



Do It Now Before It's Too Late

How many of us intend to do any number of things, whether it is to lose weight, make a will or start saving for retirement and then never get around to it?! Unfortunately intention and action are not the same thing. This was aptly demonstrated in a recent decision of the Court of Appeal of Manitoba. Although this fact situation took place in Manitoba the equivalent Ontario legislation uses the same wording so the outcome would likely be the same.

James had lived with Michelle for 10 years and he considered her his common law wife. When James died Michelle discovered that he had a group life insurance policy in the amount of \$55,000. Unfortunately, she was not designated as the beneficiary of the policy. Instead Janet, James' former common law wife, was to be the recipient.

Michelle brought an application to have the money redirected to her, arguing that James had intended to make her the beneficiary of his life insurance. While both the lower court and the appellate court expressed empathy for Michelle's predicament, they ruled against her, finding that good intentions were not good enough.

Michelle made a valiant attempt to convince the court of her position. She pointed out a number of things, including:

- Their involvement for 13 years, for 10 of which they lived together,

- Owning their house as joint tenants,
- Holding a joint line of credit and a joint bank account,
- James had designated her as the beneficiary of all of his employee benefits, including pension, medical and dental,
- James had made her his power of attorney for property,
- James had qualified Michelle as his spouse in an insurance change of form document (he did however leave blank the beneficiary nomination box),
- James had insured her life as his spouse for \$10,000.

For her part, Janet, although she had not had a relationship with James for more than 13 years, argued that James intended to benefit her to compensate her for her financial and emotional support during their cohabitation.

The decision ultimately went against Michelle because James, whether he actually meant to or not, did not change the beneficiary designation on this particular policy. Manitoba's *Insurance Act* (as does Ontario's) clearly states that any change to the beneficiary designation must be done in writing.

On behalf of the appellate court, Madam Justice Steel stated, *"As I said earlier, I would assume that the deceased probably intended that his present partner receive his life insurance proceeds as opposed to his former partner, but that is speculation. Speculation is not sufficient. The law requires a fair degree of certainty in this area to avoid encouraging litigation."*

She went on to say, *"The documents which Ms Chanowski would have the court accept as evidence of a change of beneficiary do not provide the necessary clear and express intention to remove Ms Bauer and appoint Ms Chanowski as his beneficiary. They merely speak to Mr. Miterek's intention to increase the amount of his death benefits and to insure the life of his current common-law wife. One may speculate that it is unusual for an individual to increase the death benefits for a former common-law spouse, but more is needed here than speculation to override a written designation."*

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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.

Changes to the Law in 2010 - A Recap

Every year brings changes to a variety of laws, so much so that it is sometimes hard to keep track. Below we have summarized some key changes to Ontario laws that we think you should know about.

If You Are a Plaintiff

The procedure governing litigation in Ontario saw a number of modifications to make the system run more efficiently. One of the biggest changes was to the monetary ceiling of the Small Claims Court which increased from \$10,000 to \$25,000. This means that if you have a claim worth up to \$25,000 you can avail yourself of what is often referred to as the "People's Court." The change took effect on January 1, 2010

If You Are a Driver

Several changes have been made to the *Highway Traffic Act* as well as to the *Insurance Act*.

Fully licensed drivers, aged 21 and under, as well as all novice drivers, who are caught with any alcohol in their blood will receive an **immediate** 24-hour roadside driver licence suspension and, if convicted, will face a fine of \$60-\$500 and a 30-day licence suspension. In addition, novice drivers risk cancellation of their novice licence. These changes took effect on August 1, 2010.

It is worth remembering that drivers who, at a road side stop, blow between .05 and .08, will immediately have their licence suspended for three days and will be fined \$150.

Of course, in addition to these Provincial consequences, the Criminal Code provisions for impaired driving, for blowing over .08 and for refusing to blow **also** apply, and have far more significant consequences.

Another significant change to the *Highway Traffic Act* affects drivers caught driving with a suspended licence, including for default of family support. These drivers face a seven-day vehicle impoundment. These vehicle impoundments apply regardless of whether the vehicle is borrowed from a friend or family member, used for business or employment purposes, rented or leased. This new measure, however does not apply to suspensions for defaulted fines or medical conditions. This change took effect on December 1, 2010.

The key changes to Ontario's auto insurance law mainly involve a reduction to the benefits available to individuals who have been injured in a car accident. The following are some of those changes which took effect on September 1, 2010.

Medical and Rehabilitation Benefits have been reduced from \$100,000 to \$50,000, although you can increase your limit to

\$100,000 if you choose to purchase optional coverage.

Medical-Rehabilitation Expenses for minor injuries are limited to \$3,500. Optional coverage cannot be purchased. A minor injury is defined as a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any "clinically associated sequelae".

Income Replacement Benefits will now be calculated as 70% of gross weekly earnings, rather than the previous 80% of net income. The weekly cap of \$400 remains, although you can purchase optional insurance coverage to increase the weekly cap to \$600, \$800 or \$1000.

Housekeeping Benefits have been eliminated for all but those who have sustained a catastrophic impairment and optional insurance coverage is not available. A catastrophic impairment includes paraplegia, quadriplegia, limb amputations, total loss of vision, serious brain injuries.

Attendant Care Benefits for those who have suffered more than a minor injury but not a catastrophic impairment caps out at \$36,000, a fifty per cent reduction.

If You Are Involved in a Divorce or Separation

In an effort to improve the public's access to the province's family courts a number of changes have been introduced. These changes, which came into effect on March 1, 2010, include:

- Steps to streamline and simplify family law litigation,
- Making it easier to obtain a restraining order,
- Child support being recalculated by a child support service when there is updated income information,
- A request for a proposed plan for the child's care and upbringing when making an application for custody and access. Information regarding an applicant's current or previous involvement in any family law and criminal proceedings must also be included in the affidavit.
- The definition of "Net Family Property" will now include any contingent tax liabilities when calculating a spouse's debts and liabilities on the date of separation,
- The definition of "Property" will now include a standardized calculation of the imputed value of a spouse's interest in a pension plan.

If You Have School Aged Children

In an effort to curtail bullying and other threats to children

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The CIBC Overtime Case: Chapter III

In the fall of 2007, we told you about a class action lawsuit against the Canadian Imperial Bank of Commerce (CIBC). The lawsuit, led by CIBC teller Dara Fresco, alleged that CIBC non-management employees are forced to work unpaid overtime since they are assigned heavy workloads that cannot be completed within standard working hours.

In order for this case to proceed as a class action, it had to be certified as such by the court. (See box for conditions of certification.)

In the summer of 2009, Madam Justice Lax of the Ontario Superior Court dismissed the motion for certification. She concluded that any losses were not caused by an allegedly illegal policy, but rather by a failure independent of the policy to compensate for overtime.

Not satisfied with this decision, Ms. Fresco brought her fight to the Ontario Divisional Court.

Once again her application for certification was been turned down. On September 10, 2010, in a 2 to 1 split, the Court upheld Madam Justice Lax's decision. The dissenting judge would have certified the action. The next step for Ms. Fresco is the Ontario Court of Appeal.

While the case against the CIBC remains stalled, a similar case against the Bank of Nova Scotia, launched by Cindy

Fulawka, has received the green light.

Fulawka, a personal banker with the Bank of Nova Scotia, launched her suit on behalf of personal banking officers, financial advisors, and small business account managers.

In deciding to certify this action, Mr. Justice Strathy concluded that there is “*an evidentiary basis in this case of systemic wrongs that give rise to common issues, the resolution of which would advance the claim of every Class Member.*” He went on to find that “*the systemic wrongs flow from a policy that failed to reflect the realities of the workplace because it put the onus on the employee to obtain prior approval for overtime rather than requiring the employer to ensure that employees were paid for overtime that they were permitted or required to work.*”

The Five Conditions for Certification

1. The pleadings or the notice of application must disclose a cause of action.
2. There must be an identifiable class of two or more persons that would be represented by the representative plaintiff.
3. The claims of the class members must raise common issues.
4. A class proceeding would be the preferable procedure for the resolution of the common issues.
5. There is a representative plaintiff who would fairly and adequately represent the interests of the class and who has produced a plan for the proceeding.

With respect to Ms. Fresco's case he stated, “*Unlike the case in Fresco, there is evidence in this case that the failure to pay overtime occurred because of the policy, not independent of the policy. There is also evidence that the failure to pay overtime was attributable to systemic conditions, as opposed to purely individual circumstances.*”

The Divisional Court is scheduled to hear the Bank of Nova Scotia's appeal in early December. ☞

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while they are at school, the Ontario government has passed legislation entitled *Keeping Our Kids Safe at School Act*. This law requires all school board employees to report serious student incidents to their principal. School staff will make sure that the victim receives the support they need, such as counselling or referral to child and youth services.

Serious incidents include racist, sexual, sexist or homophobic comments, slurs and jokes and graffiti as well as activities that could lead to suspension and expulsion. These changes took effect on February 1, 2010.

If You Are an Employee

Beginning early next year, if you are an employee and you wish to file a claim with the Ministry of Labour in respect of Employment Standards, you must first notify your employer of your intention. Notice can be done via mail, email, fax or phone. The hope is that the employer will remedy the situation voluntarily and in a prompt fashion. However, the requirement to contact the employer can be waived for vulnerable employees. This change will come into effect on January 19, 2011.

Our firm works in all of these areas of the law and we would be pleased to provide you with additional information. ☞

Stopped by the Police: Here is What You Need to Know

One of the top news stories in recent weeks involves a young woman from Ottawa who was stopped and subsequently arrested by the police for what appears to be no legal reason. This has led to many wondering when the police are allowed to stop you and what your rights are when this happens.

If you are driving, the police have the right to stop you if they believe that you have violated a provision of the *Criminal Code of Canada*, the *Ontario Highway Traffic Act* or a municipal by-law. They may also stop you as part of a program which ensures compliance with the traffic laws, for instance the R.I.D.E. program or a seat belt check.

If a person is stopped because the police suspect the driver has been drinking, the police can demand a Roadside Breath Test. In this particular instance, you do not have the right to consult a lawyer first. If you refuse to provide a breath test, you will be charged with a criminal offence.

If you are stopped while driving in Ontario you are required to produce your licence, vehicle registration, and insurance card if the police officer requests it. The police are not allowed to search your vehicle unless you are under arrest. They may search your vehicle if you consent to the search however you are never obligated to agree to a search.

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The moral of this story is that if the law requires a document to be in writing then it needs to be in writing for it to be effective.

Another lesson this story teaches is that if you are involved in a committed rela-

The police may stop pedestrians if they observe an offence or if they believe the person has committed or is about to commit a crime. A pedestrian can also be stopped if the police are investigating a complaint against the person.

These interactions generally involve the officer asking for your name, address and identification and other questions that are appropriate to their investigation.

If you are stopped while walking you should identify yourself if asked. If you are asked additional questions it is generally best not to volunteer too much information. Rather, you should indicate that you wish to consult a lawyer. Once you have requested a lawyer, the police must legally stop questioning you. Remember, being too talkative is usually what gets people into trouble.

You are also entitled to know why you have been stopped. If you are arrested you should definitely consult a lawyer before providing any oral or written statements. The police are not allowed to search your person unless you are under arrest.

Perhaps the most valuable piece of advice when dealing with the police is to be polite, even if you find yourself having to be firm about exercising your right to know why you have been stopped and to not answer questions you are not comfortable with. 

tionship you and your partner should together review all your property to ensure it is going to whom you intend following your death.

For more information or assistance with estate planning please contact our firm. We would be happy to help. 

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