



DEVRY SMITH FRANK *LLP*

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DSF Joins Alliot Group

by Elisabeth Colson and George Frank

Devry Smith Frank *LLP* is pleased to announce that we have joined Alliot Group, a worldwide alliance of independent accounting, law and consulting firms with more than 160 member firms in over 70 countries. Alliot Group has representation in most major cities in the United States, throughout Europe, Latin America and Asia Pacific, and in selected locations in Africa.

Membership in Alliot Group is limited to independent professional services practices that satisfy the group's stringent benchmarks and best practices. Membership is generally limited to smaller to mid-sized firms. This ensures that clients will enjoy a high standard of personal service whenever they are referred to another member of the Alliot Group alliance. We are proud to be the first Canadian law firm admitted to Alliot Group.

Over the past years, we have developed our ability to undertake increasingly sophisticated legal work, commensurate with our clients' increasingly complex needs. Membership in Alliot Group will enable us to further expand the complexity and sophistication of the services we are able to provide to our clients.

Many of our clients are multinational businesses for which we act locally. As Alliot Group continues to expand, we will now be able to provide these clients with increasingly easy access to transnational and international professional advisors, and to continue to meet our clients' growing needs. In addition, given the high proportion of Toronto's multinational population, membership in Alliot Group will enable us to ensure that these clients have access to legal and other professional services, both within Ontario and in their jurisdictions of origin. Membership in the group will provide access to a global alliance of resources to assist our clients in developing business opportunities throughout Canada and internationally.



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David S. White and Cory Estrela Join DSF as our Planning and Development Group

We are pleased to announce that David S. White, Q.C. and Cory Estrela, B.Comm., LL.B. have joined Devry Smith Frank *LLP* and will be forming our Planning and Development Law Group.

David was called to the bar in 1971 following his graduation from Osgoode Hall Law School in 1969. Since then he has practised primarily in the areas of real estate development, planning, and aggregate resource matters. He is one of Ontario's leading lawyers in the aggregate field and will be leading the DSF's Planning and Development Law Group. He has been counsel on over 25 successful licensing applications, and has acted on all types of development projects across Ontario.

Cory has extensive experience with a diverse range of planning and development matters, from zoning variances to complex matters requiring the support of a team of interdisciplinary professionals. He has been counsel to individual land-owners, ratepayers, residential developers, industrial operators, commercial developers and aggregate producers.

We would like to extend our warm welcome to David and Cory. Please feel free to contact them.



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FAMILY LAW

What Does the Term “Custody of a Child” Mean? FAQ for Custody Lawyers.

by John Schuman, B.A. (Hons.), LL.B., LL.M.

In divorce proceedings involving children of the parties, one of the things custody lawyers hear most frequently from their clients at initial consultations is that they want either “sole custody” or “joint custody” of the children. However, these clients rarely understand what the term “custody” means. Custody no longer refers to where a child lives. In Ontario Family Law, the term “custody” refers to who makes certain decisions with respect to the child. In many—if not most—cases these decisions aren’t controversial, and so who has custody makes little difference.

When parents separate, they—or a court or arbitrator—must decide on two important groups of issues with respect to the children: first, how much time the children will spend with each parent and the scheduling of this time; and second, who will make the big decisions in relation to the child, for example, about education, major medical treatment, religious upbringing, and extracurricular activities involving both parents.

The parent with “sole custody” without any other limitations will make these decisions on their own. If the parents have “joint custody,” then they must make these decisions together. It is fairly rare that parents disagree over a child’s school, medical treatment, or religion, so for most separated families, the question of who has custody really makes little difference. However, in “high conflict separations”—where parents fight with each other over almost everything—joint custody does not work well. Nor does it work well when one parent wants the other parent out of the lives of the children. In these cases, the

parent with sole custody make decisions that deprive the children of a relationship with the other parent, for example, by choosing a school that is far away from the other parent or that makes it difficult for them to visit with the children. In cases like this, judges will often try to avoid giving sole custody to the parent who is non-supportive of the children’s relationship with the other parent, either by ordering joint custody or by giving sole custody to the parent who will facilitate a relationship with both parents.

Unfortunately, custody is usually more of a status symbol than a legal necessity. After separation, parents like to say that they have “custody” of their children, and they will fight for that status without thinking about the decisions that will have to be made by the person who has custody. Because of this, it is becoming increasingly popular for separation agreements and court orders to not mention the word custody at all, or only in those cases dealing with international disputes in relation to a child. For example, if one parent abducts a child to another country, the question of which parent has “custody” will affect the legal proceedings to have that child returned.

However, if one parent acts unilaterally to remove a child from the other parent’s care, judges in Ontario often will not hesitate to make an emergency custody order in favour of the parent who is left behind.

Moreover, in their decisions over whether a child should be returned to another jurisdiction, Ontario judges are more interested in looking at the history of these parents than at who had the label of custody. Put another way, when Ontario Family Court judges are considering what parenting orders to make about the custody of a child, the question of how the parents parented the child in the past is usually more important than whether one of them had “custody.”



John is the head of our family law group and has always practised in the areas of family law and children’s rights. His direct line is 416-446-5080.

BUSINESS LAW

Commercial Lease Interpretation - Overholding Tenants

by Viet Nguyen, B.A. (ACS), LL.B.

The Court of Appeal for Ontario recently released its decision in *AIM Health Group Inc. v. 40 Finchgate Limited Partnership* dealing with the interpretation of an overholding clause in a commercial lease. The decision is instructive in that Ontario's highest Court analyzed provisions of a commercial lease in the context of commercial reasonableness, rather than strictly on the language of the lease itself.

In *AIM*, a commercial tenant operating a medical clinic decided not to renew its lease and the landlord began searching for a new tenant. The tenant then requested a lease extension from the landlord while it tried to find new premises that would meet particular standards required by the government. Despite the tenant's requests for an extension, the landlord located a new tenant and notified the tenant that the landlord required vacant possession of the premises by the end of the lease term. At the expiry of the lease term, the landlord changed the locks and took back possession of the premises.

The commercial lease contained an overholding clause that did not specifically require the landlord's consent for the tenant to remain in the premises on a month-to-month basis following expiry of the lease. In a 2-1 decision, the Court of Appeal found that overholding clauses have an implied term that a tenant may only remain in the premises beyond the expiry of the lease if the landlord consents, either explicitly by agreement or by acceptance of rent. A unilateral overholding clause is in conflict with the implied surrender clause for commercial leases, where tenants are obliged to return vacant possession to the landlord at the end of the lease term. Despite the particular language on landlord consent and acceptance of rent not being present in the lease between the parties, the Court of Appeal was prepared to interpret the overholding clause in a commercially reasonable manner to provide certainty and clarity to the parties.

While the Court of Appeal has set out the principles for interpreting this particular issue in a commercial

lease, it is in the best interest of both landlords and tenants to ensure the obligations in a commercial lease are clearly set out. Lease agreements should contain specific language dealing with the lease term, payment of rent, and overholding and surrender of premises, among other things, so that all parties understand their obligations in particular situations. When dealing with an overholding tenant, landlords must comply with the notice provisions of the lease to ensure they are within their rights to take back possession of the premises at the end of the lease term. Tenants who require lease extensions must ensure they provide notice of such a request to the landlord, and tender rent in advance for the overholding period to seek the landlord's consent. Where negotiations between the parties regarding possible lease extension or renewal is ongoing at the end of a lease, landlords and tenants should be clear on their obligations with respect to payment of rent, extension of the term during negotiations, and options in the event negotiations do not result in a lease renewal.

If you have any questions about commercial leases and the rights of commercial landlords and tenants, please contact a lawyer in the commercial real estate or commercial litigation group at Devry Smith Frank *LLP*. We advise commercial landlords, commercial tenants, developers, and financiers on all forms of commercial leasing matters and disputes.

Viet specializes in commercial collection and mortgage recovery, as well as bankruptcy and insolvency. Called to the bar in 2002, Viet earned his law degree at the University of Western Ontario and is fluent in both of Canada's official languages. His direct line is 416-446-5801.



DSF IN THE COMMUNITY

DSF Associate's Involvement in Economic Consultation

by Katerina Minaeva, Student at Law

On January 21, 2013, an associate from Devry Smith Frank *LLP*, Florendo Llamag, had the privilege to attend a roundtable discussion of Canada's economic issues at the McGregor Park Community Centre in Toronto.

The invitation to the event was made by the Honourable Tony Clement, President of the Treasury Board, to members of the Toronto Philippine business community. As a member of the Philippine Chamber of Commerce – Toronto, Florendo attended the event as part of the national government's economic consultations.

The local consultation was aimed at harnessing valuable input from hard-working entrepreneurs, professionals and business owners who invest, innovate and create jobs in Canada. In attendance from the government in addition to Minister Clement were Roxanne James, MP for Scarborough Centre, and Joe Daniel, MP for Don Valley East. The president of the Philippine Chamber of Commerce - Toronto, Oswald Tugadi, had the following words in response to the roundtable invitation: "I believe that this is the first time that we, Filipino Canadians, will have an opportunity to have input in such an exercise." Furthermore, Florendo enjoyed the opportunity to represent his local community and participate in a discussion of economic growth in Canada.



Florendo Llamag and Tony Clement

George Frank, Managing Partner in Devry Smith Frank *LLP*, was a panelist at the Osgoode Professional Development program "Mediations and Arbitrations at the Financial Services Commission of Ontario" on November 23, 2012. George and his co-panelists spoke on "Mastering Mediation at FSCO – Strategies for Applicants and Insurers." The program was attended by personal injury lawyers, insurance claims personnel, mediators and paralegals.

More join the team

Lisa Spatola recently joined marketing team at Devry Smith Frank *LLP* as the graphic designer. She has been working as a designer since graduating from Durham College in 2009 and we wish to extend our warmest welcome to her!

Lianne Kohlmann joins our IT department as our newest IT administrator. Lianne brings several years of experience as an IT trainer and Help Desk specialist. Welcome aboard, Lianne.



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From its genesis in 1964, Devry Smith Frank *LLP* has grown into a professional corps of 50 lawyers, 6 licensed paralegals, 30 law clerks and a complement of highly skilled and dedicated staff, offering a broad range of legal services to our individual, business and institutional clients.

To learn more, please visit our website at **www.devrylaw.ca** or our Facebook page, follow us on Twitter, or call us at 416-449-1400.

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