THE LAWRENCES® LETTER

News and information for clients and friends of Lawrence, Lawrence, Stevenson LLP

SPRING 2007

In this issue:

TIME'S UP!

How the new *Limitations Act* could affect you

Kenneth G. Hood

Say you decide to give some money to your children as part of your estate planning. You ask each child to sign a demand promissory note (a promise to repay the money on demand), in the belief that you can demand the money back years later if your circumstances change.

Or let's say you own a small business. You have the company give you a bonus and you loan the after-tax proceeds back to the company. To protect the loan, you have the company give you a demand promissory note. Years later, creditors put your company into bankruptcy, but you believe that you have priority over these creditors and will at least be able to recover the amount of your promissory note when the company's assets are liquidated. Right?

Sadly, you could be wrong in both cases, as a recent Ontario Court of Appeal case shows (*Hare v. Hare* 2006 CanLII 41650 [ON C.A.]).

Mrs. Hare lent her son $150,000 in 1997. Her son gave her a demand promissory note that required him to pay interest, which he did until 1998. In 2004 Mrs. Hare demanded repayment. Her son refused, whereupon she sued him. The judge held that she was prevented from taking this action by the *Limitations Act*, which sets a time period by which anyone wanting to sue someone else must start their lawsuit. Mrs. Hare appealed, but was unsuccessful in reversing the decision. The majority of the Court held that the clock started ticking when the $150,000.00 was lent, not when Mrs. Hare demanded repayment.

Before January 1, 2004, the time period in which to bring a claim was usually six years, with numerous exceptions under the *Limitations Act* and other legislation that contained their own special limitation periods. New legislation, effective January 1, 2004, reduces the time period to start a lawsuit to two years and eliminates many but not all of the special limitation periods. The Ontario Court of Appeal looked at the issue of whether the new *Limitations Act* had changed the law with respect to demand promissory notes so that now the refusal to pay started the running of the limitation period. The majority decision was that it did not, and Mrs. Hare's time for taking legal action had run out.

This case demonstrates how important it is for anyone lending or borrowing money to get sound legal advice. If you are in such a situation and are unsure whether you are protected, give us a call. We can assess your situation and help you take steps to gain the maximum protection under the law.

Ken Hood is a certified specialist in civil litigation. He has extensive experience in contractual disputes, shareholder and partnership disputes, commercial landlord and tenant disputes, and debt enforcement. He can be reached at (905) 452-6873 or khood@lawrences.com.

If Only We'd Thought of That:

Negotiating a Commercial Lease

Heather Picken

Mr. and Mrs. Old, the sole shareholders of Oldco, want to retire from their business to travel. They operate Oldco from leased premises and recently signed a new, 10-year lease in the company's name. Mr. and Mrs. Old plan to sell all their shares in Oldco to Mr. and Mrs. New, who like the location of Oldco's premises and the added benefit of a long-term lease.

After the shares have been transferred, the landlord tells a surprised Mr. and Mrs. New that the lease will be terminated, because Oldco breached a provision of the lease. The landlord points out that the lease contains a clause that the landlord's consent must be obtained for any transfer of the lease. Mr. and Mrs Old failed to obtain the landlord's consent and Oldco is now in breach of the lease. Oldco argues that it has not transferred the lease, it simply sold the shares of Oldco and Oldco will remain the tenant. The landlord, however, points to the clause in the lease which states that a change to the shareholders is a change of the effective voting control of the corporation and is considered a transfer.

> Oldco could have avoided this situation by having a real estate lawyer negotiate the original lease

The requirement to obtain the landlord's consent to a change in the corporate ownership is a common clause in a commercial lease; landlords want control over who rents the premises. Tenants who don't use a real estate lawyer when negotiating a commercial lease often overlook such provisions. A real estate lawyer could have helped Oldco avoid this situation by negotiating a right to transfer shares without needing the landlord's consent.

Or let's suppose that Mr. and Mrs. Old decide not to sell their business, but rather to modernize the premises with major renovations. To do so, they advise their customers that they are closing Oldco for five days. The landlord warns them that if they close for that length of time, Oldco will be in breach of the lease. The lease contains a covenant from Oldco that it will continuously operate its business, closing only for statutory holidays and that it will be open during normal business hours, so as not to decrease customer traffic to the plaza. Closed units look abandoned and detract from the plaza's overall appearance. Again, Oldco could have avoided this situation by having a real estate lawyer negotiate the original lease, so that the company could close for renovations without being in breach of the lease.

Lease audits are another provision to be negotiated in a lease. Conducted by real estate auditors on behalf of a tenant, normally at the tenant's expense, audits are detailed reviews of the lease to determine additional operating costs that the landlord can charge the tenant. There can be discrepancies in these costs; for example, where costs are allocated according to the size of premises; if the unit is incorrectly measured, the cost allocation will be incorrect. Landlords can limit the extent of the audit in a properly worded clause.

A commercial lease is a complex legal document. Always consult a real estate lawyer before signing one- and review it periodically, just like a will. Provisions agreed to at the commencement of the lease may now hinder tenants' plans or trigger an unwitting breach of tenants' obligations.

Heather Picken is Lawrences' Managing Partner and heads Lawrences' Real Estate Group. She can be reached at 905-452-6891 or hpicken@lawrences.com.

Not Knowing the Difference Can be Costly

Independent Contractor or Employee?

Christine Wiseman

Gordon Braiden, a longtime employee of furniture maker La-Z-Boy Canada, was required to sign on as an independent contractor in order to retain his sales position with the company. Braiden was required to incorporate and begin charging and paying GST for his services, paying his own Employee Health Tax and WSIB premiums. His benefits and RSP contributions ceased. However, nothing else changed in terms of the requirements and restrictions of his position, remuneration, or day-to-day routine and performance expectations. The agreement that Braiden signed allowed La-Z-Boy to terminate his contract with 60 days' notice. When the company sought to enforce that provision, Braiden sued.

The Court found that due to the level of control that La-Z-Boy exercised over Braiden, and Braiden's vulnerability when the company threatened to end his tenure if he did not sign on as an independent contractor, he was an employee and not an independent contractor. And since he was deemed to be a 23-year employee before termination, the Court awarded Braiden 18 months' pay in lieu of notice, totaling $139,000.00.

La-Z-Boy is appealing the decision, but the Court is sending a clear message that forcing employees to sign on as independent contractors without changing anything else in the relationship, solely to save the employer the cost of benefits, will not be condoned. La-Z-Boy's mistake was in not seeing the need for, or seeking out, advice on what truly distinguishes employees from independent contractors, and how they could realize the benefits of a 'true' independent contractor without having an independent contractor be deemed an employee.

The trend of obtaining services through independent contractors has steadily increased, owing to the appeal of the perceived flexibility and reduced expenses that utilizing independent contractors rather than employees can provide. However, the costs to an employer of having a so-called independent contractor deemed to be an employee can be substantial. The problem lies not in how a company defines its relationship with an independent contractor, but in the dynamics of that relationship - is the person truly in business for themselves or are they merely an employee by another name?

Recent court decisions confirm that the day-to-day interactions of the employer and worker are key considerations when determining the true nature of the relationship. The intention of the parties'

becomes a factor only when those particulars do not provide a definitive answer. The circumstances to be looked at include the following:

- Who controls when, where and how work is carried out?
- Can work from other sources be undertaken?
- Who owns the tools used to carry out work?
- How are profits/loss dealt with (or is compensation fixed)?

By answering these questions, it often becomes clear that the label of 'independent contractor' has been erroneously used. In that event, the risk to an employer can include responsibility for statutory deductions and employment standards entitlements such as overtime, vacation, statutory holiday and termination pay. Additionally, an employer can expect to be liable for WSIB and Health Tax premiums (including interest and penalties associated with each), and damages for wrongful dismissal when the contract is terminated. Clearly, legal advice is advisable before putting such status changes in place.

Is the person truly in business for themselves or are they merely an employee by another name?

Christine is an associate in Lawrences' Employment Law Group. She can be reached at 905-452-6885 or cwiseman@lawrences.com.

Life at Lawrences®

Lawrences®' lawyers lead active lives in the profession and in the community. Here are some of their latest achievements.

In Trust for the Future

Lawrences' estates lawyers have a reputation for being leaders in estate planning and administration and are regularly consulted by accountants, financial advisors and other lawyers about estate-related matters. This tradition has been continued by **Michael Prsa**, Chair of our Estate and Trusts group, who recently completed six years on the Executive of the Ontario Bar Association's Trusts and Estates Section, where he also served on a number of committees and chaired the Statutory Review Committee. Michael is a member of STEP (The Society of Trusts and Estates Practitioners). He is also on the panel of lawyers that provides legal services to the Public Guardian and Trustee and the Office of the Children's Lawyer for the Province of Ontario. These are government offices that have separate responsibility for protecting the interests of children, disabled individuals and charities in estate-related matters.

Taking Care of Business

When businesses need legal assistance, it helps to have advice from someone who has worked for the regulator. Our Business Law Group has added **Avi Goldstein** to the team. Avi previously worked for the Ontario Securities Commission and has significant experience advising small and medium-sized business enterprises on corporate and commercial matters, including start-up issues, stakeholder relationships, acquisitions, divestitures and business succession planning. He also carries on the Lawrences tradition of giving back to the community: he is treasurer of the Canadian Congenital Heart Alliance, a non-profit group dedicated to increasing awareness and understanding of the needs of people with congenital heart disorders.

In the Community

Making the community a better place to live has been a core value of Lawrences since the firm was founded in 1928 and continues to the present day. **Farquhar MacDonald** of our Estates and Trusts and Real Estate Groups recently joined the Advisory Council of the Brampton and Area Community Foundation, an independent organization that raises funds and makes grants to community charities. Farquhar was a founding director of the Foundation and continues to serve on its Grant-Making Committee.

THE LAWRENCES® LETTER

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Lawrence, Lawrence, Stevenson LLP
43 Queen Street West
Brampton, ON L6Y 1L9

T: 905 451 3040
F: 905 451 5058
E: info@lawrences.com
www.lawrences.com