



THE LAWRENCES[®] LETTER

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

SUMMER 2007

PLEADING GUILTY TO A MINOR OFFENCE? Get Legal Advice First

Anthony E. Bak

You have recently been charged with a provincial offence, such as careless driving, and have been summoned to appear in court. A few minutes before court begins, you approach the prosecutor and identify yourself. He looks at the ticket and says, "Don't worry, it's not a criminal offence; we'll agree to a \$200 fine on a guilty plea to an improper lane change, which is fewer demerit points. You'll be out of here in five minutes". That's a relief, right? Maybe not.

There are numerous considerations to be made before accepting what appears to be a quick and inexpensive solution to a legal problem. Failure to do so may cause you significant future problems.

First, if you plead guilty to an improper turn causing a motor vehicle collision, will that render you liable to pay any injured party's damages? This is particularly important if there is insufficient or no insurance coverage in place in the event of a successful lawsuit against you. Just the fact that you pled guilty may result in increased insurance premiums in the future, depending upon the type of offence and the risk assumed by your insurer.

Second, what will be the effect of your guilty plea if you are charged again in the future? Fines on subsequent convictions invariably escalate. The previous fine becomes the low watermark in assessing the new fine. A conviction under, for example, the Occupational Health and Safety Act carries with it a maximum fine of \$500,000, so subsequent convictions can be financially ruinous. In an attempt to promote workplace safety, the Ministry of Labour is intensifying its inspection and prosecution efforts, especially in the case of previous offenders. The Ministry has identified 30,000 businesses for inspection. More inspections will inevitably lead to more charges being laid. So, for example, if you are a builder and are charged with having a stairway without a railing during construction, your fine on conviction will be in the \$10,000 to \$25,000 range—even if no one was hurt.

But there's more. If you are a member of an industry that requires licensing in the province of Ontario, such as architecture, engineering, medicine, dentistry, and even real estate, bailiffs, car sales and funeral



directors, the government regulator may revoke your licence and livelihood on the basis of a conviction, even if the offence is not industry-related.

Surely you can simply request a hearing and explain to the tribunal about to take away your licence that you pled guilty simply to expedite matters? In fact, you really didn't do anything wrong, did you?

It's not that simple. When you enter a guilty plea to any charge, whether in a provincial offence court or in criminal court, the prosecutor reads in the facts warranting a conviction. Once you acknowledge those facts as being correct, you will be precluded from arguing to the contrary at a future point in time, in front of another civil or criminal court or licensing tribunal.

Ontario has many statutes regulating dozens of professions in which a seemingly minor conviction may have devastating consequences. These professions include automobile dealers and salespersons, travel agents, funeral directors, collection agencies, mortgage brokers, insurance brokers and certain investment advisers—to name only a few.

Do not expect the prosecutor to explain any of this to you or warn you of the possible future repercussions your plea may have. Protecting your rights is neither the prosecutor's mandate nor his job—but it *is* ours. Seek legal advice before taking a step that may have serious consequences.



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In this issue:

Pleading Guilty to a Minor Offence? Get Legal Advice First	1
Serving on Not-For-Profit Boards: Rewards and Risks	2
How to Avoid Litigation	3
Life at Lawrences [®]	4

SERVING ON NOT-FOR-PROFIT BOARDS: Rewards and Risks

Michael J. Luchenski and Avi E. Goldstein

Not-for-profit and charitable organizations provide many valuable community services. The activities of such organizations are usually guided by volunteer boards of directors, who have the opportunity to “give back” to the community, enjoy a rewarding experience and expand networking connections.

However, even volunteer directors bear responsibility and can face related liability. Recognizing this will help you be a better director and avoid liability. A director should start by understanding the purpose and history of the organization, its legal background and that of not-for-profits and charities generally, because the law differentiates between commercial and not-for-profit organizations.

For example, directors of corporations incorporated under the Ontario *Business Corporations Act* are required to exercise the care, diligence and skill of a reasonably prudent person acting in similar circumstances. This objective standard does not require a director to act beyond the capabilities of an average person.

By contrast, directors of not-for-profit corporations are required to exercise the skill that could reasonably be expected of a person with their specific knowledge and experience. For example, a doctor serving on the board of a health care organization must exercise a higher degree of expertise in respect of health care-related issues than an accountant serving on the same board. Conversely, there would be higher expectations of the accountant in respect of financial matters.

The standard is even higher for directors of charitable organizations. The Public Guardian and Trustee of Ontario, which monitors the activities of trusts and charities in Ontario, takes the position that directors of charitable organizations act as trustees in managing the affairs of the organization and therefore have a duty to:

- be reasonable, prudent and judicious,
- carry out the purposes of the organization,
- avoid conflict of interest,
- act gratuitously (i.e. without charge),
- account for the use of property, and
- manage the assets of the organization.

There can be potential conflicts for directors. For example, if someone runs a website development business and serves as a director of a charitable corporation, could that corporation hire and pay the director's business for website services? Generally speaking, directors may not charge for services that

they provide to the organization as directors. Practically, it would often be difficult to draw the line between when directors are acting as directors and when as contractors. Additionally, the director in question would have a conflict of interest in respect of all matters related to the issue. Arguably, the organization would be better served by using the director's expertise to help it make decisions, rather than for providing specific services.

Another common question relates to directors' use of their specific expertise. For example, what should an accountant on the board of a charity do if she suspects mismanagement of the organization's funds? To do nothing would be negligent. The best practice would be to engage the organization's auditors or an outside professional to make this determination. This insulates the director/accountant from personal liability and evidences her due diligence. The board would then be entitled to rely upon the recommendations of the outside expert.

What about board members' political activities? For example, could a director of a local historical association, which is campaigning to save an historical building, lobby politicians with whom he has connections? Generally, neither a registered charity nor its directors can engage in political activities, no matter how noble the cause, except in very limited circumstances that further the objects of the organization.

We all benefit when community members with business and professional expertise donate their time for not-for-profit and charitable causes. It is prudent, however, to understand the related responsibilities and liabilities and to obtain legal advice for that purpose. The Business Law Group at Lawrences has extensive experience assisting not-for-profit and charitable organizations and can help you determine your liability.



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Even volunteer directors bear responsibility and can face related liability

RISK MANAGEMENT

How to Avoid Litigation

Ed Upenieks

Running a business can be all-consuming. From finding a business partner to leasing business premises and dealing with clients, every decision contributes to the success or failure of the business.

Sometimes, because things can happen quickly in business, decisions are made over a handshake, on the telephone, or in a casual corridor encounter. If these decisions aren't properly documented in a legally binding agreement or contract, problems can occur later. Your business partner may have a different idea of your agreement than you do. Your landlord may interpret a clause in your lease differently from you. The contractor you hired to renovate your business premises may do the job differently from the way you wanted it done. Matters can deteriorate quickly and before you know where you are, you're grappling with a lawsuit while trying to keep your business alive.

Litigation is expensive, emotionally draining, and the outcome is always uncertain. Most litigation lawyers would rather spend time with a client *preventing* litigation than spend time in court wondering whether their clients' cases will be successful. Although litigation is unavoidable in some situations, risk management should be an active component of business management. Here are some simple, early steps to manage the risk of litigation and increase your prospects of a successful result should litigation be inevitable.

First, keep your advisors in the loop. One way to prevent litigation is to establish a good pattern of communication with your professional advisors--your lawyer and your accountant. Your professional advisors bring not only their professional training and expertise, but also their objectivity and their wisdom. By keeping your corporate counsel apprised of your business, especially newly planned ventures and initiatives, you have the benefit of their legal knowledge, their business judgments, their experience in other situations like yours, and their instincts. They are more apt to see the red flags on the horizon. They will know whether it is necessary to consult with a litigation lawyer.

Second, keep good records. Good business communication is an important discipline for any business person. You should have a practice of keeping a diary, making notes at key meetings and preparing memoranda and letters to document discussions. Far better to make a current record when discussions and negotiations take place, than try to re-create discussions long after the fact.



Third, know who you're doing business with. Learn all you can about your prospective business partners, including whether they have had previous business partners, previous litigation disputes, and if they have judgments against them. The same goes for other key business relationships like major suppliers.

Fourth, call your lawyer immediately if you sense something is awry—and *before* you sign a long, complicated contract. Business relationships can deteriorate; a seasoned lawyer can sometimes salvage the business relationship, or at least protect your investment. A contract can involve significant monies or a long-term commitment; have your lawyer review the contract and provide you with independent, objective advice.

Your lawyer can also counsel you on how to keep a proper and contemporaneous record or paper trail, assist in preparing letters to be sent to the other side (even ghostwriting them for you), and advise you on all your options. If you want a legally enforceable agreement that can be upheld in court, you need legal advice. Unfortunately, an agreement to agree, or a handshake, are usually not enough.

The later you call your lawyer, the fewer options you will have, the worse the situation will have become, and the more likely litigation will follow. If you are in a situation in which you feel uncomfortable, it may be time to speak with your lawyer.

Lawrences has a team of seven litigation lawyers, with over 120 years of combined experience. We would rather advise you on how to stay out of litigation than see your business sidetracked by a lawsuit.



Ed Upenieks chairs Lawrences' Litigation Group. He has 25 years' experience as a litigator, and has been certified by the Law Society of Upper Canada as a Specialist in Civil Litigation. Ed can be reached at (905) 452-6873 or

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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.

Court of Appeal Win Makes the News



The legal publication *Law Times* recently featured Lawrences' litigator **Ed Upeniaks**, whose case concerning assessment of lawyers' bills was upheld on appeal. Ed represented a client who had asked for an assessment of her lawyer's bill. The case revolved around whether she had waited too long; the original judge decided in the client's favour, as did the Court of Appeal. These cases are watched closely by the legal profession, since they demonstrate what the courts view as acceptable legal practice. Ed has become an authority on legal costs and is often invited to address legal conferences on the topic.

Court of Appeal
Win Makes the
News

Raising the Bar

Pulling Her
Weight

Successful Spring
Seminar

Raising the Bar



Training the next generation of lawyers is a big responsibility for the legal profession. The Law Society of Upper Canada invites experienced lawyers who are recognized in their practice areas to help them write "real life" questions for the Bar Admissions

Course, which articling students have to pass before they can be called to the Bar. For the second time, **Lisa Sticht-Maksymec** of Lawrences' Wills and Estates Group has been invited to help develop and test questions for the Estates Section of the course. The questions include the complete range of estates issues, including trust and estate planning, estate administration, powers of attorney, appointment of guardians, and tax planning. The focus is on professional responsibility and ethical issues in estates practice. Congratulations, Lisa!

Pulling Her Weight



While others were opening up the cottage on the May long weekend, Lawrences' real estate lawyer **Miel McGerrigle** was achieving second place in the Canadian Weightlifting Championships held in St. Thomas, Ontario. Miel qualified for the nationals by winning the provincial championships held in March. This is a remarkable achievement on its own, but even greater when you realize that Miel is one of only two athletes on the national team who works full time: all the others are students or full time athletes. Way to go, Miel!

Successful Spring Seminar

Deciding whether to pass on your business to the next generation or to sell it is a problem for most business owners. Almost 50 clients and their financial advisers turned up to hear Lawrences' lawyers speak about succession planning in family businesses at a lunchtime seminar, held at Lionhead Golf and Country Club in May. The free seminar covered such topics as:

- planning what will happen to your business when you die or if you become incapacitated
- making the goodwill of your business a tangible asset
- assessing your business as a third party buyer would
- tax-saving strategies
- ensuring your business transition and personal estate planning work together

Plans are underway to repeat the seminar; contact Lawrences if you would like to receive an invitation.

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