DSF NEWS

DEVRY SMITH FRANK *LLP* NEWSLETTER *JULY 2013* | **ISSUE 10**

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LEGAL GROUNDS FOR WILL CHALLENGES

BY JUSTIN WINCH, B.A. (HONS.) LL.B. | *MAY 1, 2013*

The loss of a loved one can be a devastating experience. Unfortunately, some of those still grieving may find another painful shock awaiting them when they learn they have been left out of the deceased's will. In difficult times like this, informed legal advice regarding legal grounds for will challenges becomes a necessity. There are a number of legal grounds on which to challenge the validity of a will. Below is a brief summary of the three most common types of will challenges.

• The first ground for challenging the validity of a will would be its failure to comply with the rules set out by the Succession Law Reform Act. Ontario requires full compliance with the formalities of execution. While most wills prepared by legal professionals will comply with these rules, many homemade wills do not.

• Another ground concerns the deceased's capacity to make the will. Did the deceased know what property and assets they had and that the will would be disposing of these assets after their death? Did they understand and have a true understanding of their obligations to spouses and children? A challenge on this ground would require hiring expert medical witnesses to review the deceased's medical records and retroactively assess their mental capacity at the time the will was made.

• The third ground concerns the circumstances surrounding the drafting of the will: Were these suspicious or was the deceased under any undue influence? A will has to represent the true intentions of the deceased. Undue influence can occur when a person feels compelled to honour the wishes of someone making a direct or implied threat, or when another person attempts to leverage an elderly persons' weakened state to their advantage: for example, when a child convinces a parent to remove their sibling from the will. Similarly, a will signed on the deceased's death bed leaving everything to a caregiver rather than family members may give rise to a challenge on the grounds of suspicious circumstances.

The law surrounding challenges to a will is complicated. Furthermore, no two cases are the same. If you are in this situation, it is important that you seek out qualified legal advice from an Estate Lawyer.

For further information or assistance regarding legal grounds for will challenges, please contact Toronto estates litigation department lawyer Justin Winch. He has significant experience representing executors and beneficiaries in the area of estate litigation, including will interpretations, will disputes, legal grounds for will challenges, passing of estate accounts and dependant support proceedings.

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SHOULD YOU ISSUE SHARES FOR SERVICES RENDERED?

BY ALBERT LUK, B.A., J.D. | *APRIL 25, 2013*

There is an increasing trend among emerging and high growth companies to pay service providers, either in part or in whole, by issuing shares in payment for services in their corporation. For the emerging and high growth company, this is a fast way to pay for services they otherwise could not afford. For the service provider (especially those who have the venture capitalist mentality of owning a piece of many businesses), it is a way to participate in the potential upside of its clients.

The practice has gained particular traction in Toronto, as numerous new accelerators, and the ecosystem created around the accelerator space view investing partially through cash and partially through share issuance as the new normal.

The practice, in and of itself, is neither good nor bad. However, the emerging and high growth company and the service provider need to consider at least three issues:

1. Valuation of the emerging and high growth company

Companies that have not received external funding generally do not have readily available valuations. Consequently, it is typically hard to value the worth of an emerging and high growth company. The more practical issue is that valuation consists of guess-work by all parties without a formal valuation.

Where the service provider happens to also be investing money and services (as Arlene Dickinson of the CBC TV show *Dragons' Den* is want to do), these issues tend to disappear or be mitigated since a pre-money valuation is being conducted. For those emerging and high growth companies not in this fortunate position, there is no definitive right answer.

2. Valuation of the services to be provided

Valuation of services provided in consideration in part or whole for shares of an emerging and high growth company can be rife with abuse. For example, a software developer charging $50,000 in cash to develop an application may suddenly increase its fee to $75,000 in share consideration. Correspondingly, an emerging or high growth company may hire the same software developer to develop an application in return for 10% of its shares and halt the project before completion, claiming no shares should be issued.

We have seen far too many hand-shake and "trust me" arrangements when services are provided in return for shares. At the very least, the parties must agree to the following:

a) A set valuation for the services to be provided. The valuation should at least be competitive with what the competition is charging. In cases where goods are being delivered instead of services, is the good being exchanged at cost, at cost plus a small profit margin, or at regular retail/wholesale pricing? In other words, please do your due diligence.

b) The criteria when the shares should be issued. Are the shares in payment for services issued at the beginning of the project, in tranches/ instalments as the project is delivered, or at the end? For the service provider, what happens if the emerging and high growth company abandons the project before completion? Do you have legal recourse?

c) The exchange of intellectual property for the services issued. This sounds obvio us, but we have seen service contract agreements that address services to be issued but not the transfer of intellectual property. Since Canadian copyright law generally states intellectual property belongs to the contractor unless otherwise indicated in writing, the emerging and high growth company needs to make sure this issue is addressed adequately.

As the above shows, the parties cannot resort to a standard contract in these types of situations. Legal advice should be sought to protect the respective interests of the service provider and emerging and high growth company.

3. Rights of the service provider as a shareholder

If the service provider and the company disagree some time in the future, should the service provider continue to remain as a shareholder? Alternatively, if the service provider provided a one-off service that is not mission critical to the business (i.e. sales and marketing services for a pitch to external investors five years ago), should it share in the upside of the business many years down the road? This is perhaps the least thought through legal issue between the parties. There are a couple of options to consider on a non-exhaustive basis:

a) The first option is to issue the service provider with preference shares that are eligible for dividends, with the company possessing a right to redeem the shares at a sum equal to the value of services to be provided plus, if negotiated, some type of additional preference value (i.e., some multiple of the preference redemption value). In other words, the service provider is paid for upside over the years and receives the value of the service provided upon exit. This is analogous to a liquidation preference on the shares venture capitalists typically receive when they invest in emerging and high growth companies. Given the unintended tax and legal issues this type of arrangement can cause, qualified legal and accounting advice are crucial for this option.

b) Another option is for the service provider and the company agree that the company has a buy-back option at some valuation to be determined. The buy-back option can either be added as part of a shareholders' agreement or as a stand-alone agreement between the parties to avoid shareholder disputes.

As the above shows, issuing shares for services rendered can be quite complicated from a business and legal perspective. It is flattering for a company to be so attractive that others are willing to work on alternative fee arrangements. And it is exciting for the service provider to have the potential to participate in the upside of an emerging or high growth company. But whatever side of the relationship you are on, both parties should conduct due diligence and seek qualified legal advice on issuance of shares in payment for services.

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THE NEXT WHISTLEBLOWER MAY BE YOU

BY ANTHONY-GEORGE D'ANDREA, SUMMER LAW STUDENT | OVERSEEN BY ELDAD GERB, B.B.A., J.D. | *JUNE 21, 2013*

Imagine this: You're at a dinner party and the guests beside you strike up a conversation about which country, Switzerland or the British Overseas Territory of the Cayman Islands, is the better place to stash money in order to avoid paying taxes at home. Would you pay attention to the conversation? Probably not, and I don't blame you. However, this article might change your mind, and I believe it warrants your attention for just a few minutes.

Although Switzerland and the Cayman Islands are notorious tax havens for individuals, Liechtenstein was also once known as an ideal tax haven. However, in 2006 whistleblower Heinrich Kieber gave German authorities a disk containing the names of individuals who stashed their money at LGT, Liechtenstein's biggest financial institution, in order to avoid paying taxes at home. Since Kieber's whistle blowing, the United States, Australia, and Germany have arrested, jailed, and fined their nationals identified on that disk for tax evasion. Over 100 Canadians were also identified in the recovered information; however, none have been prosecuted.

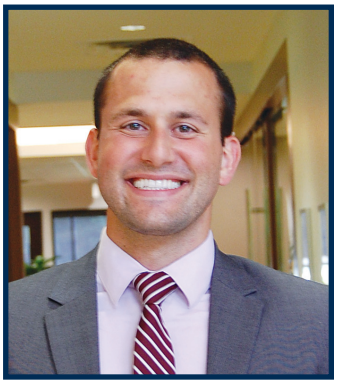
This event further clarifies that some Canadians are avoiding paying their fair share in taxes by placing their money at locations abroad. Seven years later, and perhaps somewhat inspired by whistleblower Kieber as well as by other governments that have enacted measures to deal with tax evasion, the Canada Revenue Agency (CRA) has introduced new measures to combat international tax evasion.

One of the measures that has caught the attention of some is the Stop International Tax Evasion Program. The program essentially pays individuals who give the CRA information that leads to them recovering over $100,000 in an assessment or reassessment of federal taxes.

Sounds good so far, right? A glimpse of the necessary criteria prior to paying the whistleblower, however, demonstrates that the process can be lengthy and complicated. The CRA notes that among other criteria, all objection and appeal rights associated with the newly assessed tax must have expired. Furthermore, the newly assessed federal tax has to be collected prior to paying the whistleblower. These two criteria combined can take years. So, if you're looking for a quick pay day, this program might not be for you.

Furthermore, when a payment is actually made, the CRA can give you anywhere from 5 to 15% of the recovered taxes. The actual percentage depends on the quantity and quality of the information you provided. And finally, any payment that you receive for assisting the government in collecting taxes (the same taxes that without you they may never have received) is subject to taxation.

Although the Stop International Tax Evasion Program is new to Canada, some are skeptical about how effective this program will be. However, one thing is for certain: it might be worth your time to pay a little more attention at the next dinner party.



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MULTINATIONAL LEGAL TAX AVOIDANCE IN US, EU EXPOSES TAX LAW LOOPHOLES

BY IRA MARCOVITCH, SUMMER LAW STUDENT | OVERSEEN BY ELDAD GERB, B.B.A., J.D. | *JUNE 18, 2013*

When Apple grabbed headlines this pastweek, it wasn't because it was releasing its new iPhone or iPad. Rather, it came to light that the company had engaged in an ingenious international shell game that allowed the company to dodge billions in taxes. In hearings before the US Senate, it was revealed that for almost 32 years, the tech giant had been funnelling tens of billions of dollars to subsidiaries in Ireland to avoid an equally large tax bill in the US in what one Senator referred to as "the holy grail of tax avoidances."

As a result of a loophole in Irish legislation, corporate taxes are only levied on a company after subtracting expenses, such as royalties for intellectual properties. In 1980, Apple incorporated an Irish subsidiary, in addition to numerous others worldwide, that holds the rights to all of Apple's intellectual property outside the Americas. All of the income the parent Apple made abroad was funnelled through the Irish offshoot, which would be taxed at the Irish corporate tax rate and then transferred to the parent as a dividend. Furthermore, a deal struck with the Irish government long ago allowed the subsidiary to pay taxes at rates between 0.05% and 2%, as opposed to the normal Irish corporate tax rate of 12.5%. Consider how many MacBooks and iPods are sold in Europe and Asia, and the resultant tax avoidances are astronomical.

While Apple's tax shenanigans (amazingly there isn't any evidence of illegality, so they aren't technically crimes) are sure to occupy headlines, this multinational isn't the only one to be caught in an international shell game of late. In 2012, it was discovered that Starbucks UK had paid £0 in taxes for the three years prior, and only £8.6 million pounds over its 14-year lifespan. While one might quickly attribute this to Britons' propensity for tea over coffee, the truth is that Starbucks was engaging in an equally ingenious shell game. Simply put, Starbucks UK was completely stripped and incorporated as an entity separate from the rest of its global empire, so as to rent the use of its name, logo, and all other necessary attributes from the parent company. Although Starbucks UK was making huge profits, these were shipped overseas as payment of said rent, and consequently the company registered losses every year and thus avoided paying income taxes.

After the story broke, Starbucks voluntarily paid £10 million pounds, not as a result of any legal action or settlement, but to assuage customer outrage. Surprisingly, it wasn't the exorbitant price of a latte that angered the public, but the fact that, in a country enduring tough financial times, the coffee giant was funnelling money destined for the public purse into its own.

While all this makes for exciting news, it highlights a growing tension in our irreparably globalized society and the need for coordinated, comprehensive tax reform. Business, on the one hand, is interested in pure tax minimization: paying the lowest, legally acceptable (though not always) amount of taxes. Governments, on the other hand, have to engage in a fine balancing act. They are interested in maximizing the amount of revenues generated from taxes, but must also maintain a tax rate that will make them globally competitive. Add to that the current situation most developed nations are facing — large deficits, high unemployment and rising taxes for individuals — and the balancing act becomes more precarious.

The problem is that creative multinational businesses can incorporate in numerous countries, play a world-wide shell game, and are generally limited only by the amount of money in their coffers and the loopholes in governing legislation. Governments, on the other hand, are limited by political boundaries and tax treaties signed with partner nations. Add to the mix numerous countries that aren't parties to treaties and which openly advertise to these multinationals as tax friendly zones and the problem is only compounded.

While the allegations will invariably take years to unfold, the story thus far raises an important, though obviously apparent, lesson about taxation and regulation. For some time taxation has been an international game; however, as the players and the game become more sophisticated and intricate, so too must the rules. As Apple and Starbucks have shown, the globalization of tax regulation has not kept pace with the globalization of business and multinational corporations, and reform is needed. Any such reform must exist on a global scale because, as the Irish Minister of State for Finance succinctly put it, "It's a global problem." And he is right; in a world where companies exist on a global scale, there is no point in closing loopholes in one country's legislation only to have them appear in another's.

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CITY OF TORONTO PASSES NEW HARMONIZED ZONING BY-LAW

BY MICHELLE STEPHENSON, SUMMER LAW STUDENT | OVERSEEN BY CORY ESTRELA, B. COMM., LL.B. | *MAY 31, 2013*

On May 9, 2013 Toronto City Council passed Zoning By-law No. 569-2013 (the "By-law"), harmonizing 43 zoning by-laws across the amalgamated city. Some of the by-laws being harmonized date back to the 1940s and 1950s. Though the By-law is primarily an effort at harmonization, many properties through the City (particularly in older areas where zoning by-laws have not been updated recently) will be subject to new property development standards.

The By-law does not repeal the previous zoning by-laws, which will remain in effect to regulate properties not included in the By-law, facilitate the processing of building permit applications during the transition period, and define lawfully existing properties for the purpose of exemption clauses.

A previous attempt was made in 2010 to harmonize Toronto's Zoning By-laws. That attempt was unsuccessful, resulting in a backlog of building permit applications (due to the need to comply with both the old and new standards), and over 650 appeals. In May, 2011, the City finally repealed the 2010 attempt, but it has included special provisions in the latest By-law in an effort to address concerns identified through the earlier failure.

A transition clause was created in the new By-law, such that applications will not be subject to dual review and the application of multiple sets of standards. Applications for building permits submitted prior to the enactment of the By-law will be processed under the provisions of the existing zoning by-laws only, and minor variances may be sought to the old zoning by-laws even after the enactment of the new Zoning By-law.

In addition, a special provision has been included in the By-law pertaining to minor variances, such that existing buildings with previously approved minor variances will remain in force. Minor variances that have been approved but not yet acted upon, however, can only be relied upon if the new By-law is more permissive or if it has remained the same.

Exemption or grandfathering provisions with regard to building standards will apply to lawfully existing buildings: that were in existence before any zoning by-laws were in place; that complied with the former zoning by-laws; that complied with a finally approved minor variance; or that were issued a permit during the transition period.

The deadline to file a Notice to Appeal regarding all or part of the new By-law is June 4, 2013. However, to file an appeal, an oral or written submission to the council must also have been made before the By-law was passed, or there must be reasonable grounds to be added as a party in the opinion of the Ontario Municipal Board.

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DSF IN THE COMMUNITY

SOFTBALL FOR SICK KIDS

On June 8th, DSF participated in the Heatwave Durham Softball tournament to help raise money to fight childhood cancer. Our fundraising goal was $3,500.00 but we raised $6,657.87! First place goes to James Satin who raised $4,156.00! Thank you to all who participated and donated.

DSF ATTENDS SEATTLE CONFERENCE WITH ALLIOT GROUP

Elisabeth Colson and Lawrence Hansen attended Alliott Group's North America Leadership Forum, held at the Pan Pacific Hotel in Seattle from June 11 – 14. DSF joined Alliott Group late last year.

INTERNATIONAL COMPETITION FOR MEDIATION ADVOCACY

BY ALBERT LUK, B.A., J.D. | *APRIL 25, 2013*

George Frank and Esther Cantor participated as judges and mediators in the 2013 International Competition for Mediation Advocacy ("ICMA") held March 12-15 at Osgoode Hall in Toronto. The ICMA is an international competition for law students seeking to improve their mediation skills. This year's competition featured teams from 14 law schools in Canada and the United States. Canadian teams were fielded by the University of Ottawa, the University of Saskatchewan, McGill University, the University of Toronto, the University of Victoria and Osgoode Hall Law School at York University. The competition has had participants from as far away as India. According to Esther, "Judging at the IMAC and mediating with some of the brightest young minds in law schools across the world is a great experience. It is satisfying to be paying it forward by helping to train these future advocates, but at the same time, the experience always teaches me something new about advocacy and mediation."

Judges and mediators for the ICMA competition are drawn from experienced mediators in Canada and the United States. This is the third year that George and Esther have participated as judges and mediators in the competition, and it represents a significant honour for them to have been invited to participate three years in a row.

DSF SPONSORS LITTLE SOCCER STARS

DSF is sponsoring a team of five year olds playing with Beach Community Soccer League. Our team is the DSF Dragons. We aren't sure if they've scored a goal yet, but we aren't keeping score. They all try hard. Go DSF Dragons!

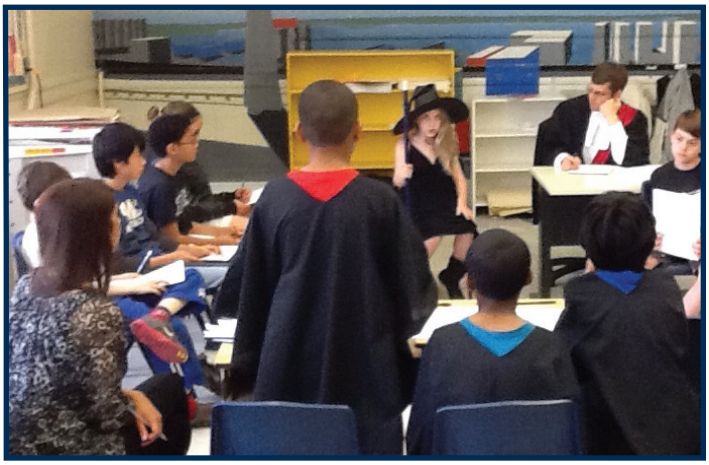
ELEMENTARY SCHOOL CIVIL MOCK TRIAL PROGRAM

BY MARTY RABINOVITCH, B.A.H., LL.B. | *JUNE 14, 2013*

For their second consecutive year, Maya Krishnaratne and Marty Rabinovitch recently volunteered at OJEN's Elementary School Civil Mock Trial Program.

The program provided an exciting opportunity for grade six students at Niagara Elementary to be introduced to various legal skills, including preparing a case for trial, courtroom procedure, examining and cross-examining witnesses, and making legal arguments. The program culminated in a mock trial, which was based on the story of Hansel and Gretel. After intense jury deliberations, a verdict was finally reached, and poor Hansel and Gretel were found liable to the witch for defamation of character.

All students performed exceptionally well in their roles and had a great time!



WELCOME TO DSF!

Ashley Batista joined Devry Smith Frank *LLP* in 2013 as Accident Benefits law clerk in our personal injury team. She brings four years of experience in civil litigation, including small claims, slip and fall, STD/LTD, and WSIB. Ashley is very passionate about her job, enjoys making a difference in people's lives, and strives to achieve success in every file she works.

Marilyn Mazzotta is a senior law clerk in the firm's Corporate Law Group. Marilyn has experience in a wide variety of corporate work, including drafting documentation for incorporations and organizations, amalgamations, continuances, amendments, dissolutions, revivals, extra-provincial registrations, reorganizations, financing transactions, and asset and share purchase transactions.

Julie Whitehouse has joined Devry Smith Frank *LLP* as a law clerk in our corporate law group. Julie has over twenty years of previous experience working as a legal administrative assistant at various well respected law firms and large organizations in the public and government sectors with a focus on corporate and commercial real estate files.

From its genesis in 1964, Devry Smith Frank *LLP* has grown into a professional corps of over 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.

SPECIAL ANNOUNCEMENT

We are pleased to announce that Eldad Gerb will be joining DSF as an associate on July 22, 2013. Eldad will join the litigation group, with a primary focus on tax litigation, cross border issues, and immigration. Congrats Eldad!

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