STHI LEGAL NOTES

STEINBERG TITLE HOPE & ISRAEL LLP

BARRISTERS & SOLICITORS · TRADEMARK AGENTS

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Clear & Unambiguous

"Clear & Unambiguous" is the theme that runs throughout this edition of *STHI Legal Notes*. In this issue we look at a variety of topics; however, they are all tied together by the legal concept of "clear and unambiguous". Whether we are talking about the terms of a will, the clauses in a contract or the articles in a lease agreement, it remains critical that words, sentences and ideas be plain and obvious.

Lawyers are often criticized for the length and wordiness of the documents they draft, but the intended consequences of these documents live and die on the language used. It is for this reason that professional legal advice is so important. Our experienced team of lawyers are well versed in the topics tackled in this issue. We are always pleased to be able to assist our clients with their legal needs.

As the last days of summer fade away and the beautiful colours of fall make their entrance, we would like to take this opportunity to wish all of our clients an early Happy Thanksgiving!

When Can a Landlord Enter a Tenant's Unit?

Pursuant to the *Residential Tenancies Act*, a landlord may enter a tenant's unit only for the reasons listed in the Act. Those reasons include the following:

- in cases of emergency, without notice to the tenant;
- if the tenant consents to the entry, at the time of entry;
- to show the unit to prospective tenants, without notice if the tenant is vacating;
- in accordance with written notice given to the tenant at least 24 hours before the time of entry in order to carry out a repair or do work in the rental unit;
- to allow a potential mortgagee or insurer to view the rental unit;
- for any other reasonable reason for entry specified in the tenancy agreement.

In this issue

The Facts

The landlord wished to sell the rental unit and sought entry to the tenant's apartment to take measurements and photos. Although the tenant allowed the landlord to enter her home to take measurements, she refused to allow him to take photos. The tenant argued that the photos would show her and her children's personal belongings to the world over the Internet in furtherance of a sale.

When she continued to refuse him entry to take photos, the landlord sought to have the tenant evicted.

The Litigation

The lease that the tenant had signed stated that the landlord had "the right to enter upon notice in any circumstance."

Relying on the Act and the lease, the Landlord and Tenant Board agreed that the tenant had violated the landlord's right under the lease. The Board found that the tenant had substantially interfered with the landlord's ability to sell the property and so ordered her eviction.

The Divisional Court reversed the Board's decision, finding that it had made a fundamental error in law in reaching the conclusion that "any other reasonable reason" was broad enough to include taking photos. The Court concluded that absent a specific term of the lease, or with the tenant's con-

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Clarity, Public Policy and Testamentary Freedom

"The law does not require a testator to explain, let alone to defend, her reasons for her testamentary dispositions. Indeed, in my view, the privacy of those reasons is inherent in the principle of testamentary freedom."

Ontario Court of Appeal

The Ontario Court of Appeal recently decided a case involving the issue of a testator's freedom to distribute his estate as he chooses. The appellate decision hinged on whether the words he used conveyed the testator's wishes clearly and unambiguously, regardless of the possible motives for the bequests.

The Facts

Spence, the testator, and his first wife had two daughters. When the couple chose to divorce, Verolin went to live with Spence and Donna went to live with their mother. Following the divorce, the sisters never saw each other again nor did Donna ever see her father again.

Verolin and her father had a good relationship. Throughout her post-secondary studies, Spence financially supported Verolin.

Their relationship went off the rails when Verolin had a child fathered by a white man. Verolin and her family were black. Spence began to restrict his communication with his daughter. After the baby was born, he cut them out of his life completely and at the time of his death he had never met his grandson. According to Verolin, she did try to reach out to her father over the years but he refused her advances.

Following Spence's death, Verolin discovered that her father had left her nothing in his Will. Rather, he left the bulk of his estate to his daughter Donna and her two children despite having had no contact with them over the years. He not only failed to leave Verolin anything, he expressly excluded her from the Will.

Clause 5(h) of his Will states:

I specifically bequeath nothing to my daughter, [Verolin] as she has had no communication with me for several years and has shown no interest in me as her father.

The Litigation

A year after her father's death, Verolin applied to the court, pursuant to the *Succession Law Reform Act* (SLRA), for

1. a declaration that the Will was void, in whole or in part, because it was contrary to public policy;
2. leave to proceed with a dependant's relief application under the SLRA; and
3. directions from the court.

The basis for her argument was that her father's decision to exclude her and her son from receiving anything from his estate was racially motivated and therefore violated public policy.

In support of her case, Verolin filed her own affidavit as well as an affidavit sworn by Ms. Parchment, one of her deceased step-mother's best friends and who had acted as Spence's occasional caregiver. This affidavit evidence was uncontradicted.

The judge who initially heard the application did find that the Will was clear and that on its face it did not offend public policy. She stated that "were it not for the unchallenged evidence of Ms. Parchment and Verolin, the court would have no alternative but to go no further than the wording in the will."

After considering the affidavit evidence, the judge concluded that the reason that Spence had left nothing to Verolin was indeed motivated by race and that this "offended not only human sensibilities but also public policy." She struck down Spence's Will with the result that Spence was now considered to have died without leaving a Will and his estate was to be divided equally between his children, Verolin and Donna.

The Appeal

BMO Trust, the Estate Trustee, appealed the decision to set aside the Will. The thrust of its appeal was that the affidavit evidence should not have been admitted and that the application judge had improperly interfered with Spence's testamentary freedom.

The Ontario Court of Appeal began by recognizing the principle that a testator has the freedom to distribute their property as they choose and it is only in exceptional circumstances that the court will interfere with that freedom. The Court also stated that in Ontario, as a general rule, no one, including spouse or children, has an entitlement to any of the testator's property. Spouses and children who are dependent on the testator for financial support, may be able to apply under the *Family Law Act* and/or the dependant relief sections of the SLRA.

While it may be hurtful and unfair, neither Verolin nor her son had a legal entitlement to a share of her father's estate. More importantly the terms of Spence's Will are "unequivocal and unambiguous", and no interpretive question arises concerning the meaning of the Will. The Court went on to state, "Although this may reflect the sentiments of a disgruntled or bitter father, it is not the

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language of racial discrimination." The Court concluded that based on the clear and unconditional wording of the Will, there was no reason for considering extrinsic evidence, for a public policy-based inquiry regarding the Will's validity or for judicial interference with Spence's testamentary freedom.

In this particular case, while Verolin alleged that her father's reasons for excluding her and her son from the Will were racially motivated, the actual clause in the Will made no such reference. But what if Spence had explicitly stated in the Will that he was disinheriting Verolin because she had a child with a white man? The Court stated that "the bequest would nonetheless be valid as reflecting a testator's intentional, private disposition of his property – the core aspect of testamentary freedom." It further stated that "to apply the public policy doctrine to void an unconditional and unequivocal testamentary bequest in cases where, as here, a disappointed potential heir has been disinherited absolutely in favour of a different, worthy heir, would effect a material and unwarranted expansion of the public policy doctrine in estates law."

Putting aside Spence's motive for disinheriting his daughter, real or imagined, what this case does underscore is the importance of using language that clearly spells out one's intentions regarding the distribution of one's estate.

Professional legal assistance in the drafting of a Will ensures that your estate is distributed as you desire. Our estate lawyers would be pleased to assist you.

A Fixed Term is a Fixed Term

Our third case involves an employment contract. Like the previous two, this case comes down to the wording in the contract and whether it was clear and unambiguous in its meaning.

The Facts
The employee had signed a five-year written employment contract to work as the truck shop manager at an automotive service centre. The agreement expressly provided for early termination.

(8.1)Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the Employment Standards Act of Ontario.

After just 23 months, the employer terminated the employee without alleging cause and paid him two weeks' salary in lieu of notice pursuant to the *Employment Standards Act*. The employee sued for breach of contract and sought to be paid for the threee years and one month remaining under his employment contract.

The lower court found that clause 8.1 was unenforceable due to its ambiguity. The judge stated, "I regard the language used in clause (8.1) to be sufficiently ambiguous as to the true extent of the plaintiff's entitlement under the E.S.A. and in the result, that ambiguity must be construed against the defendant again having regard to the power imbalance that exists between an employer and employee as a matter of course."

The lower court concluded that the employer had breached the contract and had to pay common law damages for wrongful dismissal, subject to mitigation.

The employee appealed the decision, arguing that he was entitled to compensation for the unexpired portion of the contract. It should be noted that the employer did not appeal the striking out of clause 8.1.

The Law
There is a common law presumption that every employment contract includes an implied term that an employer must provide reasonable notice to an employee before terminating employment. This presumption can only be rebutted if the contract "clearly specifies some other period of notice, whether expressly or implied."

The majority of the wrongful dismissal cases we have considered in past editions of the newsletter have centered on reasonable notice. In other words, cases involving wrongful dismissal and the assessment of common law damages based on such factors as the length of employment, the age of the employee, the type of position occupied, etc.

The Appeal
The Ontario Court of appeal agreed with the employee that he was entitled to the balance owing under the fixed term employment contract, stating that "Where an employment agreement states unambiguously that the employment is for a fixed term, the employment relationship automatically terminates at the end of the term without any obligation on the employer to provide notice or payment in lieu of notice." By the same token it follows that the appellant is entitled to the compensation that he would have earned to the end of the employment contract and that he is not subject to mitigate his damages.

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When It's Clear It's Clear

The case of *Tim Ludwig PC* v. *BDO Canada LLP*, involves a partnership, and BDO's attempt to circumvent the clear language in the governing agreement that spelled out how to force a partner into retirement.

Ludwig, who was a chartered accountant and a licensed trustee in bankruptcy, was a partner of BDO. On July 8, 2014, he met with two of the partners who told him that the CEO had an absolute right to require a partner to retire and that he was exercising that right. Three months later, on October 8th, the Policy Board, pursuant to the parntership agreement, met, ostensibly, to determine whether it was in the best interests of the partnership for Ludwig to remain. At the meeting they agreed with the CEO's decision.

Ludwig commenced a legal action seeking damages for lost profits and retirement benefits of almost $1.3 million.

Following a review of the facts and the time line, the Superior Court judge concluded that BDO had failed to follow its own forced retirement policy that was clearly set out in its partnership agreement. He stated, "A strict construction of the power of expulsion accorded to the Policy Board by virtue of article 17.4 clearly suggests that the Policy Board did not make a valid determination within the meaning of that article; the determination to expel had already been made in advance of the 8 October meeting. Accordingly, the decision to expel was invalid. It amounts to breach of contract, and breach of the partnership agreement."

This case can be contrasted to the employment and landlord/tenant cases in that the relevant clause was not attempting to be broad and all encompassing, rather it provided a clear process, the CEO simply chose to ignore it. The clear language was an absolute defence to all the arguments put forth by BDO in trying to justify their actions.

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Bottom Line
Again in this case we see the desire to use an all-encompassing clause to cover off all possibilities. Unfortunately, this one size fits all approach is instead neither unambiguous nor clear. In fact, the result had the opposite of the desired effect and proved costly to the employer.

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sent, there is no authority under the Act to require entry into a tenant's premise to take photographs for marketing purposes to advance the sale of the property. As a result, there were no grounds for the tenant's eviction.

Conclusion
In this case, the landlord attempted to use extremely broad language to cover off all the possibilities for entering his tenant's unit. Instead, had he listed a set of clear reasons for possibly having to enter the tenant's home he would likely have been successful.

In addition to drafting legal documents, a professional legal advisor can assist you to consider possibilities that are relevant to your specific legal situation.

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