MINDEN GROSS LLP

Summer 2013

TOPICS:

A Verbal Contract Is Not Worth The Paper It's Written On

Gus Sorkos was born in Greece and immigrated to Canada as a young man. In 1960 when he was 22 years old he was working as a short order cook in a small restaurant in London, Ontario. It was there that he met Victoria who was then a waitress and the mother of a young boy. Victoria and Gus started a common-law relationship which lasted about forty years until Victoria's death in 2001.

Although both Victoria and Gus had little formal education, they achieved financial success and acquired a number of real estate properties including a farm and two cottages. Victoria's son, Brian who died in 2008, had two children, both sons, Paul and Mark, who over the years spent more and more time with Gus, particularly at the farm and cottages.

Gus had no biological children. Mark and Paul called Gus and Victoria their "Papa" and "Nana". Gus treated the boys in all respects as his grandchildren.

At a breakfast meeting with Gus in 1985 when Paul was 17 and Mark was 13 years of age, Gus told them that he "would be asking a lot of them in the future" and that he expected them to assist him with the farm and cottage properties. They were to be available when needed and when asked. They would not receive any pay for their services. In return he would leave them in his Will both the farm and the cottages and $350,000.00 each to maintain these properties. The boys agreed. All three shook hands. The Trial Judge referred to this meeting as the "1985 Breakfast Agreement". Paul and Mark immediately and continuously lived up to their end of the 1985 Breakfast Agreement.

The boys at the expense of their personal relationships and their own priorities in life devoted themselves to all of the requests Gus made of them and assisted Gus with whatever was required at the farm and cottage. They remained true to their commitment to Gus until his death in 2009.

Although Gus had made a Will about 15 years after the 1985 Breakfast Agreement leaving the farm and cottages equally to Paul and Mark as well as $500,000 to each of them, he subsequently made other Wills.

After Victoria died in 2001, Gus married Eirini Sorkos who looked after Gus until his death in 2009.

In a Will dated December 17, 2003 Gus left $250,000 to his wife Eirini, $50,000 to Paul and $25,000 to Mark and the residue of his estate to his five siblings in Greece.

Paul and Mark brought a court action against Gus' Estate for the farm and cottages. They relied on the 1985 Breakfast Agreement that he would leave them, as an inheritance, the farm and cottages in return for the time and energy they spent attending to tasks he requested of them.

The 1985 Breakfast Agreement was entirely verbal. Ordinarily agreements relating to land and the transfer of land are required to be in writing.

Paul and Mark gave evidence that for more than 25 years they worked for and assisted Gus on the farm and at the cottages as and when Gus asked. Their efforts and work over the years at the farm and cottages were connected to the 1985 Breakfast Agreement.

Paul and Mark called several witnesses to confirm their evidence of their relationship with Gus. At least four witnesses including one witness who had worked for Gus as a waitress for 20 years and then as his property manager testified that the boys carried out all the tasks that Gus requested and that he always stated that he was leaving the farm and cottages to the boys.

The Trial Court dealt with legal concepts of part performance and the doctrine of proprietary estoppel. The elements of proprietary estoppel can simplistically be summarized by saying that an equity arises when an owner of land (Gus) encourages others (Paul and Mark) to believe that they will have some rights over the property and in reliance upon this belief, the parties (Paul and Mark) acted to their detriment to the knowledge of the owner (Gus). When the owner (Gus) sought to take unconscionable advantage of Paul and Mark by denying them the benefits which they expected to receive, the doctrine of proprietary estoppel stepped in.

The court in this case ordered that the farm and the cottages be transferred to Paul and Mark.

The court summed up its decision as follows:

> ***In my view, when making out his December 17, 2003 Last Will and Testament purporting to leave the farm and cottage properties to his residuary beneficiaries (not Paul and Mark), Gus was no longer legally in a position to do so. To hold otherwise would be unconscionable to these Plaintiffs who had partially altered their lives for more than 25 years to Gus' benefit and to their detriment. The degree to which they had so altered their lives is like asking to "put Humpty Dumpty back together again". It is impossible.***

Although Paul and Mark became entitled to the farm and cottages the Court declined to award them with $350,000.00 each as the promise to transfer these funds lacked the necessary corroboration.

With respect to the farm and cottages, Samuel Goldwyn was wrong.

With respect to the $350,000, Samuel Goldwyn was right.

Family disputes, to paraphrase Aristotle, are cruel.

As one judge characterized a family dispute "I would note at the outset that the Court has seldom experienced such hostile animosity or hatred…" or in another family dispute heard by a different judge "the themes emerging from the evidence reveals a cautionary tale of parental hopes dashed, sibling rivalry, and love for a place embittered".

In one case a 102-year old mother sued her 66-year old son to reclaim title to a house transferred by her to her son. The judge, in deciding that the son legally did not have to give back the house to his mother, concluded:

> ***One can say only, at most, that the son has chosen to ignore the Fifth Commandment – "Honor Thy Father and Thy Mother", which unfortunately is not a law within the jurisdiction of the court.***

In a February 2013 decision a son ("Barry") sued his mother and two sisters because of a promise he testified was made to him by his father (James) that the property on which they operated a scrap yard business was to belong to Barry. Although he was a great son to his father and mother, the judge was not satisfied that the promises were made and that if the promises were made, they were not sufficiently clear, specific and authoritative.

The Judge, in concluding that Barry lost the case held:

> ***I also accept that parents usually try to be even-handed with their children. That may not be the case if a child has repudiated a parent or the relationship has been damaged for some other reason. However, there was no evidence that was the situation here. There was no evidence that James and Lois were in any way estranged from their daughters. The family dynamics seemed normal enough prior to James' death. Barry spent the most time with his parents because he lived next door to them. He may have been closest to James on an emotional level because of proximity and their shared interests. However, there is no reason to believe that James preferred Barry to his daughters.***

In a 2012 decision by the Ontario Court of Appeal involving a lawsuit by a son suing his mother and two sisters for a dairy farm promised to him by his father, now deceased, the Chief Justice of the Court of Appeal ordering a new Trial, after more than $500,000 in legal fees had been incurred stressed that a "new trial is in neither side's interest". He said "This case cries out for a mediated, consensual resolution".

If, unfortunately, there are disagreements, then heed the Chief Justice's advice and seek a mediated, consensual resolution. The best thing, of course, is to avoid family disputes and not build brick walls dividing families.

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When will an employment agreement survive a corporate acquisition?

THE RECENT DECISION OF THE ONTARIO Superior Court in ***Whittemore v. Open Text Corporation*** provides useful illustration of the rollercoaster ride that an employee might experience when his corporate employer goes through changes in its status.

Mr. Whittemore started work in 1994 with a small company called SoftArc Inc., as a software developer.

Five years later, SoftArc was taken over by another small company, MC2. MC2 had Mr. Whittemore sign an employment agreement at that time. It included a provision that on termination, an employee with more than 4 years service was entitled to 4 weeks salary in addition to the minimum statutory notice regardless of his actual length of service. It also provided for a sabbatical every 5 years.

Mr. Whittemore's salary and job functions did not change after the takeover. His years of employment with SoftArc were recognized in terms of his seniority. The company was listed on the TSX in March 2000 at which time its name was changed to Centrinity Inc.

In 2002, Centrinity was purchased by Open Text Corporation. At this point, a change was made to the sabbatical provision in the employment agreement which he had signed with MC2. Open Text informed the former employees of Centrinity Inc. that its corporate policy was not to provide any sabbatical so anyone intending to stay on with Open Text would have to agree to give that up. Whittemore did so.

As far as Whittemore was concerned, his employment contract with Centrinity was over and he had a new agreement with Open Text along the same terms except for the sabbatical. In all other ways, his job remained the same.

In 2011 Open Text terminated Whittemore's employment. He was given the minimum statutory notice together with a lump sum payment of 4 weeks' base pay, in accordance with his original employment agreement. By that time he had over 17 years of service which, at common law, would have entitled him to substantially more.

Whittemore sued for damages for wrongful dismissal. Open Text responded by insisting that Whittemore remained bound by the original employment agreement and accordingly, he had been paid all that he was owed.

A judge had little difficulty concluding that his employment agreement entered into with SoftArc continued to apply when it was taken over by MC2/Centrinity Inc.

The more interesting question was whether or not that contract continued to be in effect after the takeover by Open Text.

The critical question on this point related to the way in which the takeover had taken place. Where a company taking over a business does so by purchasing shares, the law is clear that there is no change in the corporate identity of the employer and therefore no termination of employment. In other words, the result of an amalgamation through a share transaction is not the death of a company but rather its continuation in a new form. In this case, the Court characterized the Open Text transaction as an amalgamation with MC2/Centrinity. As a result there was no change in the identity of the employer and the existing employment contract continued.

The question of the elimination of the sabbatical privilege was discussed as well. The judge considered that it had been open to Whittemore to advise Open Text that its refusal to continue the sabbatical program constituted a breach of the terms of his employment contract and therefore a constructive termination. However, he did not do so. Instead, he agreed to the change and carried on as usual. As a result, he lost any right to complain about the loss of the sabbatical or insist that the original employment agreement had come to an end.

As Whittemore had condoned the change to the employment agreement by his conduct, the employment agreement remained in force and Open Text was entitled to rely on its termination provisions.

This case highlights the importance of exercising great care when a person's corporate employer is acquired or in some way taken over by a new entity. An existing employment agreement may or may not continue to apply, depending on the circumstances.

It also highlights the importance of being careful in the way one responds to a change in terms of employment. Accepting a change without taking the appropriate legal position may have unintended consequences down the road.

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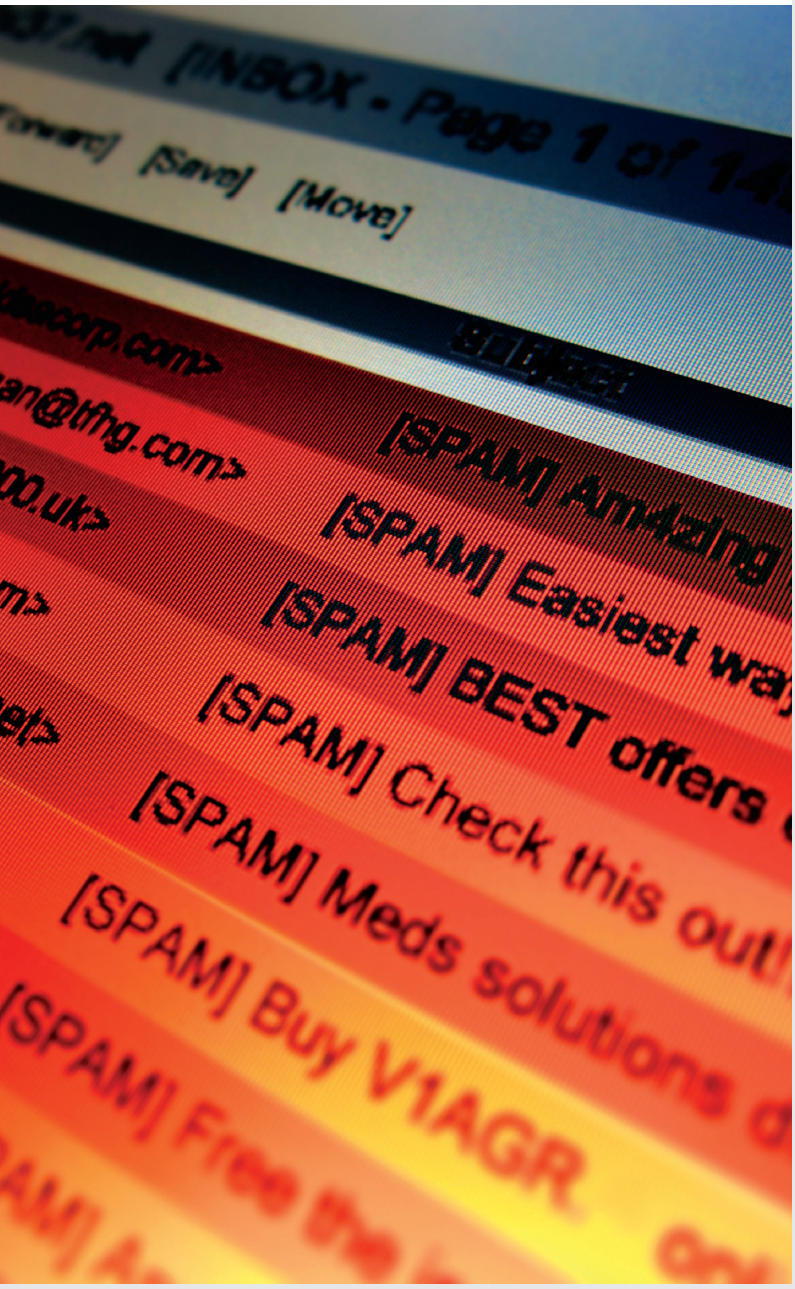
Canada's Anti-Spam Legislation [CASL]



How [CASL] will affect your business

TO MOST PEOPLE, MYSELF INCLUDED, the word "spam" conjures up images of unwanted and annoying emails covertly finding their way through our e-mail filters. I am hesitant to believe that my legal services have been referred to "Nigerian princes". Similarly, I cannot help but wonder why I am so often inundated with cheap offers for pharmaceutical products. These are but a few examples of electronic messages that we have come to view as the archetype of "spam". Thus, it will come as a surprise (or even a shock!) to most people that the emails and other electronic messages that you send on a daily basis may be caught by Canada's Anti-Spam Legislation ("CASL").

CASL, which was given royal assent on December 15, 2010 and is expected to come into force in 2014, hopes to prohibit the sending of a commercial electronic message ("CEM") without the sender first (A) complying with the form of CEM prescribed by CASL and the regulations and (B) obtaining the prior implied or express consent of the receiving party.

To put the breadth of CASL into perspective, a CEM is defined under CASL as an electronic message that would be reasonable to conclude has, as one of its purposes, the encouragement of participation in a commercial activity. "Electronic messages" are defined to include any means of telecommunications, including text, sound, voice, and image messages. "Commercial activity" is similarly broadly defined to mean any transaction, act or conduct that is of a commercial character, whether or not the person who

carries it out does so in the expectation of profit. The lack of a requirement for an expectation of profit pulls electronic messages sent by charities and not-for-profit corporations within the net cast by CASL.

CASL should not be taken lightly as, in addition to the broad application of the Act, there are considerable penalties for violations of its provisions. CASL provides for penalties of up to $1,000,000 for individuals and $10,000,000 for corporations. CASL also provides for a private right of action allowing any person to apply to the courts to obtain financial compensation for damages incurred due to breaches of the Act.

Under CASL, to comply with the form requirements, CEMs must properly identify who is sending the message, include the contact information of the sender and provide a proper unsubscribe mechanism. These categories of form requirements are expanded in CASL and the regulations. For example, messages sent on behalf of multiple persons, such as affiliates, must identify all such persons and contact information must be valid for a minimum of 60 days after a message is sent. In addition, all unsubscribe requests must be honoured without delay and within 10 business days of receipt.

Consent to the receipt of a CEM may be implied where there is an existing business or non-business relationship between the sender and recipient of the CEM. If consent is not implied, senders of CEMs may obtain the express consent of their recipients. In obtaining the consent, the sender must outline the purpose(s) for which the consent is being sought and provide the identification and contact information of the person(s) seeking the consent.

There are, of course, exemptions to compliance with the form and consent requirements. The most applicable full exemptions include internal messages sent between employees and messages sent to a family member or person with which the sender has a personal relationship. On the other hand, some messages may be solely exempt from the consent requirements. For example, factual information about a loan, subscription, membership, account or similar relationship between the sender and recipient would be exempt from the consent requirements. Messages related to the delivery of a product, goods or services, or an upgrade to the same, that the recipient is entitled to receive under the terms of a previous transaction, are similarly exempt.

It is clear that, going forward, compliance with CASL will require the maintenance of an organized and well-structured database tracking which CEMs: (i) require express consent and must comply with the form requirements; (ii) must solely comply with the form requirements; and (iii) are exempt from the form and consent requirements entirely. The database will also have to track the date, time, manner (implied or express, written, electric or oral) and purpose of consents received, along with the dates when CEMs were sent out and when unsubscribe requests have been received. There is a three-year transition period following the enactment of CASL in the case of recipients with which a sender has an existing business or non-business relationship. However, because CASL provides that an electronic message that contains a request for consent to send a CEM is itself considered to be a CEM, the period leading up to CASL coming into force should be used to solicit and obtain express consent.

Whether CASL will hamper the efforts of aspirant Nigerian princes remains to be seen. What is certain, however, is that, for better or for worse, the way businesses communicate with their customers and clients will change significantly.

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Firm News

Canadian Legal Lexpert Directory 2013 Recognizes Leading Practitioners at Minden Gross LLP

Minden Gross LLP had 6 lawyers recognized as leaders in their fields in the 2013 edition of The Canadian Legal Lexpert® Directory.

Congratulations to Stephen Posen, Stephen J. Messinger, Christina C. Kobi, Adam L. Perzow, Howard S. Black and Eric N. Hoffstein.

The annual Canadian Legal Lexpert® Directory identifies the leading firms and lawyers across Canada in a wide variety of practice areas through the comprehensive surveying of leading practitioners in Canada.

Minden Gross LLP is pleased to support the Investing in Justice Campaign in support of Pro Bono Law Ontario

Pro Bono Law Ontario's Investing in Justice Campaign enables private practice lawyers to help sustain and expand programs for low-income Ontarians province-wide; to embrace new technologies to address gaps in service; to increase pro bono participation; and to make it as easy as possible for lawyers to discharge their professional obligation to increase access to justice. 100% of the proceeds from the Campaign will fund PBLO programs and services that collectively provide critical legal assistance to tens of thousands of low-income and disadvantaged people in the community. Minden Gross is pleased to announce the beginning of a 5 year sponsorship of this program.

For more information, please go to the Pro Bono Law Ontario website at http://www.pblo.org/

Professional Notes

David Ullmann was quoted in the article, "Tim Bosma case: Dellen Millard's mother sells family home for $1.2 million" in the Toronto Star, July 2013

David Ullmann was quoted in the article, "Millard land deals 'beyond smelly,' experts say" in the Toronto Star, June 2013

Arnie Herschorn was mentioned in the June 2013 edition of the Ontario Bar Association's JUST. magazine

Howard Black and **Samantha Prasad** presented Trusts - Don't Leave This World Without Them at the 2013 FPSC Educator Conference

Samantha Prasad was the keynote speaker on Shedding Light On Family Business Succession Planning