ENDURING POWER OF ATTORNEY AND PERSONAL DIRECTIVES IN ALBERTA

Mae Chow

When thinking about estate planning, most people have a general idea about Wills. There are two additional tools that you can use to ensure that your wishes are known and met during your lifetime if you are no longer able to make your own decisions. These are:

- The **Enduring Power of Attorney (EPA)** appoints an individual to manage your *property* when you are incapable.
- The **Personal Directive (PD)** appoints an agent to make decisions about your *person* when you are incapable.

What is an Enduring Power of Attorney?

An EPA appoints a person (i.e. attorney") to manage your property if you become incapacitated. The document allows the attorney to make legal and financial decisions on your behalf. In your EPA, you specify the powers that the attorney has, which may be general and/or specific. Examples of the general and the specific are: "My attorney may do anything that I may lawfully do', or "my attorney may only use property for myself, my spouse and my dependent children".

There are two types of EPA:

- An *Immediate EPA* is effective when it's signed and will continue if you become incapable.
- A *Springing EPA* comes into effect only if you become mentally incapable of making reasonable judgements about your property.

Planning your EPA

In your EPA, you appoint an *attorney* to manage your property. This can be your spouse, adult child, another relative or a trusted friend. Your attorney can live anywhere, and must be over the age of 18, but geographic location is usually a condideration. Alternatively, you can choose to appoint a trust company.

Why do you need an EPA?

Without it, the *Adult Guardianship and Trusteeship Act* applies. Your family may need to get a Court Order of Trusteeship which can be costly and time consuming to manage your affairs for you,. If a Court Order is needed to name a trustee, that person must be a resident of Alberta.

What is a Personal Directive?

With a PD, you choose an agent to make personal (non-financial) decisions for you. A PD is most often associated with healthcare, but it can also cover accommodation, decisions about with whom you live, participation in social, education and employment activities, and other legal matters not related to assets. A PD is effective only when you are considered incapacitated and unable to act for yourself.

An example of an instruction that may be included in your PD is: "I do not wish my life to be prolonged by artificial means when I am in a coma or persistent vegetative state and, in the opinion of my physician and other consultants, have no known hope of regaining awareness and higher mental functions, no matter what is reasonably done."

Without a PD, the *Adult Guardianship & Trusteeship Act* applies. A Court order may be required for decisions, which can be costly and times consuming to obtain. It can also be difficult for family members to decide who applies and this route is not private.

Myths about Personal Directives

There are some myths surrounding PDs that we encounter in our practice. Here are some of them:

1. Personal Directives can be used to demand euthanasia or assisted suicide.
2. A family member or friend can write a Personal Directive on behalf of an individual who has lost capacity.
3. A Personal Directive can "require" the provision of medically futile treatment. This is possible, but not always the case.
4. Directives of a family member can override the directives of an appointed Agent who is not a member of the patient's family.

Supplemental to the PD is *Supported Decision-Making Authorization*. This allows a person to assist in some or all decisions on personal matters for elderly, infirm, brain injured, or people with developmental disabilities even though the person remains competent.

Both Enduring Powers of Attorney Personal Directives may be sensitive and often technically challenging to prepare. We recommend that you work with a lawyer to create an EPA and PD for yourself or a loved one.

EDMONTON OFFICES

SUITE 2800, 10060 JASPER AVENUE
EDMONTON, ALBERTA
T5J 3V9

Phone: 780.428.6036
Toll Free: 1.800.782.9409
Website: www.dcllp.com
Email: edmonton@dcllp.com
Twitter: @dcllp

This newsletter is intended to give general information only. We recommend you contact a lawyer for specific legal advice.

THE LINK

CONNECTING YOUR BUSINESS AND PERSONAL LEGAL NEEDS

CONTENTS:

1 COMMERCIAL LOANS
2 CORPORATE DIVORCE
3 BUILDER'S LIEN ACT
4 POWER OF ATTORNEY & PERSONAL DIRECTIVES

AN INTRODUCTION TO THE BUILDER'S LIEN ACT

Ron Smith

The Builder's Lien Act is in place to protect the owners and contractors, subcontractors, suppliers and labourers who engage in a construction project. It includes a mechanism for contractors and suppliers to be paid for services and it limits the liability on the owner. The Act covers all sizes of projects—from commercial developments to home renovations.

Essentially, a lien allows an unpaid contractor or supplier to claim a charge against the owner's property (or minerals, in the case of mining) if they have not been paid. The Act requires the owner to create a lien fund, made up of a 10% holdback against the value of work completed and materials furnished plus other amounts due and owing under the contract. There is a separate lien fund for each contract that the owner signs. The owner's liability is limited to the lien fund(s), and they can use these funds to pay creditors to remove the lien on property, rather than foreclose.

Who is a Lienholder?

A lienholder is any person who does any work or furnishes any material for an 'improvement'. An improvement is defined as:

"anything constructed, erected, built, placed, dug or drilled, or intended to be constructed, erected, built, placed, dug or drilled, on or in land except a thing that is neither affixed to the land nor intended to become part of the land"

General maintenance, like snow removal, legal and accounting services are not considered 'improvements'.

Entitlement to a Lien

Rights are created as soon as work commences and/or materials are furnished. If the lienholder is not compensated, it can bring an action against the owner and any contractors to whom it has supplied work or materials. The court has the authority to order that the owner's interest in the property be sold in order to satisfy the claims of lienholder(s).

'Lienable' lands include Fee simple, Leaseholds, Mines & Minerals and Condominium plans. Liens are not generally enforceable against Crown Lands; however, they can be registered against lands owned jointly by the Crown and a third party. Indian and Métis lands fall within the exclusive jurisdiction of the Federal Government, and the Provincial lien legislation does not apply.

Registering a Lien

To create a Lien, you must register a Statement of Lien at the Land Titles Office or, for mineral interests, at the Department of Energy. A lien must be registered within 45 days from the date when the labour and/or materials were last furnished or the contract was completed or abandoned. In the case of work provided to an oil or gas well site, the limitation is 90 days.

Litigation process

Once a lien has been registered, the Act provides the parties with many procedural mechanisms to deal with a claim:

- Paying money into Court
- Notice to Prove Lien
- Notice to Commence Action
- Order for the Sale of Land

This is an overview of the Builder's Lien Act. A builder's lien can be an effective way to garner payment for unpaid work or materials, but it is important to note that it is not a guarantee of payment. Seek legal counsel to understand the requirements and restrictions that might apply to your situation. Likewise, if you are an owner, you may wish to obtain legal advice to ensure that you set up your Lien Fund(s) correctly and limit your liability accordingly.

CORPORATE DIVORCE

THE OPTIONS FOR DEALING WITH SHAREHOLDER DISPUTES

Ted Feehan and Erin Burton

It is often said that we spend more time with the people we work with than with our families. When business partners get in to bed together to run a company, many of the same dynamics and pressures of a marriage come in to play. And, like a domestic marriage, sometimes things don't work out and a 'corporate divorce' becomes the only viable option. In these circumstances, a solution must be found for buying out one of the owners. If a buy-out is not an option, than a process for selling and divvying up or assets of the business will have to be found.

There are four common approaches to resolving a shareholder dispute when one or more of the shareholders wants to buy out a partner and continue to own the business. Which solution is appropriate will depend on the level of acrimony that exists between the business partners.

Mutual Agreement

If the parties can agree, the least expensive and most expeditious way to transfer shares is by agreeing to a share value and transferring the shares from one owner to another. Of course, for an agreement to be reached, all parties need to be willing to negotiate.

Shotgun Agreement

A common provision in a shareholders agreement is the Prior Unanimous Agreement (USA). It sets out the steps by which one shareholder can force the sale of shares. Commonly referred to as a 'shotgun agreement' this process involves one shareholder offering to buy out the other shareholder at a price per share of their choosing. The recipient of the offer must either accept the offer or buy out the shares of the other shareholder at the same price.

Minority Rights

If a minority shareholder believes the company has not acted in good faith, they can appeal to the court for the application of an Oppression Remedy. The Court can order a number of different remedies, including the purchase of the shares of the minority shareholder.

Litigation & ADR

Commencing litigation can often force a party's hand and lead to settlement negotiations, which can include the transfer of shares. But, litigation in and of itself cannot force the sale of shares unless it results in an oppression order from the Court. Alternatively, the parties can agree to go to mediation or arbitration to determine the best option for the sale of shares. Mediation and arbitration offer a faster and less expensive route to resolution than going through the courts.

Other options for dealing with a serious dispute, that has little to no chance of resolution, typically involve ending the business in one way or another.

Butterfly Transaction

Under this process, the parties can agree to split the corporations into two separate corporations. The two new corporations must carry on the same business as the old entity. The division of assets in butterfly transactions can be difficult.

Liquidation

If there is a complete deadlock between equal shareholders that cannot be resolved through other means, the Courts can appoint a liquidator to sell the company assets. The shareholders of the company can also vote to place the company into liquidation.

Sell to a Third Party

The company shareholders may elect to sell the company and its assets to a third party. The shareholders agreement may contain provisions that need to be considered if this option is being pursued, especially if there are minority shareholders.

Informal Wind-down

The shareholders may formally agree to wind-down the corporation, pay off its creditors and cease operations. Unanimous consent of the shareholders will be required before the corporation is informally wound down.

While other options and strategies do exist to navigate disputes amongst shareholder, the options listed above are the most common tactics employed. It must also be noted that there are many potential tax implications that accompany the options listed above. Tax advisors should be consulted before any shares are transferred.

Having an up to date shareholders agreement that addresses dispute resolution processes can save all shareholders enormous and valuable time and energy. Spending time at the outset of the business relationship, or when relationships between shareholders is positive, is the best approach to getting agreement on how best to resolve any future dispute.

COMMERCIAL LOANS

WHAT TO KNOW BEFORE YOU SIGN

Percival Odynak, QC

Many business owners in need of financing for their business look to banks and other commercial lenders. After all, interest rates are low and a commercial loan usually does not require owners to give up any equity in the company or control of operations and strategic direction. However, commercial loans do come with several costs and obligations that can place a heavy burden on a business and that can be easily overlooked.

When applying for a loan, the first document that is presented by the lender is the Term Sheet. It sets out the general guidelines under which the lender will consider lending to the borrower. There is no legal obligation or commitment by either party at this stage. If the loan application proceeds the lender will conduct its due diligence on the business and its finances as well as the finances of the owner.

When the lender is prepared to make the loan, they will present the business with the Loan Offer. The Loan Offer is the binding contract that sets out the specific terms of the loan. It needs to be studied carefully by the borrower to ensure they understand their commitments.

The requirements specified in the Loan Offer will include:

- Financial tests
- Reporting requirements
- Security
- Fees
- Penalties

The financial tests are a series of ratios used to evaluate the performance of the business. The financial ratios specified in the Loan Offer must be maintained throughout the life of the loan. Examples of ratios required by lenders include:

- Quick ratio - a company's ability to meet its current obligations using its most liquid assets
- Current ratio - the number of times current assets exceed current liabilities
- Debt to equity - used to measure a company's financial leverage, calculated by dividing a company's total liabilities by its stockholders' equity

If it was difficult for the business to achieve the required ratios when applying for the loan it may be difficult to maintain them throughout the repayment period.

The reporting requirements of the loan may also place a significant cost and time burden on the business. If a full audit is required, the cost will be significant and should be considered as part of the cost of the loan. A 'review' or 'notice to reader' by an independent accountant of the business's finances will not be as time consuming or expensive, but still should be considered when reviewing the Loan Offer.

The security for the loan is another important consideration. Owners of incorporated companies will often be required to provide guarantees and their personal property as security, along with the assets of the business. The Loan Offer may specify that the assets of the business include not just physical property, but inventory, receivables and intangibles such as intellectual property.

In addition to the interest rate, the Loan Offer will include details of the fees the borrower must pay to the lender for making the loan. These fees can be for the costs of the due diligence process, loan processing fee, on-going loan administration, closing costs and an annual review. These fees can all add up. In many cases, the high fees are hidden behind a very attractive interest rate. Do the math. It may well be worthwhile paying a higher interest rate in exchange for a reduction in fees.

Finally, there is the issue of penalties. If a business fails to satisfy all the contractual obligations of the Loan Offer, the lender can call in the loan. If the transgressions are mild, the lender may give the business 90-120 day to repay the loan. If the breach of the Loan Offer terms is more severe, the time frame could be significantly shorter. Either way, the business owner will need to spend considerable time and energy finding an alternative lender in a very short period of time.

Owners looking for loans to fund a growing business must remember to look at the full cost of loan beyond the interest rate and repayment schedule. The specifics of the Loan Offer contract may not make that loan worthwhile. And remember, contracts can be negotiated, but not after they are signed. If there are terms you are unhappy with, raise them with your lender before signing. You may well be able to agree on terms with which you are both comfortable.