



THE LAWRENCES® LETTER

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

SPRING 2008

DEATH, TAXES AND TESTAMENTARY TRUSTS How Estate Planning Can Help

Michael J. Prsa

Losing a loved one is bad enough, but losing large chunks of an inheritance at the same time can feel like cruel and unusual punishment. A bereaved family can find probate fees or capital gains tax eating up a large part of their loved one's estate.

Consider the following scenario: Mrs. Smith plans to leave what remains of her deceased husband's estate and her own to be divided equally between her two adult children, John and Jane. Assume the estate consists of the assets listed in Table 1.

Table 1. Smith Estate

Asset	Cost	Fair Market Value at Death
Home	\$200,000	\$400,000
Investment account	\$200,000	\$600,000
Private company shares	\$100,000	\$1,000,000
Total	\$500,000	\$2,000,000

On their mother's death, John and Jane each expect their share of the estate to be around \$1 million. They are shocked to find that about \$330,000 of the estate disappears in capital gains tax and probate fees. Here's why.

Under the *Income Tax Act*, a deceased person is deemed to have sold all property at fair market value immediately before death. With some exceptions, if the asset has appreciated in value, there will be a capital gain, of which 50% is reported as taxable income. In this scenario, if the home is the principal residence, it will be exempt from capital gains tax, but the investment account and the private company shares could attract about \$300,000 in capital gains tax.

Probate fees or estate administration taxes vary from province to province. In Ontario, the probate fee rate is 0.5% for the first \$50,000 of estate value and

1.5% thereafter. An estate worth \$2 million would be subject to about \$30,000 in probate fees.

Had the Smith family done some estate planning, the scenario could have been very different.

For example, a \$750,000 capital gains exemption is available for capital gains on a qualifying small business. To qualify for the capital gains exemption, the business must meet a variety of different tests. With proper planning, the Smith business could be set up to qualify for the capital gains exemption, reducing capital gains by almost \$175,000 in this example.

Had Mrs. Smith used the dual Will strategy, she may have been able to save approximately \$15,000 in probate tax on the value of the private company shares. The dual Will strategy usually involves putting assets that require probate in one Will and those that may not require probate in a second Will. Other probate tax-saving strategies may also be available.

Mrs. Smith could also set up trusts for each of John and Jane in her Will. Trusts created in a Will are called testamentary trusts. They can earn income and file a separate tax return. Mrs. Smith may also include John's and Jane's family members as discretionary beneficiaries of each trust. The trustee can then decide annually how to allocate the income between the trust and the various discretionary beneficiaries of each trust, to take advantage of each tax payer's low tax bracket. This income-splitting strategy can provide considerable tax savings over the life of the trust.

Anyone contemplating such arrangements should obtain proper professional advice in advance. What works in one situation may not work in another. The lawyers in the Wills and Estates Group at Lawrences have significant experience helping families develop efficient and effective estate plans.



Michael Prsa chairs Lawrences' Wills and Estates Group. A member of the Society of Trusts and Estate Practitioners, Mike focuses his practice on estate planning, estate administration and estate litigation. He can be reached at (905) 452-6880 or mprsa@lawrences.com.

WORKPLACE HEALTH AND SAFETY

An Ounce of Prevention is Worth a Pound of Cure

By Anthony E. Bak and Roslyn Baichoo



Workplace accidents are costly, not only to the injured party and to productivity, but also to the employer's liability, since failure to provide a safe workplace can now be a criminal offence. Transpavé Inc. of Saint-Eustache, near Montreal, is the first company in Canada to be found guilty since the *Criminal Code* was amended in 2004. It was recently fined \$100,000, plus an additional \$10,000 victim surcharge that will be contributed to provincial victim assistance programs. It is expected that this conviction will lead to others.

Transpavé makes paving stones. On October 11, 2005, Steve L'Ecuyer, a 23-year-old worker, was crushed to death as he attempted to free stones that were blocking the operation of a machine. He had just relieved a co-worker who was going on break when the fatal accident occurred. Investigators found that a safety barrier meant to prevent the machine from operating when someone was underneath it had been disconnected because it was causing production slowdowns.

As always, preventing such situations is infinitely preferable to defending a subsequent prosecution. The *Occupational Health and Safety Act* is designed to protect employees, not employers. The Act does provide for a defence of "due diligence", if an employer can show that all reasonable steps were taken to avoid an accident. This may include demonstrating that multiple safety procedures, protocols and safeguards were built into the production process, even though the legislation does not mandate this type of redundancy. Even if safety procedures were in place at the time of the accident, if the Ministry of Labour can show that an additional safety procedure or protocol could have prevented the accident, the chances of conviction are great.

The law requires employers to report immediately to the appropriate authority any deaths or critical injuries sustained by a worker at the workplace. Employers are also prohibited from doing anything to alter the accident site until the Ministry of Labour officials conduct their investigation. In all but the most exceptional cases, the Ministry will lay charges alleging that the worker was injured due to the employer's failure to safeguard the employee adequately. An employee's conduct in deliberately failing to follow

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company procedures and safety protocols is irrelevant: employee misconduct is no defence.

Company directors should be watchful on this issue, because the recent *Criminal Code* amendments make directors of corporations liable for wrongful acts committed by corporations. Senior officials may be found guilty, regardless of whether they are the actual controlling minds behind the operation.

The successful strategy in these situations is, of course, accident prevention. As with most problems, the ounce of prevention is more economically palatable and legally more successful, than the pound of cure. Directors and employers should ensure that workplace safety policies are prepared, distributed and explained to all employees. Employers should create a record of employee signatures to prove that they received a copy and participated in whatever training was offered. However, it is not enough simply to prepare and distribute these policies: they must also be updated when machinery and operation systems change.

Employers should also conduct regular health and safety audits of their workplace. Consider diarizing these events and making them an integral part of the company's business plan. Identify the employees or the contractor who will conduct the audit and act on recommendations in a timely manner. Document the company's response to any recommendations and indicate the costs of compliance. Some employers have actually invited the Ministry of Labour's staff to conduct its own survey of their workplace. Some employers may not find this palatable, since the Ministry will usually find violations where none was thought to exist, but for others it is the ultimate way of ensuring compliance. At the end of the day, employers must establish that they went above and beyond the simple requirements to maintain a safe workplace. As lawyers trained in this area, we can assist with the drafting of policies and determining whether any specific regulations ought to be considered given the industry involved.



Tony Bak is a partner in Lawrences' Litigation Group. He practises civil and criminal litigation, with extensive experience in business licensing and regulation. He can be reached at (905) 452-6875 or aebak@lawrences.com.



Roslyn Baichoo is an associate in Lawrences' Employment and Labour Group. She represents both unionized and non-unionized employers before various provincial and federal labour and arbitration boards, the Ontario Human Rights Commission and all levels of the Ontario courts. She can be reached at (905) 452-6878 or rbaichoo@lawrences.com.

PURCHASING A VACATION PROPERTY

Paradise or Nightmare?

Miel A. J. McGerrigle

Janet had planned to spend her retirement years as a proud cottage owner in beautiful Muskoka. She had plans to renovate, extend and winterize the old cottage, replace the dilapidated dock, and do some landscaping. She and her husband, Jim, had bought the cottage without doing any of the investigations that are critical with the purchase of a cottage. She is paying for that now.

Her first problem was in getting building materials to the site. The normal route to the cottage was by water, but the materials had to be trucked in. The nearest road was at the back of the property, but the only access was through the neighbour's property, for which she required permission. The neighbour, fearing truck damage, was reluctant to give it. In addition, Janet wanted to have vehicular access to the property, and found that she had to purchase a right-of-way from the neighbour to allow this. She also had to apply for Planning Act permission from the local municipal Committee of Adjustment. This involved paying for the application, survey plan and municipal road widening in order to obtain the access!

Next, she learned that the applicable zoning bylaw would not permit year-round occupation of the cottage; she would have to apply for a rezoning or minor variance to amend the existing 'seasonal use' provision. The zoning by-law also would not allow the size of addition she wanted to construct, nor would the current septic system and water well be adequate for her future use of the property; in fact, both of these systems had to be replaced.

What next? Janet did not obtain a survey at the outset. After closing, she was stuck with the responsibility of drilling a new well, repositioning the existing back yard shed and demolishing her boathouse—all because these structures were found to be encroaching onto her neighbour's lands.

To top it off, when Janet attempted to replace her existing dock, she found that it had been constructed on Crown land along the shoreline. She would have to purchase the frontage from the government before she could do anything further with the dock. The



retaining wall she wanted to construct along the shoreline would also disturb a fish habitat, so those plans had to be shelved as well.

Finally, it had always been her intention to keep the cottage within the family so that it could be enjoyed for many years to come. After Jim's untimely death, Janet decided to add her adult son on title with her as a joint tenant. This was done partly to avoid paying land transfer tax, probate fees and burdening her estate with the payment of capital gains tax. Sadly, Janet's son also predeceased her and she was left owning the cottage with her daughter-in-law, with whom she never got along.

As this example shows, purchasing a cottage or vacation property involves more legal issues than does the purchase of a regular residential property. Lawrences' Real Estate Group has developed special expertise in the purchase of vacation property and can help ensure that your cottage purchase turns out to be a dream, not a nightmare.



Miel McGerrigle is an associate in Lawrences' Real Estate Group, which has considerable experience in working with the purchasers of vacation property. Miel can be reached at (905) 452 6884 or mmcgerrigle@lawrences.com.

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Life at Lawrences®

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

Making Headlines



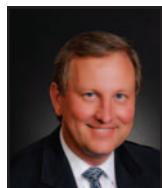
Lawrences municipal lawyer **John O'Kane** made headlines earlier this year when he successfully represented a group of 17 municipalities, comprising over 60 Ontario cities, towns and counties, at the Court of Appeal for Ontario. The group was an intervenor in the case of *Carsons' Camp Limited v. Municipal Property Assessment Corporation and the Town of South Bruce Peninsula*. At issue was the payment of property taxes for items placed on land but not owned by the owners of the land, like trailers. The case, which had implications for municipalities across Canada, was featured in the municipal publication *Novaes Res Urbis*, the *Brampton Business Times*, and *Bar-eX News*. John is the co-author of an article on the topic in an upcoming issue of the national magazine *Municipal World*.

New Directions



Speaking of municipal law, **John O'Kane** is a founding member of The Association of Canadian Assessors' Counsel (ACAC), which held its inaugural conference in Ottawa on May 8-10, 2008. John and **Tony Bak**, head of Lawrences' Litigation Group, attended. The members of ACAC are lawyers from across Canada who advise municipal assessing and taxing authorities. The ACAC was formed so that members could keep each other up to date on current cases and situations related to municipal assessment.

Cost Conscious



Lawrences' litigator **Ed Upenieks**, is an expert on legal costs, frequently addressing legal groups about issues related to the awarding of costs in lawsuits. He recently gave a presentation to the Ontario Bar Association entitled: "A Practical Approach to Costs: How to Get Them and How Not to Get Them Awarded Against You."

Making Headlines

New Directions

Cost Conscious

Mentoring New Canadians

Fame Before 40



Mentoring New Canadians

By day, Lawrences' employment lawyer **Roslyn Baichoo** represents employers, advising on workplace investigations, hiring, terminations, and general proactive approaches to workplace concerns. By night, she is a mentor with ACCES Employment Services, helping new Canadians integrate into the Canadian workplace. Roslyn is currently helping a graduate of a UK law school go through the Canadian accreditation process, carrying on Lawrences' long tradition of giving back to the community.

Fame Before 40



University of Toronto at Mississauga is celebrating its 40th anniversary this year. As part of the celebration, UTM is honouring its top 40 alumni—and Lawrences' real estate associate **Miel A.J. McGerrigle** made the list! Read more about Miel's achievements at <http://www.utm.utoronto.ca/-index.php?id=6160&alumniID=93>.

THE LAWRENCES® LETTER

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