BOWLEY LEGAL NEWSLETTER

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Real Estate Practice Re-invented– Around the time this Newsletter goes to press, we are rolling out a completely novel way of delivering service to real estate clients. We are not aware of anything like it in Ottawa, or for that matter, anywhere at all.

Once we receive the Agreement of Purchase and Sale or Mortgage Commitment, a tailored electronic letter goes out, laying out the basics of the transaction. Within the letter, hyperlinks take you to extensive web pages which lay out the implications of various legal options and issues. These reader-friendly articles empower you, as purchaser, vendor or borrower, by providing comprehensive information on every aspect of the transaction.

Coupled with these letters are intake forms, sent out at the same time. These forms help focus the collection of data at an early stage, ensuring that the transaction proceeds smoothly and avoiding last-minute panic.

Of course, not all clients enjoy the computer experience, and for these we provide a paper-based equivalent.

How not to save probate fees– At a maximum of 1.5%, the Estate Administration Tax is one of the lowest tax rates in Ontario, if not on the planet. Nevertheless, amateur tax planners go to great lengths and sometimes considerable expense to "beat the system".

Among such schemes are joint tenancies, *inter vivos* gifts and badly planned trusts. Sometimes these are clever, but all too frequently they lead to unintended and tragic consequences. Such tax dodges carry with them the risk that the donor will lose control of the asset and, in many cases, incur Income Tax liability far in excess of the probate fee saved. For example, putting Mom's home into joint tenancy with the two kids might save three thousand dollars in probate costs, but add four or five thousand to each of the kids' income tax when Mom dies. Not clever.

While properly planned testamentary trusts can save tax in the order of ten or twelve thousand dollars per year per beneficiary, amateur schemes often cost an estate (or the beneficiaries) tens or hundreds of thousands of dollars in tax which could have been easily and legally avoided but for such amateur scheming. Like parachute packing and plastic surgery, this area is best left to the experts.

How can you defend a guilty man?– "There is no doubt about the position and duties of a barrister or advocate appearing in court on behalf of a client. It has long been recognized that no counsel is entitled to refuse to act ... for any person however unpopular or even offensive he or his opinions may be, and it is essential that that duty must continue: justice cannot be done and certainly cannot be seen to be done otherwise.... Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witness for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. "Lord Reid, in *Rondel v. Worsley*.

But what if you actually know your client is guilty? In *The Road to Justice*, Lord Denning wrote, "A difficult question arises when the barrister gets to know during the trial itself that his client is guilty. If he then publicly announces his withdrawal from the case, it may seriously prejudice his client. It may, therefore, be his duty to his client to stay in the case, but his conduct of the case must be regulated by the higher duty not to be a party to a lie. He must not, therefore, assert that his client is innocent, for he knows him to be guilty. He must not suggest that the witnesses for the prosecution are telling untruths, for he knows them to be telling the truth. He must not put his client into the witness box to tell a lie. All he can do is to urge that the prosecution have not proved their case; for even the worst criminal is entitled to require the case to be proved against him."

> What information consumes is rather obvious: it consumes the attention of its recipients. Hence a wealth of information creates a poverty of attention.
>
> **Herbert Simon**

This newsletter is also provided to their clients with the compliments of

THOMAS & WINSHIP

Lorne– Did you know that most males with the given name "Lorne" are Canadian and that they were named (if unwittingly) in honour of Canada's fourth Governor General, the Marquis of Lorne (1845-1914)?

> Psychiatry enables us to correct our faults by confessing our parents' shortcomings.
> **Laurence Johnston Peter**

Ouch! Why it Matters to be Careful– There is no prize for paying too much tax. The law permits the taxpayer to use all lawful means to avoid paying any more tax than is absolutely necessary. This is called "tax avoidance" which is perfectly legal, moral, ethical and prudent– unlike "tax evasion" which is a crime. The tax man, of course, wants to extract the last possible penny of tax, and looks at every tax avoidance scheme with a jealous eye. This is the dynamic in which estate planning lawyers ply their trade.

In the recent tax case of *Antle v. The Queen,* Justice Miller, in finding against the taxpayer, had this to say: "This conclusion emphasizes how important it is, in implementing strategies with no purpose other than avoidance of tax, that meticulous and scrupulous regard be had to timing and execution. Backdating of documents, fuzzy intentions, lack of transfer documents, lack of discretion, lack of commercial purpose, delivery of signed documents distributing capital from the trust prior to its purported settlement, all frankly miss the mark – by a long shot. They leave an impression of elaborate window dressing. In short, if you are going to play the avoidance game, it is not enough to have brilliant strategy, you must have brilliant execution." In the result, the tax man got gazillions of dollars.

All too often we receive trusts or minute books which are woefully out of date, missing crucial documents and generally which don't look much like the reality of the business. Links between holding companies and operating companies are dodgy and family trusts are out of sync with all of these. Often we can repair, provided the evidence is there of the true actions and intentions, but sometimes the whole mess is just too far gone, and we are looking at little more than salvage.

Moral of the story? If you are using corporate or trust vehicles to try to save a few tax dollars, ensure that the paperwork is thorough, up-to-date, and consistent with the reality of your business. If you have any doubt, call!

"Select individuals"– Many readers have noted that this firm serves "business, professionals and select individuals" and wonder exactly who are such exalted beings. Really, "select individuals" are everyday people who follow the golden rule and treat others as they would be treated. We do our best to deal with all of our clients fairly, intelligently and with respect, and those who give back in kind are "select individuals". Those who whine, expect us to help them cheat or refuse to listen to sound advice are encouraged to move on to some other law firm.

TEP– After nearly two years of intensive study and testing, Norman Bowley has been recognized by the international Society of Trusts and Estates Professionals ("STEP") as a designated trusts and estates professional and is entitled to use the designation TEP.

Restrictive covenants– Such covenants are said to "run with the land"- that is, if you buy the land, you become bound to perform the covenant. In an urban setting, these are typically covenants which were laid down by the original developer in your area (frequently because he was strong-armed by the city) to set certain minimum standards. The very first purchaser from the developer had to promise certain things and each purchaser steps into his or her shoes.

Typical covenants have the same object as by-laws– they are intended to control, or restrict, the use of the land. These commonly include such terms as not planting certain undesirable trees, not leaving debris in the front yard, not keeping livestock in the city, not painting your house purple, not changing the drainage..... generally speaking, not doing the things which would annoy you if your neighbour did them! Occasionally these go beyond good-neighbourliness and deal with such matters as communal mail boxes or an acknowledgment about restricted bus services.

> People want economy and they will pay any price to get it. **Lee Iacocca**

Counsel to Business, Professionals and Select Individuals

200 Isabella Street, Suite 203, Ottawa, Ontario, Canada K1S 1V7 613-233-9541 fax 613-233-7965 www.bowley.ca
Norman Bowley Professional Corporation