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### HERE WE GROW YET AGAIN!

Joining us effective December 1, 2007 are Michael Kleinman and David Kornhauser, two senior well respected lawyers who have been in practice together for many years.

Michael A. Kleinman, B.A., LL.B. (Osgoode Hall) was called to the Ontario Bar in 1986. Michael worked as a junior lawyer and then became a partner at Horlick Kleinman in 1991. The lawyers at Horlick Kleinman formed the nucleus of Conway Kleinman Kornhauser LLP, where Michael was a partner from October, 1995 to November, 2007.

Michael's practice primarily focuses on commercial litigation with an emphasis on franchise, business and shareholder disputes. Michael has appeared as counsel in all levels of Court in Ontario and a variety of administrative tribunals. Michael has successfully obtained and defended numerous motions for injunctive relief and also has experience in commercial real estate including the preparation of and enforcement of commercial leases.

Michael is actively involved in various charities and social causes.

He lives in mid-town Toronto with his 3 lovely children, Veronika, Jade and Ryan.

David N. Kornhauser, LL.B. (Dalhousie University), M.B.A. (Schulich School of Business, York University), B.A. University of Toronto, was called to the Ontario Bar in 1987. David's practice involves representing private and public, small and medium sized companies, in all aspects of business law. Clients include technology companies, service providers, franchisors, manufacturers, master licensors, distributors and retailers, in a variety of industries, as well as not for profit/charitable organizations. David also represents a number of franchisors and franchisee associations in all aspects of franchise law.

David provides legal advice and representation in connection with the purchase and sale of businesses; shareholder, partnership, joint venture and co-tenancy agreements; corporate amalgamations, restructuring and reorganizations; royalty-based agreements; information technology agreements; corporate

financing; the securitization and realization of assets; commercial leasing; documentation with respect to securities regulatory agencies in both Canada and the United States; and corporate governance.

David recently served as Co-Chair for the 2007 Canadian Franchise Association Legal Symposium and has authored or co-authored a number of papers including: "Franchise Agreement Drafting"; Ontario Bar Association Institute Franchising Program, September, 2005; "Franchise Associations"; Ontario Bar Association Institute Franchising Program, January, 2004, as well as many other papers and seminar presentations.

David is also involved in the community at large. He is presently a Trustee at Beth Torah Synagogue. He has been a Director and Corporate Secretary for B'nai B'rith Youth Organization and a Volunteer Lawyer, Canadian Bar Association. David has been married to Peggy for 20 years and has 4 children.

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From the Court Reporter's Files

Q. You cannot just nod your head, all responses have to be oral, okay. What school did you go to.

A. Oral.

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### PROMISES ARE NOT FOREVER

Demand promissory notes are frequently used to document loans within the family. Care must be taken, particularly in light of recent changes to the Limitation Act, to ensure that the intention of the parties is met and the possibility of dispute within the family is lessened.

A demand promissory note "matures" upon delivery – that means that the limitation period for enforcing the loan it documents starts to run when the note is signed not, contrary to common belief, when demand upon the note is made. Recent sweeping changes to the Limitations Act have shortened almost all limitation periods to two years and this period applies to promissory notes. Accordingly if more than two years goes by without an action being commenced to enforce the loan, and assuming no payments are made on account, the borrower will have a perfectly valid limitation period defence.

Problems can also arise where the promissory note is taken only to keep options open but with the expectation that the loan will be forgiven. If the lender were to pass away or become incompetent the obligation to enforce the note would fall to the Executor, Trustee, or Power of Attorney. That person may feel obliged to enforce the note, if there is no written documentation of it having been forgiven. To do otherwise would be to prejudice the other beneficiaries and expose herself to potential liability.

These types of problems can only be avoided by fully documenting the agreement or intention and reviewing your financial situation on a regular basis.

### INTERNATIONAL MEDIATION

Our Senior Counsel Paul Jacobs, Q.C., C.Med., C.Arb, spoke at a conference in Mexico City in June. The conference was organized by the International Centre for Dispute Resolution jointly with the Inter-American Bar Association. Delegates attended the conference in Mexico City from a wide range of countries including Canada, United States, Mexico, and other Central and South American countries.

Paul spoke on a panel representing Canada along with representatives of Mexico and the United States. The subject matter was whether a mediation could resolve North American business disputes having regard to differences in culture, laws, legal systems and enforceability.

Mexico is just at the very beginning stages of accepting mediation as a tool for dispute resolution. In Paul's view they are some 12 to 15 years behind the status of mediation in Ontario. Paul explained to these lawyers the high degree of success which mediation has enjoyed already in litigated disputes, and the new impacts mediation is making in commercial matters including shareholder and partnership

disputes, commercial agreements, and mergers and acquisitions.

Paul is a chartered mediator and chartered arbitrator. For more information about these matters, call Paul directly at (416) 361-2620.

### PRENUPTIAL AGREEMENTS

A "Prenuptial Agreement" is a contract and, by and large, subject to the usual laws of contract and enforceable, or attackable, as such. However the Courts have been more willing to interfere with the freedom to contract and set aside marriage contracts than a routine commercial contract.

The recent decision of the Ontario Superior Court in *Levan v. Levan* is an illustration of the mistakes that can be made when negotiating and entering into a marriage contract. In that case the validity of a marriage contract was in dispute. The Court held that the husband failed to disclose all of his assets, and did not give any estimate of the value of the assets he did disclose. The husband also did not disclose his income.

The Court also concluded the wife was pressured into signing the marriage contract only two days before the wedding and was told there would be no wedding unless she signed.

The Court also noted that the marriage contract severely restricted the wife's entitlement to spousal support and eliminated any claim to an equalization of net family property. Furthermore the Court noted that the marriage contract was extremely complex and neither party understood its provisions fully.

Finally, perhaps most importantly, the husband deliberately interfered with the wife's attempt to receive independent legal advice.

The *Levan* decision is a textbook case of mistakes that can be made in the drafting and execution of a marriage contract executed. Not surprisingly that marriage contract was set aside.

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From the Court Reporter's Files

Q. Is your appearance here this morning a result of the subpoena I sent your lawyers?

A. No I always look like this.

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### MINOR CHILDREN AS LIFE INSURANCE BENEFICIARIES

Parents will often name minor children as primary or alternate beneficiaries of life insurance policies in the belief that this will, by itself, be sufficient to provide support for the children in the event of the parents' death. This is a mistake.

Life insurance proceeds are not part of the estate of the deceased, unless the estate is the named beneficiary. They flow directly to

the beneficiary. The Executor or Trustee named in the Will will have no control over the life insurance proceeds.

Where the beneficiary of the insurance proceeds is a minor and the life insurance policy does not otherwise specify, the Insurance Act requires that the insurer pay the insurance proceeds into Court to the credit of the minor. The proceeds will be retained by the Court and paid to the beneficiary with interest, in a lump sum when he or she reaches 18 years of age.

In some cases insurance policies designate a Trustee in the event the beneficiary is still a minor. However if this designation consists of nothing more than selecting a Trustee, it will not solve the problem. The insurance company will be obliged to pay the money to the Trustee but the Trustee will be under the same restrictions. The money must be held and invested and paid out to the beneficiary in full upon the beneficiary reaching 18 years of age.

In either case the life insurance proceeds are not generally available for ongoing living expenses of the child. By Court application the guardian of the child can seek to demonstrate that some portion of the money is necessary for a particular expense.

There are two solutions. Either the insurance policy should designate the estate as the beneficiary and the Will should give specific directions to the Trustee as to the use of this

money, or a separate "insurance trust" should be created for the life insurance policy specifying a Trustee for the policy and the powers and discretion of the Trustee to use the monies for the day-to-day support of the child.

### 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.

### 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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