



THE LAWRENCES[®] LETTER

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

SUMMER 2009

Protecting the Money You've Made

William G. Sirdevan

John and Jane run a website development business through their corporation, Risk Inc. John and Jane's business grows and Risk finds itself with significant retained profits. This gives John and Jane the confidence to have Risk branch out into software development. Risk attracts a large client, Windfall Inc., which asks them to create several proprietary programs. Seeing even greater success on the horizon, John and Jane cause Risk to invest heavily in the work for Windfall, hiring qualified staff and incurring extensive costs so that they can meet Windfall's needs. Unexpectedly, Windfall experiences catastrophic financial difficulty and is put into bankruptcy. Suddenly, Risk is owed a huge receivable by a now bankrupt Windfall and has many unpaid creditors of its own.

Until and unless they are distributed, Risk's retained profits comprise one of its assets. When one of its major customers goes bankrupt at a time when it owes Risk a great deal of money, Risk's retained profits can quickly disappear.

Various legal asset-protection strategies could have been used to protect Risk's retained profits. Such strategies require careful planning and implementation and must be done before the type of situation described above comes to pass. The steps involved in one such strategy are as follows:

1. John and Jane incorporate a second corporation, Holdco Inc.
2. John and Jane transfer their shares in Risk to Holdco. Using the "rollover" provisions of the *Income Tax Act*, this can be done without triggering tax consequences.
3. Risk pays a dividend to Holdco in the amount of the retained profits. Under the *Income Tax Act*,



this inter-corporate dividend flows tax-free to Holdco.

4. Holdco lends these profits back to Risk and, as security for this loan, Risk grants a general security agreement to Holdco.

Had such a strategy been properly implemented, Holdco would have been a secured lender to Risk at the time of Windfall's bankruptcy and Risk's retained profits would be beyond the reach of Risk's trade creditors.

Effective creditor-proofing of this type is not to be confused with fraudulent schemes that attempt to avoid debt obligations. Rather, it is a legitimate and prudent strategy that is a responsible and necessary part of managing business activities. Lawrences' Business Law Group has helped many successful business owners structure their businesses to protect their best interests.



Bill chairs Lawrences' Business Law Group. He has over 20 years' experience advising clients on corporate and business structuring, reorganizations and business succession and transition planning. Bill can be reached at (905) 452-6871 or wsirdevan@lawrences.com.

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Leasing Commercial Space: Negotiating for

Ayo N. Ogor

The owner of a small strip mall is having trouble finding reliable tenants for long-term leases. To trim costs, he has cut down drastically on repairs and renovations. The mall is beginning to look run-down and unattractive. One of the tenants is a coffee shop in year three of a ten-year lease, when a huge national competitor moves in across the street, causing the coffee shop's revenues to drop by 40%.

Economic uncertainty can threaten the viability of both landlords' and tenants' businesses. To retain reliable commercial tenants in the present economic climate, landlords are becoming increasingly willing to negotiate on leases.

Commercial tenants should be aware of possible rights they can negotiate into existing leases. Commercial landlords should be aware of how to protect their interests and those of their mortgagees (lenders), while ensuring that they continue to satisfy tenants.

Set-off Right

What this is: The right of the tenant to undertake work on behalf of the landlord and deduct the cost from the rent payable.

Tenant's position: Tenants want to compel the landlord to carry out repairs without having to go to court. In the example above, renovations may improve the tenant's ability to compete. If the landlord does not cooperate, set-off rights allow the tenant to make the repairs and deduct the cost from the rent.

Landlord's position: Landlords do not want tenants unilaterally deciding on standards for the property. Landlords who cannot avoid granting this right should ensure they receive ample notice to complete the repairs before the rent is set off. The amount and the issues for which the tenant can set off should also be strictly defined.

Kick-out Right

What this is: upon occurrence of certain events, such as a major drop in revenue, the right to terminate before the expiry of the lease. In the above situation, a kick-out right would allow the tenant to terminate the lease without penalty.

Tenant's position: Tenants are increasingly requesting this right, particularly in industrial leases, due to the uncertain economy. Alternatively, they may seek the right to reduce the amount of space they lease, or to change locations in the complex. In the above example, this right would allow the tenant to move further away from the competitor.

Landlord's position: If granting this right, landlords may reserve the right to recoup any financial incentives given

with the lease, such as rent-free periods, leasehold allowances, and broker commissions. They should ensure this right does not survive beyond the original term of the lease, and that mortgagees' consent is obtained beforehand.

Assignment and Subletting Clauses

What they are: clauses determining the tenant's rights to sublet or assign the lease to a third party. In the above situation, this would allow the tenant to find a subtenant and move out if there is no kick-out right.

Tenant's position: Tenants want maximum ability to sublet or assign leases, and even obtain recognition for new tenants. Without this, the original tenant would still have to sign any documentation required for dealings with the landlord, such as written requests for repairs. Tenants are also increasingly requesting non-disturbance clauses that protect assignees or subtenants, so that even if the landlord eventually defaulted on the mortgage, the lender would be required to respect the subtenants' rights if they continue to pay rent and fulfil their obligations under the sublease.

CHANGES TO ONTARIO DRIVING LEGISLATION:

Is Your Business Threatened?

Anthony E. Bak

Transportation is the lifeblood of many businesses. Let's say that "ABC Delivery Service" prides itself on meeting its customers' needs. One Friday afternoon, one of its customers, a pharmacy in a small southern Ontario town, needs an urgent delivery. ABC guarantees the distributor that the stock will reach the pharmacy before 6:00 pm. The driver lives in the direction of the destination and is as interested as the customer in completing the delivery before 6:00 pm. Several delays make it touch and go whether the driver will reach the pharmacy in time, so once on a clear, open road, he speeds up. Unluckily for him, he is stopped by the Ontario Provincial Police. The driver, with a 15-year safety record, is astounded to be charged with "stunt driving": he is suspended from driving for one week effective immediately and his vehicle is impounded. He learns that if he is subsequently convicted, he will receive six demerit points and a fine up to \$2,000. Worse, he might receive a further suspension and possibly even jail time.

Welcome to the world of recent amendments to the Ontario *Highway Traffic Act*.

Businesses that operate fleets of vehicles need to take particular notice of these changes, since they may have

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Changes in Changing Times

Landlord's position: If granting this right, landlords can require guarantees and indemnities from both the assignors and assignees. If the subtenant should then default, the landlord can seek financial compensation or can require the original tenant to satisfy the lease terms.

Rights to Go Dark v. Operating Covenants

What they are. Operating covenants prevent tenants from shutting down businesses they are running on the premises, whether or not they are still paying rent. In the above example, the right to go dark would permit the tenant to cease operating the coffee shop on those premises.

Tenant's position: Tenants want the right to stop operating if necessary under poor economic circumstances, even while still paying rent.

Landlord's position: Landlords do not want deserted premises. Protective rights for the landlord can be written into the lease, so that if a tenant stops operating, the

landlord can terminate the lease and take over the premises. Any special rights previously granted to the tenant, such as signage rights, would be eliminated.

A commercial lease is always an important negotiation for both parties. Any special rights negotiated will depend on the particular situation. Both landlords and tenants should have a real estate lawyer review their leases, to protect their best interests.

Lawrences' Real Estate Group has significant experience in advising both landlords and tenants on their rights in commercial leases. We can help you draft or renegotiate leases to suit your circumstances.



Ayo Ogor is an associate in Lawrences' Real Estate Group. She has particular expertise in commercial leasing transactions and can be reached at (905) 452-6887 or aogor@lawrences.com.



a profound impact on the business. Anyone found driving at more than 50 km over the speed limit may be convicted under the *Highway Traffic Act* of "stunt driving". This offence carries with it six demerit points and a minimum fine of \$2,000, with the possibility of a further two years' driver's license suspension and a six-month jail sentence. Even first offenders with good prior driving records are being assessed fines in the thousands of dollars on conviction.

In addition, simply being charged with the offence will result in a confiscation of the motor vehicle for one week and a suspension of one's driver's licence during that time period. From early indications, it appears that prosecutors are very hesitant to accept pleas to lesser offences that carry fewer demerit points and smaller fines.

Similarly severe penalties have been instituted in relation to driving and the consumption of alcohol. Drivers who are pulled over and provide breath samples

that exceed the limit will lose their licences on the spot for three days and their vehicles will be impounded. Subsequent transgressions will result in longer suspensions. The provincial standards triggering these suspensions are almost twice as strict as the level set out in the *Canadian Criminal Code*.

Even if you are not convicted of an offence, your insurance company will likely increase your insurance premiums. The increase in insurance premiums will inevitably last for years, raising the cost of insurance by many thousands of dollars. Under the provisions of the *Compulsory Automobile Insurance Act*, it is an offence to drive without insurance in the Province of Ontario. A first conviction carries a minimum fine of \$5,000.

Business owners and drivers are urged to keep these recently amended driving provisions in mind and ensure that everyone using their vehicles, whether for business or personal reasons, is aware of the changes. The law is quite clear that driving is a privilege, not a right—and that privilege is under greater scrutiny than ever before.

Lawrences' Litigation Group has significant experience with automotive-related situations and can advise on the best means of action given specific situations.



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

Businesses that operate fleets of vehicles need to take particular notice of these changes, since they may have a profound impact on the business.

Life at Lawrences®

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

The Birth of Something Big!



A happy team from Lawrences recently presented the William Osler Health Centre Foundation with a cheque for \$100,000.00, representing donations from the firm, individual lawyers and staff. Seen here are (left to right): Betty Hanson and Debbie Sparrow from Lawrences' staff, Heather Picken, partner and head of Lawrences' Real Estate Group, Bill Lawrence, one of Lawrences' founding partners, Anne Randell, President & CEO of the Foundation, and Ed Upenieks, a partner in Lawrences' Litigation Group.

The hospital has dedicated a birthing room on the obstetrical floor to recognize Lawrences' donation (see picture of plaque at right).



At the Podium

Lawrences litigator **Ed Upenieks** is in demand on the speaker circuit. In the spring, he delivered a seminar to Ottawa lawyers entitled "demystifying solicitor-client assessments: what they never taught you in Law School". Recently, together with Senior Regional Justice Van Melle, he delivered a seminar on costs of motions and applications. The program was sponsored by the Peel Law Association.

At the Bar



Congratulations to Lawrences' newest recruit, **Iris L. Pichini**, on her recent call to the Ontario Bar. Iris was an articling student at Lawrences and is now part of the firm's Litigation Group, doing work in all areas of the firm's litigation practice. Iris chose Lawrences because "I've had

fantastic mentors here and I can gain experience in a lot of different areas. There's a commitment to excellence and pride in the firm's longstanding reputation." Iris can be reached at (905) 452-6884 or ipichini@lawrences.com.

THE LAWRENCES® LETTER

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