

LegalEase[®]

A straightforward look at law and business

Sorbara, Schumacher, McCann LLP is a fourteen-lawyer local law firm with offices in Kitchener and Guelph specializing in all areas of business law

Income Attribution and Family Trusts

Many professionals and owners of small to mid-sized family businesses use family trusts in order to transfer money on a tax-reduced basis through income splitting.


Income splitting is the loan or transfer of monies to lower income earning individuals, typically spouses or children, so that income or gains from investments are taxed at a lower rate, decreasing the overall tax burden on the family unit. Often times, this is accomplished by creating a family trust. The higher income earner then transfers assets into the trust for the benefit of the lower income earners so that the assets will be taxed in the hands of the lower income earners.

While there are allowable mechanisms for income-splitting within families, the income attribution rules provided for in the Income Tax Act generally block attempts to shift income to another person. The attribution rules have the effect of ignoring the legal recipient or beneficiary of property, including the income or capital gains arising therefrom, and attributing the income back into the hands of the individual who transferred or lent the property.

In the case of family trust arrangements for income splitting purposes, taxation authorities will often attempt to challenge these arrangements by characterizing them as reversionary trusts. A reversionary trust is deemed to occur when the transferor of the trust property retains control of the trust property either by becoming a beneficiary under the trust or by having discretion or power to determine how, when and to whom the disposition of the trust property may occur.

In those circumstances, taxation authorities will consider the trust to be a reversionary trust and will attribute all income, capital gains and losses involving the trust property to the transferor and the trust property cannot be rolled out to beneficiaries other than the transferor on a tax-free basis during the life of the transferor. This attribution rule essentially nullifies any benefits to the taxpayers from the creation of the trust. Further, the rule applies to all of the assets of the trust even if the transferor is not a beneficiary of certain assets or does not otherwise retain control of those assets.

In order to avoid these consequences within the context of a family trust, one should take great care to ensure that the trust created will not be considered a reversionary trust. In this regard, the transferor ought not to be a beneficiary under the trust and his or her consent should not be required in order to dispose of the property. The transferor also should not be the sole trustee or part of any unanimous decision making body in relation to the trust.

If you have any questions about family trusts or would like to review your current estate and tax planning, please feel free to contact any of our solicitors. 

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New Spousal Support Guidelines

For years, judges and family law practitioners have grappled with the issue of spousal support. Spousal support has always been a difficult issue in family law disputes in part because there have been no formal guidelines with respect to quantum or duration of support and also because it is very much subject to judicial discretion based upon the individual facts of each case. There were similar problems years ago with respect to child support until Parliament created its Child Support Guidelines which provide a formula for calculating the minimum support requirements in any given case.

In order to alleviate some of the uncertainty surrounding spousal support, the Federal Department of Justice released a draft proposal for spousal support guidelines earlier this year. These guidelines are meant to provide a framework for calculating the quantum and duration of spousal support upon the dissolution of marriage in a manner similar to the guidelines in place for child support. However, unlike the Child Support Guidelines, the new spousal support guidelines are not mandatory and do not override judicial discretion in determining what, if any, support to award in any particular case.

The new guidelines create two formulas to determine an appropriate range for the quantum and duration of spousal support. The first formula applies to relationships where there are no children of the marriage and the second deals with relationships where children are involved.


Where there are no children of the marriage (as that term is defined by the *Divorce Act*), support is based upon the duration of the marriage and the gross income difference between the spouses. The guidelines attempt to equalize the respective incomes of each spouse for somewhere between 1/2 to 1 year per year of marriage. Therefore, a spouse of 10 years would be entitled to support for somewhere between 5 and 10 years. Because of the way the formula is set up, the guidelines provide more protection for a spouse that has been married for a longer period of time as he or she would be more likely to suffer a greater disadvantage from the dissolution of the marriage.

Where children are involved, support under the new guidelines is largely determined by the age of the child. The guidelines provide for an indefinite period of support where children are involved. This is because children can affect the familial roles and future abilities of each spouse in a significant way. Rather than limiting the duration of support, the guidelines provide for reviews of the same at important milestones in the children's lives so that the Court can reassess the need for support and the abilities of the spouses as time

passes. Under this regime, it is likely the Court would re-examine support when the child first enters full-time school, when the child reaches the age of twelve and when the child becomes independent.

Under the guidelines, the pool of the spouses' net disposable incomes is divided between the two spouses by providing the lower income spouse with between 40-46% of the combined net disposable income of the spouses. It is hoped that such support will have the affect of offsetting any disadvantage suffered as a result of the marriage or children.

Although the guidelines may be of some assistance to Courts and family law practitioners alike, they are not meant to be, and cannot be, determinative in defining the quantum and duration of spousal support. Unlike child support, a spouse is not automatically entitled to spousal support and, as such, the effect of the new guidelines is somewhat limited in nature. Entitlement will still largely depend upon the need of the recipient spouse and the ability to pay of the payor spouse, both of which are complicated and fact-driven issues within family law disputes. Further, the guidelines overlook relevant criteria which may impact upon the ability of a spouse to obtain economic independence after the dissolution of the marriage, including spousal roles, career paths, remarriage and children born subsequent to divorce. The Court will continue to consider criteria external to the guidelines in determining the quantum and duration of support in the interests of justice.

The new spousal support guidelines may be a useful tool in making persuasive arguments and formulating offers to settle but they are not a complete replacement for judicial discretion. Only time will tell how Courts will use the guideline calculations and whether or not the guidelines will meet their objectives of promoting settlement and consistency with respect to spousal support awards. 

Around the Firm

The partners and staff at Sorbara, Schumacher, McCann LLP are pleased to announce that Sebrina Schoen has completed her articles with the firm and was called to the Ontario bar on July 18, 2005. Sebrina has joined the firm as its newest associate and will be practicing in the area of family law and litigation, primarily from our Guelph office. If you wish to discuss a family law or litigation matter with Sebrina, please feel free to contact her at either office.




Sebrina Schoen

Sebrina's addition to the Guelph office is not the only news from our Guelph office. We are excited to announce that, effective October 1, 2005, we will be relocating our Guelph office to a century-old home located at 457 Woolwich Street in Guelph. This new building has improved space and facilities that will allow us to continue to grow and service our clients in a timely and effective manner. You will no doubt hear more about this change of location as the moving date approaches.



New Guelph Office

We have also had the opportunity to celebrate memorable events for two of our staff members this summer. On June 18, 2005, our corporate commercial clerk, Marcia Schieck (formerly Schnurr), was married to her high school sweetheart, Roger Schieck, at a beautiful ceremony in Mildmay, Ontario.

On July 9, 2005, Erin Wiseman, one of our corporate assistants, and her husband Mike welcomed the arrival of their second child, Edward Patrick Wiseman. Everyone is happy and healthy and we wish them well during this exciting time. 



Marcia & Roger Schieck

Ontario's new *Consumer Protection Act*, 2002 came into force on July 30, 2005. This Act consolidates a number of previous statutes, including the *Business Practices Act*, the *Consumer Protection Act*, the *Consumer Protection Bureau Act*, the *Loan Broker's Act*, the *Motor Vehicle Repair Act*, and the *Prepaid Services Act*. The new Act also provides expanded protection to consumers in a number of different areas, particularly, e-commerce transactions, motor vehicle, travel and home purchases and unsolicited sales.

The Act governs Ontario business or any businesses that sells, leases or finances goods to consumers who reside in Ontario and specifically applies to any consumer agreement or transaction for goods or services with a value over \$50.00. A consumer is defined to be "an individual acting for personal or household

purposes" and does not include a person acting for business purposes. The Act expressly provides that any ambiguous language in a consumer agreement will be interpreted in favour of the consumer and against the supplier and the supplier is deemed to warrant that any goods or services supplied under a consumer agreement are of reasonable and acceptable quality.

With respect to e-commerce transactions, suppliers must include in their selling agreements an opportunity for customers to accept, decline or correct errors in the online agreement before it is enforceable. Suppliers must also deliver a written copy of the agreement to the consumer within 15 days of acceptance, failing which the consumer may rescind the agreement within 30 days. Online suppliers must also create an easily accessible complaints and consumer service process to

monitor and address consumer complaints.

The new Act also provides strict disclosure obligations for those who extend credit or leasing agreements to consumers. These disclosure requirements include, among other things, disclosure of items such as: the cost of borrowing, the start and end date, amortization, interest rates and the manner of interest calculations, grace periods, default charges, and security interests. The Act further provides that borrowers are permitted to prepay the full outstanding balance at any time without bonus or penalty.

With respect to travel arrangements involving time share memberships, the new Act prescribes a number of requirements for information that must be included in a time share agreement and it further provides consumers with a 10 day cooling off period.

Consumer Protection Law

Under this provision, a consumer may, for any reason, cancel a time share agreement within 10 days of receiving a written copy of the agreement.

The new Act also addresses the issue of unsolicited goods and material changes to existing consumer agreements. Under the Act, “negative option billing”, whereby the supplier bills the consumer before goods or services are requested, is strictly prohibited. Further, the Act provides that suppliers must obtain the express consent of consumers for any “material change” to the ongoing provision of goods and services. If this consent is not obtained, the additional goods and services provided is deemed to be unsolicited in which case the consumer is not be obligated to pay for, use or dispose of the same.

Another interesting feature of the new Act

relates to the provision of estimates. If a consumer agreement contains an estimate, the supplier is prohibited from charging the consumer an amount that exceeds the estimate by more than ten per cent and, if it does so, the consumer may rely upon the estimate and require the supplier to provide the goods or services at the price that was estimated. The Act further provides that the consumer and the supplier may amend the estimate or agreement in the event that the consumer requires additional services and materials.

The above is only a brief highlight of some of the changes to the consumer protection regime in Ontario as a result of this new legislation. Businesses offering goods or services in Ontario, particularly those who rely upon e-commerce transactions, extend credit or leasing arrangements, or those who provide

estimates on a regular basis, should be sure to examine their business practices in light of these new requirements. Those found to be in contravention of the Act may be subject to rescission of agreements by consumers as well as fines ranging from \$50,000 for individuals to \$250,000 for corporations or even imprisonment, and they may be liable to pay compensation or restitution to consumers.



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Before acting on any information contained in LegalEase, Sorbara, Schumacher, McCann LLP urges readers to obtain professional legal advice, as each situation has its own unique set of circumstances.

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Don't Let Sleepin

In the recent decision of *Ciccio v. Ciccio*, the Ontario Superior Court of Justice affirmed that a lender's right to recover monies owing under a mortgage expires 10 years after a missed payment or due date if no payment or acknowledgment of the debt is made by the mortgagor during that 10 year period. The Court further confirmed that, in the case of demand mortgages, the 10 year limitation period begins to run on the date that the mortgage is executed.

In *Ciccio*, a husband and wife received a loan from the husband's parents to use a down payment on a home. The couple then executed a mortgage in favour of the husband's parents as evidence of, and security for, the loan. The mortgage had a five year term with a first payment date of July 3, 1988 and a final payment and due date of June 2, 1993. The couple did not make any payments towards the mortgage nor did they sign any written acknowledgments of the debt.

The couple separated in late 2003 and the husband's parents made a demand for payment under the mortgage in February 2004.

The wife disputed the validity of the demand and the mortgage and relied upon section 23(1)

of the *Real Property Limitations Act*. That section provides that a lender cannot bring an action to recover monies owing under a mortgage if more than 10 years have passed since there has been some payment or acknowledgment of the debt in writing by the mortgagor. The wife argued that this was a conventional mortgage with regular payments commencing in 1988 and ending in 1993. Since no payments were made during that time period (or at all) and since 10 years had passed without any payments and without a written acknowledgment of the debt, she argued the parents were barred from now enforcing their mortgage. The husband and parents took the position that the mortgage was a demand mortgage and that the 10 year limitation period did not start until the date of the demand.

The Court ruled in the wife's favour. In doing so, it agreed with the wife that the mortgage was a conventional mortgage and that the limitation period set out in the Act began to run on the date of the first missed payment. The Court went on to say that, even if the mortgage had been a demand mortgage, the limitation period would have begun to run on the date that the mortgage was executed and not from the date of the demand.

In either case, had the couple made any payment towards the mortgage during the ten year period or otherwise acknowledged the debt in writing, the limitation period would then start to run from the date of the payment or acknowledgment.

It is common for parents to loan money to their children to assist with the purchase of a home. While parents will often take a mortgage on the property as evidence of the loan, they do not often strictly enforce their mortgage rights or otherwise seek any payments until their child's relationship breaks down or upon the death of one of the borrowers. In these circumstances, mortgagees should be cognizant of the *Ciccio* decision and the operative provision of the *Real Property Limitation Act* or else they could lose their rights to enforce the mortgage.

One way for parents or other potential mortgagees to preserve their rights under the mortgage is to ensure that the mortgagors make a nominal payment towards the mortgage every year, preferably by cheque which includes a clear description as to the nature of the payment. Another option is for the mortgagees to obtain from the mortgagors a signed, written acknowledgment of the debt on a yearly basis.



ing Mortgages Lie

With each of these payments or acknowledgments, a new 10 year limitation period would begin so the mortgagee will be able to enforce their rights at any time within ten years of the last such event.

If the circumstances of this case apply to you or if you are planning to assist a child or family member with the purchase of a home, you should be sure to take proper steps to preserve your rights under the mortgage. If you any questions about this case or any other mortgage-related matters, any one of our real estate lawyers would be glad to speak with you and assist you in any way.



LegalEase is circulated seasonally to over 1,000 businesses and individuals in and around Waterloo Region and Wellington County. If you would like more information about LegalEase or are interested in contributing to upcoming issues, please feel free to contact Justin Heimpel at our Kitchener office.

Copyright – What is it and what does it do?

Everyone has come across the © symbol in their everyday life and most people have a basic understanding of what copyright is. However, there is a great deal of confusion and misunderstanding as to how one acquires copyright and what it does.

Copyright automatically vests in the author or creator of a work upon creation of the work. The term “work” includes traditional media such as literary works but also includes other media such as musical recordings and computer software. The author or creator of a work may thereafter assign or license any or all of their rights in the copyrighted material to a third party for profit or otherwise. Generally speaking, the holder of copyright in a work has the sole right to produce or reproduce the subject matter of the copyright.

In both Canada and the United States, authors may make formal applications to have their copyright acknowledged and registered. While it is not clear how often this process is used in Canada, the U.S. Copyright Office receives more than 600,000 applications annually. Registration of copyright is done by completing an application form and sending the same to the Copyright Office along with the required fee and, in certain cases, other required materials. Detailed instructions together with the current fees schedules are available on the Canadian Intellectual Property Office's Website at <http://strategis.ic.gc.ca> or the U.S. Copyright Office's Website at <http://www.copyright.gov>.

In Canada, upon registration with the Copyright Office, the holder of copyright receives a certificate which acknowledges the copyright, provides proof of ownership and can be used to defend the same in the event that the copyright is later infringed. In the event of a legal dispute over ownership or rights to the work in question, the onus to prove ownership is on the individual who does not hold a certificate of registration.

In the United States, there are a number of advantages to registration of copyright. Registration establishes a public record of a copyright claim and is necessary before an infringement suit may be filed in any American Court. Registration also allows the holder to obtain additional legal costs from the opposing party if successful in a Court action in a number of circumstances. Finally, registration allows owners to record the registration with the U.S. Customs Service to protect against the importation of infringing copies.

Under the Universal Copyright Convention, the symbol of copyright notice © can be used by any holder of copyright (registered or not) as a further means of preventing unauthorized duplication or copyright infringement. Unfortunately, this symbol and even formal registration of copyright does not provide a guarantee that one's copyright will not be infringed and is no assurance that one's claim to ownership will prove successful. These measures will, however, assist the copyright holder in the event that a dispute arises.

Should you require any further information regarding copyrights or other intellectual property rights, please contact our offices or visit the Canadian Intellectual Property Office Website, the U.S. Copyright Office Website, or U.S. Trademarks and Patent Office Website (<http://www.uspto.gov>). 



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