

BOWLEY LEGAL NEWSLETTER









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Another reason to maximize RRSP's– Happily, creditor-proofing and retirement planning come together nicely. As a result of recent amendments to the Bankruptcy and Insolvency Act, property available for distribution amongst creditors does not include the debtor's interest in any RRSP or RRIF (except for contributions in the twelve months before the bankruptcy).

Professionals and entrepreneurs who have room in their RRSP accounts should be looking at this not only as their retirement savings but as one of the few safe havens in the event of a catastrophic financial event. The one-year clawback provision should be a powerful incentive to act early, bearing in mind the truism about horses and barn doors. Speak to your advisor.

Economics 101: lessons from the Crows– Some people like crows and some don't, but everyone agrees they fare well. In fact, the two branches of economics are named in honour of the famous brothers Mike Crow and Mac Crow, who know how to stay out of Scare City. Here are their simple rules:

-  Where there's a scarecrow, there's a garden.
-  If you find a dead horse, don't try to eat it all by yourself.
-  When it's your turn for guard duty, show as much enthusiasm as when it's your turn to feast.
-  Mate for life. Care well for your young.
-  If an oncoming truck interferes with your dinner plans, be patient. Trucks come and trucks go, but the porcupine isn't going anywhere.
-  It's OK to have an ugly nest if it's sturdy.
-  In bad times, get out of the rain and fluff up your feathers. Soon enough, the sun will come out.
-  Even when nobody agrees with you, speak your mind. You have just caws.

The Border Colleagues raised over \$5,800.00 for the Ottawa Humane Society's "Wiggle Waggle Walkathon".

Many thanks to the numerous friends and clients who donated generously.

Do Common Law Spouses Have Property Rights on Separation?– Unlike married spouses in Ontario, common law spouses have no legal right to equal division of property upon separation. But, they can assert an equitable claim (a *trust claim*) when seeking an interest in property owned by the other spouse.

A trust claim is asserted when the spouse that does not hold legal title to property alleges that the other holds a share of his or her property in trust for the claimant's benefit, notwithstanding that the claimant has no legal ownership.

The most typical trust claims advanced by common law spouses, are *resulting trusts* and *constructive trusts*. With resulting trusts, it is presumed that the non-titled spouse should have a share in the other spouse's property as a result of his or her contributions— direct or indirect— to the acquisition or maintenance of the property. For such a claim to succeed, there must be evidence of a common intention of the spouses to share in the property which is typically demonstrated by direct financial contributions when acquiring the property, or indirect financial contributions such as time and labour.

Constructive trust claims differ from resulting trust claims in that it is not necessary to establish a common intention to share in the property. A constructive trust is imposed as a remedy where the title-holding spouse would be *unjustly enriched*, to the detriment of the other spouse, with no legal reason for permitting such enrichment.

Trust claims tend to be complex and costly to litigate. One way for spouses to protect themselves against the necessity of advancing or defending a trust claim upon separation is to have a Cohabitation Agreement. For more information, visit our website.

There is nothing so useless as doing efficiently that which should not be done at all.

Peter F. Drucker

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THOMAS & WINSHIP

Tax Free Savings Account– New on the retirement planning scene is the TFSA. Unlike RRSP's where you get a tax break for contributing, you contribute to TFSA's with after-tax dollars. But thereafter you pay *no tax* on the growth (interest, dividends and capital gains) within the account. When you withdraw, there is no tax on the income. You may contribute up to \$5000 per year, and any amount not used in a year can be carried forward indefinitely.

Although the TFSA will normally lose its status upon a taxpayer's death, if he or she has named his or her spouse or partner as a "successor holder" the account will remain tax-free until the death of the survivor.

Testamentary Trusts and Tax Savings– The tax savings available through the use of testamentary trusts are almost too good to be true. Of course, the rules are extremely strict and the consequences of being "offside" are severe.

Testamentary trusts arise on and as a result of the death of a testator. Contributions have to arise by and as a result of the death of the *contributor* (not necessarily the originator of the trust.)

There are huge tax benefits in the use of a testamentary trust, probably the greatest of which is that the trust is taxed at the same rates as an individual and can then pay out to the beneficiary tax-free.

Why is this such a big deal? Let's say that two widows each leave \$250,000.00 to their respective sons, each of whom earns \$80,000.00 per year, and the \$250,000.00 can earn 10% (\$25,000.00) income per year. One leaves the gift directly, the other by way of a testamentary trust. Let's now compare the effects.

If the gift is direct, the \$25,000.00 is added to the son's income and taxed entirely in his hands, for a combined tax bill of approximately \$30,100.00. If the \$25,000.00 is taxed in the hands of the trust, however, the trust will be treated as if it were a separate individual earning only \$25,000.00. Tax on that sum is \$5,300.00, and on the son's \$80,000.00 is \$19,300.00, for a total tax bill of \$24,600.00. (The trust doesn't get personal deductions, if you're doing the math.)

The tax saving is approximately \$5,500.00. Every year, year after year after year. For higher amounts, it is even more impressive, up to around \$12,000.00 annually.

With savings of such a magnitude available, it should come as no shock that CRA watches these trusts like a hawk and pounces on every one which goes offside. As they say, "Don't try this at home!" Consult your lawyer, your accountant and your investment advisor.

Construction liens– If they are not paid on a timely basis, suppliers of labour and material used in a building or improvement to land have a right to claim a lien. This ties up the land and creates a limited right to enforce payment of the unpaid amount. Construction lien law creates a complex web of trusts and hold-back requirements to benefit workers and suppliers. Breach of these can make the owner or head contractor personally liable.

Owners, builders, contractors, suppliers and workers need always bear in mind their various legal rights and obligations when involved in construction, installation or supply. Because of the short and strict time-lines imposed upon all claimants, anyone with an unpaid claim should seek legal counsel at the earliest moment.

Bulk Sales– The deal seems too good to be true. The seller owes everybody (including CRA) a ton of money and he's had enough. He just wants to sell everything he has for whatever he can get, stick the cash in his pocket and leave town. For you this is as risky as buying "hot" goods off the back of a truck. Don't do it!

Why not? Because you are going to talk to us, and we'll tell you about the *Bulk Sales Act*. We'll explain that if you just hand money to the seller without attending to "legalities", you will end up paying twice– once to the vendor, once to all the disappointed creditors. The moral: if you are thinking of buying all or most of the assets of a business, call us. We're much cheaper than buying it twice!

Estoppel– A very useful and important concept, estoppel is the legal version of the old adage "What you do speaks so loud I can't hear what you say." Permitted as a shield but never as a sword, estoppel prevents a party from asserting something which his behaviour plainly indicates is not true, even where a document may say otherwise. Like all "equitable" instruments, the use of estoppel by the courts is always complex and nuanced, and is only available to a party whose own behaviour is beyond reproach.

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