



SMHI LEGAL NOTES

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BARRISTERS & SOLICITORS · TRADEMARK AGENTS

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What You Need to Know About Constructive Dismissal

Did you know it is possible to be fired without really being fired?! It's true. This situation is referred to as constructive dismissal. Traditionally, when an employee is wrongfully dismissed, the employer has actually fired the employee without cause and without providing reasonable notice.

In the case of constructive dismissal, however, the terms of employment have been substantially and unilaterally changed by the employer such that the employee can consider himself or herself dismissed. The employee can then leave the employment and seek damages.

There are a variety of changes that an employer may make that could (but will not always) result in a constructive dismissal, including:

- Relocation.
- Demotion.
- Reduction or change in responsibilities.
- Reduction in salary and/or benefits.
- Changes in working conditions.

While this area of the law may sound straightforward it can in fact be fraught with danger. If an employee does not act quickly enough, he or she may be considered to have accepted the changes. On the other hand, if an employee acts too quickly, he or she may be considered to have resigned.

Determining whether a constructive dismissal has occurred depends very much on the facts of each individual situation. According to the Supreme Court of Canada, *"To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment."*

To illustrate what a tricky area this can be, consider the following examples. Do you think the court found that the employee had been constructively dismissed?

1. The employer changed its bonus structure from a bonus based on net profits and with no cap to a fixed bonus.

Yes. By imposing a cap, the employer had attempted to limit the employee's participation in the company's growth.

2. The employee earned \$95,000 as V-P of Leasing and Franchising. He was unable to meet his expected targets. Following a restructuring, the employee was offered the new position of V-P of Leasing with a base salary of \$85,000.

No. The employee had been having difficulty meeting the requirements of his original position and therefore it would have been reasonable for him to assume a new role.

3. For economic reasons the employer moved its operations from Ontario to Quebec. Despite the offer to pay all moving expenses the employee refused to relocate.

No. The employer's decision was not unreasonable. An employee is not entitled to a job for life in a place of his choosing.

4. Following a corporate restructuring the employee was demoted from his position as V-P. Although his salary remained the same, his responsibilities were significantly reduced.

Yes. This was a case of constructive dismissal even though the restructuring was undertaken in good faith and for valid business reasons.

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The articles in SMHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.

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5. The employee who had been President and CEO of the employer was demoted to V-P of Finance and Administration. His salary remained the same.

Yes. As a result of the change, the employee had no real managerial responsibility and the change represented a significant demotion.

6. Following a restructuring, the employee, a senior engineer, was demoted. Although he had been considered for a new managerial position he indicated that he was not interested.

No. The employee was deemed to have accepted the change when he refused to be considered for the new position.

7. When the employee was hired he indicated that he would not work shifts for health reasons. When the employer decided to make shift work compulsory the employee quit.

Yes. Not working shifts was a clear term of the employee's contract.

8. The employee was asked to report to a former subordinate.

Yes. Having to report to a former subordinate amounted to a loss of prestige and status for the employee.

In addition to making an informed decision about whether a particular set of circumstances can be considered constructive dismissal, employees also need to be aware that they have a duty to mitigate their damages. This duty to mitigate may involve accepting the new position. Before making what could be a life altering decision you should seek legal advice.

If you are an employer considering a reorganization or significantly altering an employee's job, you too would be wise to seek legal advice. This will minimize your risk of an employee thinking he/she has been constructively dismissed. ☞

Changes to the Law that May Affect You

Over the past few months, the various levels of government have been busy introducing and passing new legislation. Many of these changes may have a direct impact on our readers.

On the International Front Passports

If you plan on flying to the United States in the near future make sure your passport is up to date. Effective January 23, 2007 all persons entering the United States by air will have to show a passport. As it currently stands, passports will not be necessary if you are entering by car until June 1, 2009.

For further information about Canadian Passports you can visit www.ppt.gc.ca

On the Federal Front Drunk Driving Laws

In November, the Federal government introduced a bill to amend the Criminal Code, specifically those sections dealing with impaired driving. The highlights include:

- For a first offence, the minimum fine will increase from \$600 to \$1,000 (in addition to driver's licence suspensions.)
- For a second offence, the minimum jail sentence will increase from 14 days to 30 days (in addition to driver's licence suspensions.)
- Police will be able to demand that a person suspected of driving while impaired by alcohol or drugs participate in a sobriety test at the roadside, something that they are not

currently allowed to require.

- Challenges to breathalyzer results will be restricted to evidence that the breathalyzer machine was not functioning properly or was not operated properly. The change would do away with evidence from witnesses that the offender had only consumed a minimum of alcohol despite the blood alcohol reading.

On the Provincial Front Gift Cards

The Ontario government has passed legislation which gives the government the authority to eliminate expiry dates on gift cards. The idea is that the cards would retain their full value no matter when consumers redeem them.

Seat Belts

As of December 1, 2006 every person riding in a vehicle in Ontario must be buckled up. This change closed a loophole that allowed vehicles to contain more passengers than seatbelts, as long as all seatbelts were in use.

Passengers over the age 16 who fail to buckle up could be fined \$90, a \$20 victim surcharge and receive two demerit points on their driving records. Drivers are responsible for ensuring that passengers under 16 are wearing seatbelts or are in appropriate car seats.

The new legislation also bans "doubling up," i.e. two or more people using the same seatbelt at the same time. ☞

Real Estate Fraud - A Victory for the Homeowner

Although not a rampant crime, the problem of real estate fraud is very real including, here in Toronto. Real estate fraud can result in a home being sold or mortgaged without the knowledge of the legal owner. Up until recently this has meant that innocent owners risk losing their home, since the scam artist is usually long gone by the time the fraud comes to light. However, a recent decision of the Ontario Superior Court of Justice provides some welcome news for property owners.

The Facts

In 2001, the Rs purchased a condo in north Toronto. Three years later, the property was mortgage free. Unbeknownst to the Rs, while they were paying off the last of their mortgage, fraud artists, posing as the Rs, purported to sell the condo to a bogus purchaser. The price for this fraudulent sale was \$270,000. In addition, the bogus purchaser was able to secure a mortgage on the Rs condo from TD in the amount of \$247,860.

The fraud artists presented what appeared to be proper identification at the time of the sale and the deed and the mortgage were registered at the Registry Office.

When the Rs discovered what had happened they sued the bank. Specifically, the Rs sought to have title to their condo restored to their names and the fraudulent mortgage set aside. Although the bank agreed that the fraudulent transfer was invalid, it argued that the mortgage was a valid charge on the property.

The Law

In 1885, Ontario adopted a land registry system whereby title to real property would be established by setting up a register. The register would guarantee that the person named as property owner had title, subject only to any registered encumbrances.

The job of the registrar is to verify that the proper documents (e.g. transfers and mortgages) are properly completed, to accept the designated fees and land transfer taxes and to correctly register the documents on title. Note that it is not the registrar's job to verify whether owners have indeed sold and/or mortgaged their property.

Although the government eventually enacted the *Land Titles Act*, the Supreme Court of Canada has stated that the statute did not abolish the original principles of the common law.

The Decision

The judge in the Rs' case concluded that the mortgage was a

fraudulent charge and was void. He recognized that the Rs and the bank were both innocent parties, but held that only the bank had been in a position to do something which might have been able to prevent the fraud. In the judge's view, the bank had failed to exercise due diligence by ensuring that a proper in-person appraisal was carried out prior to releasing the mortgage monies. He also found that certain anomalies should have put the bank on notice that something was not right. The end result was that, in this instance, the bank could not rely on the register.

The Caveat

In 2005, the Ontario Court of Appeal decided *Household Realty v. Liu*, another mortgage fraud case, in favour of the mortgagee. Unlike the Rs' case, where the registered owners of the condo were innocent of the fraud, the fraud in the Household Realty case did involve one of the registered owners.

Most cases involving a fraudulent mortgage are decided in the mortgagee's favour. Therefore it is by no means certain that if TD appeals this decision the appellate court will not rule in its favour. Having said that, this set of facts might be different enough to favour the homeowners.

What To Do?

Although this type of fraud is more common than ever before, it remains relatively insignificant when one considers the number of transactions that are registered on a daily basis in the Ontario Registry System.

The Ontario government recently amended the *Land Titles Act* to ensure that ownership of property cannot be lost as a result of the registration of a falsified mortgage, fraudulent sale or a counterfeit power of attorney. Any land titles obtained by fraudulent means will be null and void. The changes will also speed up financial assistance for victims of fraud, ensuring the title is returned and a decision on compensation is made within 90 days. In addition, the maximum penalty for real estate fraud has been raised to \$50,000 from \$1,000.

A pro-active step that you can take to protect yourself from this kind of fraud is to purchase title insurance. It can be ordered through your lawyer during a refinance transaction or at any time during the course of home ownership. The policy will be effective from the date on which you took title to the property until you sell your home.

If you would like to learn more about purchasing title insurance please contact our firm. 

Start the New Year Off Right

If a man dies and leaves his estate in an uncertain condition, the lawyers become his heirs.

Edgar Watson Howe

An astounding 50% of Canadian adults do not have a will. Those who do not have great wealth believe a will is not necessary. Others avoid the topic as too morbid. And then there are the numerous procrastinators who will get around to it some day!

Five Good Reasons

If you have not prepared your will (or it is out of date) here are five good reasons for making your eternal statement.

Your Family - If you die without a will, your property will be divided according to a legal formula. The outcome may have nothing to do with your family's needs or your wishes.

Your Children - The court will appoint a guardian to care for your children, if you do not.

Costly Delays - Your assets are immediately frozen if you die without a will. Before anything else can happen, the court must appoint an administrator for your estate. The result is delays and extra legal costs.

Taxes - To avoid the potentially heavy tax burden of death, proper estate planning, including a will, is essential.

Peace of Mind - When you have a will you can feel confident that your affairs are in order and that your family will be protected and will not endure needless work and expense following your death.

Type of Will

You should consider retaining a lawyer to draft your will. Although you can write your own, if you want to be sure that your instructions are clear it is best

to get the advice of someone with the expertise. In addition, if the language is vague or the technical requirements of the law are not met your homemade will may not stand up to a court challenge. The same caveat applies to do-it-yourself kits.

The Details

Before meeting with a lawyer you should prepare a list of what you own and what you owe. There are also a number of questions to which you should give some advance thought to, including:

- Who are the people that depend on me for financial support?
- Do I have certain possessions that I want to go to particular people?
- Who should look after my children?
- What will happen to my pet?
- Who is going to be the executor of my will?
- At what age should my children have control of their inheritance?

Although there is a lot to think about and many decisions to make, a lawyer will guide you through the process.

Reviewing Your Will

Once you have a will, you should review it periodically, every three to five years. Changes in your financial and family situations may require revisions. For instance, marriage voids a will but separation does not. If you divorce your will is read as if your ex-spouse predeceased you. Although a move from one province to another does not nullify a will, practical changes, such as the executor, may be necessary.

Preparing a will should rank high among your financial and family priorities. 

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PRACTICE AREAS

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