

ADVANCING *Issues*

Spring 2005 • Published quarterly by Corporate Planning Associates • Vol. 12, No. 1

Introducing “CPA Capital Corp”

By P. Lee Fisher, President and Chief Executive Officer, Corporate Planning Associates

With the coming of Spring 2005, we are pleased to announce a new beginning. CPA Capital Corp. is a company we have founded along with Joe de Tuba. It will combine the talents of Joe with those of the existing CPA professionals.

Joe has over 30 years of investment and merchant banking experience in both Canadian and International markets. Since 1994, Joe has carried on an independent corporate finance

practice dedicated to the Canadian small and medium-sized business market.

He has acted as fiscal agent and financial advisor to entrepreneurs, owners and managers of medium-sized public and private companies.

In 1972, Joe commenced his banking career with Bank of Montreal following which he joined Dresdner Bank AG in 1977 where he was responsible for its domestic Canadian banking strategy. In 1980,

Joe joined Credit Suisse Canada, and was responsible for creating a wholesale Canadian portfolio of both corporate and public sector securities.

From 1982 to 1995, Joe was responsible for the Canadian operations of Hambros Bank Limited, a U.K. merchant bank; he served as a Director on the main board in London and established its registered dealer subsidiary in Canada.

We are all looking forward to this joint venture. For more, read on ...

CPA Capital Corp

By Joe de Tuba, Corporate Planning Associates

CPA Capital Corp. (“CPAC”) offers its services as an independent financial advisor and corporate finance specialist to Canadian owners and operators of small to medium size business. Our philosophy is to establish long-term relationships with clients. In all but exceptional cases, CPAC will not be interested in taking on transactions for transactions’ sake. The objective is to successfully offer a continuum of services to the client throughout its business cycle.

We offer expertise and credibility in delivery of the following services:

1. **Private Placements of Debt and Equity:**
 - Financing Strategy
 - Term and Operating Loans
 - Subordinated Debt
 - Convertible Debentures
 - Common and Preferred Equity
 - Tax Advantaged Structures
2. **Management Buyouts**

3. **Financial Restructuring**
4. **Leveraged Buyouts**
5. **Mergers & Acquisitions**
6. **Business Value Assessments**

Two questions may come to mind. Why focus on Canada’s owner operator mid-market and what value is created for Corporate Planning Associates (“CPA”)?

Firstly, Canadian statistics reveal that there are over 2,000,000 small

continued on page 2

businesses operating in Canada that employ about 60% of the total population and contribute approximately 40% of the GDP. These statistics define an ideal market sector from which to establish a successful corporate financial advisory practice. Yet, it has been my personal experience during the last 10 years that this market has been severely underserved. Why? Primarily because the investment banks and major bracket financial service firms focus on large size transactions which emanate from Canada's major cities. The cost of building expertise and credibility in the large public sectors of the market has imposed expense ratios that can only be offset by generating significant fees from large transactions. How many times has one heard that the transaction size is too small? At CPAC the forefront of our marketing thrust will be dedicated to this private mid-market sector located not only in large regional centres but also in smaller communities across Canada.

Secondly, Corporate Planning Associates has a proud history of offering superior quality financial services catering to the individual. During the past number of months CPA and I have discussed the merits of expanding and diversifying the CPA brand by offering an integrated corporate and personal wealth management service. We think that CPAC can represent an important contribution to the future growth strategy of Corporate Planning Associates.

But, is there a market for this approach? A recent study entitled, *Are Canadian Entrepreneurs Ready for Retirement?* would seem to support the creation of this new value added business model. In the report, it states that "500,000 small business owners will retire in the next five years." It also says that "\$1.2 trillion in business assets is poised to change hands by 2010 – the largest turnover of economic control in generations". It will be one of CPAC's

primary roles to offer comprehensive corporate finance advice on all salient issues that would impact the transfer of business assets into personal wealth assets. The strength of our approach becomes self-evident. Prior to and at the point of transfer of these business assets, the experienced management team at Corporate Planning Associates can become involved and ensure that independent personal advice is provided to the client. Armed with a professional and experienced corporate finance capability, the needs of the owner-operator can now be served by CPA Capital Corp. and Corporate Planning Associates, a service we think is unparalleled in the Canadian market.

Based upon the tenants of Credibility, Confidentiality, and Confidence, we intend to create a growing client list that will serve to distinguish CPA Capital Corp. in the Canadian market.

For further information on CPA Capital Corp., please contact Joe de Tuba at CPA Capital Corp. Suite 1700, 320 Bay Street, Toronto Ontario M5H 4A6. Tel: [416-364-7898] Email: jdetuba@cpafin.com

CPA's Marketing Update

By P. Lee Fisher, President and Chief Executive Officer, Corporate Planning Associates

During the fourth quarter of 2004, we began working with eight new clients, of which five are extensions within existing corporations or referrals from existing clients. Two of our new clients represent two new corporations who have not previously

worked with CPA. Both companies are located in Calgary where there are many exciting things happening. In the first quarter of 2005, we welcomed six new clients, including one new corporation from Toronto. Two of our new clients are referrals from existing clients.

Thank you to everyone for your support.

With regard to our advertising campaign, we are in the final stages of the program and want to thank Doug Whitehead, Courtney Pratt and Dominic Gammiero for their endorsements.

It's just not the same: Married vs. Common Law relationships

By Bernadette Dietrich, Partner, McCarthy Tetrault

It is a surprisingly common misapprehension that common law spouses (in a relationship of some duration) enjoy the same rights as legally married spouses. This is simply not so. The distinction between the two becomes all too real for some common law spouses when it comes time to divide the spoils on relationship breakdown or on the death of one spouse. The Supreme Court of Canada case, *Walsh v. Bona*, [2002] 4 S.C.R. 325, has confirmed that the legal distinction between these two types of relationships will persist. In this case, which challenged the constitutional validity of the *Nova Scotia Matrimonial Property Act*, our highest Court decreed that it is constitutionally permissible to restrict a matrimonial property regime to married persons. Ascribing spousal status to people who cohabit outside marriage, it found, takes away their freedom to choose a particular family form and thus, affects their liberty.

In Canada, the Northwest Territories, Nunavut, Saskatchewan and most recently Manitoba (June 2004), automatically include cohabitants in their matrimonial property laws. In Quebec, British Columbia and Nova Scotia, common law couples can register their relationship or civil union and thereby opt in to the relevant provincial matrimonial law on the breakdown of the relationship. In Ontario and the other remaining provinces, by contrast, the different rights and benefits enjoyed by each type of spouse are entrenched unless and until the legislature sees fit to amend the relevant statutes.

The Ontario *Family Law Act*, R.S.O. 1990, c.F.3 provides a mathematical formula for dividing property between legally married spouses, now including same-sex spouses, on marriage breakdown or death. For such couples with no domestic contract providing otherwise, the application of the *Family Law Act* will generally result in an equal division of the assets the couple amassed while married. Simply expressed, each of the spouses calculates the value of his or her respective assets acquired during the marriage (not including gifts and inheritances and certain other excluded property) and the spouse with the greater “net family property” pays the spouse with the lesser, one-half of the difference, known as an “equalization amount”.

The same sharing regime can apply on death. On death, however, the surviving legally married spouse must elect, in writing, within six months from the date of death (or longer with court approval) for a division of property under the *Family Law Act*, resulting in an equalization amount. The surviving spouse is required to deduct from the equalization amount the value of any life insurance policy proceeds on which he or she was designated as a beneficiary and any lump sum payment provided under a pension or similar plan on the death of the deceased spouse. Any jointly held property, which passes to the surviving spouse by right of survivorship, however, becomes the exclusive property of the surviving spouse and no corresponding deduction is made from the equalization amount. A spouse who makes an election in

favour of the statutory equalization amount foregoes any benefit to which he or she may have been entitled under the deceased spouse's Will (or on intestacy), including the right to act as an Estate Trustee, unless the Will specifically provides otherwise.

This equalization of property does not apply to common law couples in Ontario, irrespective of the length of their relationship, and whether or not they have children together, unless they have specifically adopted this, or a similar regime, by contract.

A common law spouse does, however, have certain limited rights, which are automatic, if the relationship dissolves as a consequence of the death of one of the spouses. These include splitting the Canadian Pension Plan credits, a survivor's old age security allowance for older low income spouses, C.P.P. death benefits and the C.P.P. survivor's pension.

Relief is also available to a common law spouse who has contributed money or value to property used and enjoyed by the couple during their relationship, where title to the property is held by the other spouse. However, in these cases, the onus is on the common law spouse to prove unjust enrichment and make a successful resulting or constructive trust claim to the property, or a share of it. A claim of this nature necessitates a court application, and the tests to establish an ownership interest in a particular property can be both onerous and difficult to meet. Concrete, persuasive evidence of contribution, in terms of actual dollars or time, can be difficult to

continued on page 4

produce. Further, resolution of these issues through mediation or litigation can prove very costly.

A common law spouse, like a legally married spouse, may also be entitled to financial support on relationship breakdown or on the death of the spouse. In Ontario, spousal support is available to common law spouses who have cohabited three years or more. Support on relationship breakdown may be available to a legally married or common law spouse under the *Family Law Act*, and on death, under the *Succession Law Reform Act*, R.S.O., 1990, c. S.26. Under each statute, the court will consider the needs and means of the spouse to determine an appropriate amount of support. Also factored into the equation are the spouse's capacity to contribute to his or her own support, his or her age and physical and mental health, the ability to provide for him or herself, the length of time of cohabitation, the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation, and the spouse's accustomed standard of living, among other things. As a consequence of a very recent case, *Cummings v. Cummings*, [2004] O.J. No. 90 (C.A.), the court may also consider any moral obligation the deceased individual may have owed to the surviving spouse or others.

In Ontario, common law spouses cohabiting with a legally married individual may be especially exposed. If the deceased common law spouse dies leaving both a legally married and a common law spouse surviving, both spouses may have claims against the estate. If there is no Will, the legally married spouse (and children from that relationship) may end up claiming most if not all of the estate on intestacy, to the exclusion of the common law spouse. Even if the deceased left a Will favouring the common law spouse, if inadequate provision was made for the married spouse and/or children from a previous relationship, the Will could be challenged by such spouse and children, the result of which may be a redistribution of the estate among the dependants and the common law spouse.

For common law couples who wish to establish an economic partnership, serious consideration should be given to some or all of the following: joint ownership of assets; designation of the common law spouse as the beneficiary on RRSPs, RRIFs, life insurance, pensions and other benefits; establishment of an *inter vivos* trust for the common law spouse; properly planned Wills; and domestic contracts.

Unmarried couples, including unmarried same-sex couples, can

enter into legally binding domestic contracts detailing their property arrangements. Domestic contracts can stipulate that the statutory matrimonial property regime applicable to married couples applies to their relationships, subject to any necessary modifications. In upholding the legal distinction between married and common law couples, the court favoured choice and held that the "law respects the choices made by couples and enhances their ability to live in relationships of their own design." Implicit in this decision is some sage and practical advice for common law spouses: Reduce your design to writing; choose a contract. The relatively recent S.C.C. decision in *Miglin v. Miglin*, [2003] S.C.R. 303 supports the view that where each party has received independent legal advice, a carefully crafted contract between them will be upheld, even where a party has released all rights to support. A deal is a deal.

This article first appeared in The Lawyers Weekly, September 2004

This article is reprinted with permission of the author.

Published by

Corporate Planning Associates
Suite 1700, 320 Bay Street
Toronto, Ontario, M5H 4A6

Tel: (416) 364-7898

Fax: (416) 364-6438

Managing Editor:

Joy Rooney

While we make every effort to ensure the accuracy of information contained in *Advancing Issues*, we cannot guarantee its accuracy or completeness. Readers are advised to seek professional advice to determine the applicability of the information to their own circumstances. Reproduction, in whole or in part, without written permission is forbidden.

Subscription price: \$100 per year

Visit our Website at www.cpaфин.com

Marilyn Miller retires

Marilyn Miller, our Receptionist for the past twenty seven years, retired from CPA in February of this year. Marilyn had a knack for remembering every face (and voice!) she came into contact with during her tenure at CPA. Marilyn continues to reside in Toronto, and will now have the time to visit with her children and grandchildren. She is fondly remembered by everyone who worked with her here at CPA, and our very best wishes are extended to her as she begins this new phase in her life.

