



# THE LAWRENCES<sup>®</sup> LETTER

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

WINTER 2011

## EXPROPRIATED!

### What to Do Before the Bulldozers Get to the Gate

#### Edwin G. Upenieks

Mike and Joe run a small trucking company. Their office and yard where they keep their trucks and equipment are conveniently located beside the highway. They have just leased part of their property to a neighbouring business for parking. This morning, their office administrator greets them at the door with a Notice of Expropriation from the Ministry of Transportation: the province is widening the highway. What now?

As the Region of Peel grows and new roads are being built or existing roads widened, many property owners (both individuals and business owners) are receiving Notices of Expropriation. The first step on receiving such a notice is to determine what is involved: will all of your property be taken, or only part of it? Will you be able to remain? If so, will you still be able to carry on business? The next step is to seek legal advice from an experienced expropriations lawyer to protect your interests and maximize your financial recovery.

Sometimes, an expropriating authority will attempt to negotiate the purchase of your property even before the expropriation process is launched. The negotiator will show up with a survey of the proposed expropriation and an Offer to Sell Agreement and Release in hand. Do not sign this agreement! It may limit your entitlement to compensation. Discuss the terms with your lawyer, because you may also be able to claim for such other items as:

- compensation for loss of trees or landscaping.
- business losses.
- disturbance damages.
- loss in value of the rest of your property.

#### Can You Challenge an Expropriation?

Land expropriations must be in the public interest. A landowner may request a Hearing of Necessity to determine whether taking the owner's land is "fair, sound and reasonably necessary" in achieving the expropriating authority's objectives. In some instances, it may be possible to negotiate limits on the taking or move the boundaries to accommodate the owner's circumstances.

Under Section 25 of the *Expropriation Act*, the expropriating authority must serve an offer in two



forms, Offer A and Offer B. Offer A is all-inclusive, requiring the landowner to provide a Full and Final Release in return for the specified funds, with no further negotiation permitted. An Offer B is usually for a lesser amount, but permits the landowner to accept a prepayment while a claim for a larger amount proceeds. In most cases, Offer B is the preferred course.

#### What is Involved in an Expropriation?

The expropriating authority is required to serve the Notice of Application for Approval to Expropriate Lands on each registered owner and must also publish the notice in a newspaper with general circulation.

Expropriations differ, but a complex case may involve numerous steps beginning with a Hearing of Necessity, through negotiations, all the way to an Ontario Municipal Board (OMB) Hearing and possibly an Appeal to the Divisional Court. In such a case, it may be necessary to retain an appraiser with the required AACI designation, a traffic engineer, a noise consultant, a planner, and a business valuator.

Timing ranges from a few months for simpler cases or where the expropriating authority has an incentive to settle early, to several years if the case goes to the OMB. Interest does accrue on most components of the claim, at 6% per annum. The landowner is typically compensated for all reasonable legal, appraisal, or other expert costs. If there is a shortfall in the payment for legal, appraisal and other expert costs, the landowner is responsible for the difference.

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## NEW LEGISLATION SIMPLIFIES INCORPORATION AND REPORTING Attention all Members of Not-for-Profit Organizations!

### Michael J. Luchenski

Many of our clients are active in organizations that are run for a specific purpose other than profit. These organizations, many of which are incorporated, range from registered charities, to trade associations, to sports and social clubs. In a previous article (*The Lawrences Letter*, Summer 2007) we outlined the legal responsibilities of directors in not-for-profit organizations, noting that such directors were held to a higher standard than were directors in for-profit corporations. With the proclamation into force of the *Canada Not-for-Profit Corporations Act* on October 17, 2011, all that has changed.

Under the new Act, the rules are clearer, procedures for the approval of by-laws and articles of incorporation are simpler and faster, and boards will be able to make fundamental changes, such as amalgamation.

Also, directors will be subject to a more objective standard for carrying out their duties and responsibilities and will therefore assume less liability. A new *Not-for-Profit Corporations Act* (Ontario), which is awaiting proclamation into force, is expected to convey similar benefits on not-for-profits incorporated in Ontario.

A soliciting corporation is one that receives public donations or government grants totalling over \$10,000 in a single financial year. These corporations will be subject to more rigorous financial audit and reporting requirements and will be required to have at least three directors. A corporation that does not receive at least that amount of funds need have only one director and will be subject to far less scrutiny for financial and reporting requirements.

To enhance and protect members' rights, the new legislation requires that not-for-profit corporations make financial statements available to members on request. Soliciting corporations will also be required to file their financial statements with the Director or Registrar, who will then make them available to the public.

Existing not-for-profit corporations will be required to become compliant with the new Act over the next three years. Corporations that don't comply by October 17, 2014, will be dissolved. Directors



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and officers are responsible for ensuring that their organizations comply with the new legislation. They can also use the opportunity to amend their corporations to better reflect the way in which they conduct their affairs today.

If you are involved in a not-for-profit corporation incorporated under the *Canada Corporations Act*, you must insure that the corporation takes the following five steps within the next three years:

1. Review the existing letters patent and by-laws.
2. Prepare articles of continuance.
3. Prepare by-laws that comply with the new Act.
4. Obtain approval of the members.
5. File the required documents with Corporations Canada.

Lawrences' Business Law Group has extensive experience assisting not-for-profit and charitable organizations and can help you determine which changes your organization needs to make.



Michael Luchenski is a partner in Lawrences' Business Law Group and has helped several not-for-profit organizations organize their operating structures. He can be reached at (905) 452-6889 or [mluchenski@lawrences.com](mailto:mluchenski@lawrences.com).

## NEW LEGISLATION CHANGES PROBATE RULES

# Being an Executor can be Taxing

### Michael J. Prsa

The executor of an estate has many duties. One of them is to ensure that debts and taxes are paid before the estate is distributed to the beneficiaries.

In Ontario, there are two main types of taxes on death: income tax and probate tax (which is formally known as 'estate administration tax'). Although probate tax was tripled in 1992 from 0.5% to 1.5% of an estate's value, the Ontario government has not seen a corresponding increase in taxes collected. In May, 2011, the Ontario government passed legislation giving the Ontario Minister of Revenue the power to audit and reassess an estate within four years of the tax being payable. This legislation is to take effect **January 1, 2013.**

Executors will be under more pressure to verify the value of assets disclosed for probate purposes. Some speculate that the Minister of Revenue may even question or hold an executor accountable for assets that are usually not included in the probate tax calculation. The new legislation will also require executors to give the auditor reasonable assistance and to answer all questions in respect of an audit. The Minister will also have power to access third party premises and review third party records. It will be an offence for any person to assist the executor in making false or misleading statements: the minimum fine will be \$1,000 and the maximum, twice the amount of estate tax payable.

These changes will likely cause families to work harder at excluding assets from the probate tax calculation. There are many strategies for doing this, but each strategy must be assessed based on the facts of each case: not all strategies apply in all cases. It is dangerous to restructure how assets pass on death without understanding all the implications.

For example, a common probate tax minimization strategy involves the transfer of assets into joint



names with family members, or naming specific beneficiaries on certain plans. These strategies are not always appropriate; they can lead to complications and unexpected consequences. In some cases, transfers into joint names may create an income tax problem far greater than the probate tax that would be saved. Care should be taken to obtain proper advice from an estates lawyer.

At Lawrences, we have extensive experience in all aspects of estate planning and administration. We have helped many families minimize estate taxes payable and arrange their financial affairs to ensure that parental wishes can be carried out. Call us to determine how we can help you arrange your estate in a tax-efficient way.



*Michael Prsa chairs Lawrences' Wills, Estates, and Trusts 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 [mjprsa@lawrences.com](mailto:mjprsa@lawrences.com).*

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### Choosing the Right Lawyer

Expropriations are a highly specialized area of the law. The expropriating authority usually has a team of negotiators, lawyers, appraisers, and other experts, all of whom have extensive experience. Your legal counsel must be a match for this. Your lawyer must know the specialized area and the right experts. Your lawyer must have credibility with the opposing negotiator's lawyers, appraisers and experts. At Lawrences, we have had experience in all these steps, and have assembled a roster of appraisers and other experts whom we retain as required. We have represented clients in a wide range of expropriations

from simple road widenings up to multiple properties, multiple businesses, and varied damage claims. If your land is going to be expropriated, call us immediately.



*Edwin G. Upenieks is a member of Lawrences' Litigation Group. Certified by the Law Society of Upper Canada as a Specialist in Civil Litigation, Ed has 28 years' experience as a litigator and has represented clients in many expropriations throughout southern Ontario. Ed can be reached at (905)*

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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.*

### Judge Upenieks



Lawrences litigator Edwin G. Upenieks is used to appearing in court, but now he has a new, additional role. Ed has been appointed a Deputy Judge for the Central West Region of the Small Claims Court, which is a branch of

Ontario's Superior Court of Justice. Small Claims Court deals with civil disputes up to a value of \$25,000. In addition to his busy litigation practice, Ed now conducts settlement conferences and hears motions, assessments, and trials one or two days a month in Brampton, Burlington and Milton.

But that's not all. Ed has been appointed Vice-Chair of the Canadian Bar Association Judicial Compensation & Benefits Committee, and elected Vice-Chair of the CBA's National Membership Committee, representing almost 40,000 lawyers across Canada. In Ontario, he represents the Central West Region on the Ontario Bar Association's Board of Directors, and is the Chair of Membership for Ontario. Congratulations on these accomplishments, Ed!

### THE LAWRENCES® LETTER

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In this festive season, we take this opportunity to thank you, our friends and clients, for your continued support and for your business.

We wish you and your family a happy holiday season and health and prosperity in 2012.

To support the health of our community, Lawrence, Lawrence, Stevenson LLP is pleased to make a donation to William Osler Health Centre Foundation in support of our new Brampton Civic Hospital, in lieu of sending holiday cards this year.

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