israeli Bar.

POWERS OF ATTORNEY FOR PROPERTY

A Power of Attorney for Property is a document by which the “Grantor” gives someone else, the “Attorney”, the authority to manage his or her financial affairs. Originally Powers of Attorney were typically used to allow the Grantor’s financial affairs to be looked after during prolonged absences while travelling. They were not designed to be used if the Grantor became mentally incapacitated and in fact would be void if the Grantor became legally incompetent to look after his own affairs.

The opposite is now the case. The main use of Powers of Attorney today is to ensure one's financial affairs are looked after during a period of mental incompetency. In the modern world, where worldwide instantaneous communication is simple and easy, Powers of Attorney are rarely required for the old reasons of physical absence (although they are still available for that purpose). The Substitute Decisions Act has altered the law so that the Power of Attorney can continue to be effective even if the Grantor is no longer competent.

In most cases a Power of Attorney for Property authorizes your Attorney to make any financial decision you yourself might make (except for making a Will, which by Statute is not a power which can be delegated to an Attorney). However Powers of Attorney can be limited, either in duration or in scope. For example if you are leaving the country the Power of Attorney could be restricted to the period of your absence. Alternatively the Power of Attorney could be restricted to dealing with one particular asset, such as the sale of a house. Caution must be taken when creating such a Power of Attorney with a limited scope. Unless they are carefully drafted they may inadvertently void a pre-existing general Power of Attorney.

Unless the document specifies otherwise, a Power of Attorney is effective as soon as you sign it. Because the document confers such extensive powers it is often held in the hands of an impartial third party, such as your lawyer, to be released when needed, i.e. when you are incapacitated. A Power of Attorney can specify that it will only become effective upon incapacity but if so the document itself will have to spell out how a determination of incapacity would be made and by whom. This is cumbersome and difficult.

Deciding who will represent you as your Attorney under a Power of Attorney is similar to choosing an Executor for your Will. You should select someone you trust, who understands the nature of your financial obligations and is capable of managing your money. You should also name an alternate in case your first choice is unable or unwilling to take on the responsibility.

Legal Trivia Quiz

1. Who is the Chief Justice of the Supreme Court of Canada.
2. Who was Perry Mason's secretary?
3. In Ontario how many jurors sit on a civil jury.
4. Who said "If the Law supposes that, the law is a ass?" and what caused him to say it?

(For answers see last page.)

Deal Mediation

[Editor's Note: Mediation is now firmly established as a tool to be used in the course of the litigation process to try and settle matters without the expense and uncertainty of a trial. The following article by Paul Jacobs of our firm explores an emerging broader use for mediation, sometimes called "deal mediation"].

What is deal mediation? I have seen no definition of this concept, but among business people and commercial mediators the term is certainly developing. In my experience a deal mediation may be distinguished from litigation mediation in a number of ways. Firstly, there is no existing litigation or structured dispute between the parties. Secondly, the parties may therefore choose to be unrepresented by counsel. Thirdly, the parties may already be commercially connected through some form of agreement, or may wish to negotiate a new agreement, but need a facilitator. These differences can create a completely different complexion in deal mediation from that in litigation mediation.

Let me offer, as one example, the case of two owners of a company who have different styles and different strengths. Over time, their different views have led to breakdowns in communication, or even to deadlock. When events of this nature occur, there is inevitably a domino negative effect. A situation such as this may come to the attention of the corporate solicitor, but he or she would most likely be in a position of conflict in attempting to mediate between the principals of the company.

So how does a mediator get the mandate to conduct a "deal mediation" in circumstances such as this? It is possible that one of the principals who knows a mediator, makes the contact. However, in those circumstances the other principal may not be prepared to agree to a person suggested by the first. Perhaps the corporate counsel will make a recommendation. In circumstances where corporate counsel becomes involved, it is probably most likely that he or she would offer the names of two or three mediators and let the parties decide for themselves who they should use. In some measure this could lead to a "beauty contest" where the shareholders either together or separately interview potential candidates for the mediation. However, such a meeting or meetings offers the mediator an opportunity to ask many questions of the principals, the answers to which will be needed in the mediation process. The referral might come from a neutral service provider consulted by one of the parties, or by a lawyer for either of them.

Once the parties agree on a mediator, there should always be a mediation agreement. The individuals themselves will be the parties to the mediation. The corporation may also be a party. In the course of the preliminary interviews, the mediator should have discerned some of the different views and styles of management from the parties.

This is only one typical example of a deal mediation. It is quite possible that mediators will become involved in negotiating deals in the first instance with the parties directly and that the lawyers will only become involved in drafting and finalizing the contract.

Paul Jacobs, Q.C., C. Med, C.Arb.

This is an extract from an article first appearing in the December 2005 issue of the Newsletter of the Mediation Committee of the Legal Practice Division of the International Bar Association (Vol 1, No 3), and is reproduced by kind permission of the International Bar Association, London, U.K.

Collaborative Family Law

The end of a marriage or relationship can be tragic enough, but often the process of divorcing only adds to the pain. Spouses may come to see each other as adversaries and the divorce as a battleground. This may lead to experiences of confusion, anger, loss, and conflict.

A growing number of parting couples, along with other professionals such as lawyers, divorce coaches, and financial consultants have been seeking a more constructive alternative. These professionals developed a collaborative practice model. Collaborative practice is a reasonable approach to divorce based on three principles: (a) a pledge not to go Court; (b) an honest exchange of information by both spouses; and (c) a solution that takes into account the highest priority of both spouses and their children. Mutual respect is fundamental to the collaborative way. When respect is given and received discussions are likely to be more productive and an agreement reached more easily.

The key difference between collaborative practice and conventional divorce is the pledge to reach an agreement without going to Court. This enables the separating spouses to keep control of the decisions themselves, rather than giving it up to a Judge. In order to accomplish this, all the parties consent in writing to be part of a respectful process that leads to an out of Court resolution. With collaborative practice, the goal is to develop effective relationships, solve problems jointly, and prevent a Court battle.

Ross Macdonald of our firm is a trained collaborative law practitioner and a member of the Collaborative Practice Toronto.

What We Do Well

An important part of the practice of Macdonald Sager Manis LLP consists of secured lending transactions and debt enforcement for many major financial institutions. The qualities that make us stand out in these highly competitive areas – thoroughness, cost consciousness, timely reporting and attention to detail – extend to all our areas of practice including:

- Litigation
- Banking & Finance
- Wills & Estates
- Bankruptcy/Insolvency/ Debtor-Creditor
- Family Law, including Collaborative Family Law
- Corporate Transactions
- Real Estate
- Shareholder/Partnership Disputes
- Leasing
- International Transactions
- Construction Contracts & Litigation
- Franchise Law
- Labour & Employment Law
- Trademark
- Municipal Planning
- Environmental Law
- Intellectual Property
- Government Procurement Law
- Privacy Law
- Securities Law

We would be pleased to be of assistance to any of our existing clients, or new clients, in any of these areas.

Answers to Legal Trivia Quiz

1. The Right Honourable Beverley McLachlin, P.C.

2. Della Street

3. Six

4. Mr. Bumble in "Oliver Twist" upon being told that the law assumes a wife acts under the control of her husband. The full passage reads "If the law supposes that, the law is a ass - a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be open by experience - by experience."

The Fine Print

The articles contained herein are not intended to be an exhaustive review of the law or to constitute legal advice, but rather to merely highlight issues you should be aware of. Proper well informed legal advice will be necessary should these issues affect you or your business.

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