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DSF Devry Smith Frank *LLP* Lawyers & Mediators

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Toronto: 95 Barber Greene Road, Suite 100, Toronto, Ontario M3C 3E9
Barrie: 85 Bayfield Street, Suite 300, Barrie, Ontario L4M 3A7
Whitby: 209 Dundas Street East, Suite 401, Whitby, Ontario L1N 7H8
Innisfil: 1000 Innisfil Beach Rd. Innisfil, Ontario L9S 2B5

WWW.DEVRYLAW.CA

COVID-19 PREVENTIVE MEASURES

Devry Smith Frank *LLP* has been helping our clients navigate this new, COVID-19 world. As an essential service, our offices have remained open and adhere to best practices as recommended by the various levels of government. We have modified how our office functions both for our lawyers and staff, and in relation to our clients. We continue to work hard to keep everyone safe while remaining available and accessible to our clients.

We have also developed a COVID-19 resource centre through which we update our clients on the evolving legal implications and requirements related to the pandemic. Among other useful information, our resource centre includes options for tax planning during COVID-19 and a summary of the highlights of the federal and Ontario governmental COVID-19 relief measures, both prepared by Elisabeth Colson, who heads up our Corporate and Commercial Law Department.

Elisabeth Colson
416-446-5048 | elisabeth.colson@devrylaw.ca

TAX PLANNING

COVID-19 presents a unique opportunity in terms of tax planning; an estate freeze today at COVID-19 values could result in significant capital gains tax savings when the market and the economy rebound.

The value of capital assets such as securities or real estate purchased at pre-COVID-19 prices has likely suffered in recent weeks. Some tax loss planning options which may be available to individuals and/or to corporations include:

1. An estate freeze, whereby assets are frozen at today's reduced value. The expectation is that the markets and economy will rebound. The final tax return of an individual who undertook an estate freeze will reflect today's lower, "frozen" value of any assets which had been included in the estate freeze and which remain in the estate upon the individual's demise, resulting in reduced final tax in their regard.
2. Take a capital loss now, and carry it back to offset capital gains earned in the past 3 years for a refund of taxes paid. To the extent not applied to prior years, capital losses may be carried forward indefinitely.
3. Sell selected assets and realize a capital loss and repurchase them at a lower price, mindful of any relevant qualifying periods during which neither the individual nor their spouse can repurchase the asset without jeopardizing the use of the loss until the replacement asset is sold.

DSF's lawyers can provide advice and can help implement these and other tax planning options available to individuals and/or to the corporations under their control.

We also invite you to review our summary of the highlights of the various Ontario and federal relief measures currently available in response to COVID-19, available on our website at https://devrylaw.ca/.

NEWS AND UPDATES

MOST RECENT SEMINARS

Immigration lawyer Maya Krishnaratne hosted a seminar in Colombo, Sri Lanka in March 2020. Topics included Canada's Express Entry system for economic immigrants with tips and tricks for study and work permits. In May, Maya hosted a webinar titled 'Express Entry Roadmap' during which she provided insights to help navigate popular routes to Canadian permanent residence status.

Maya Krishnaratne
416-446-5841 |maya.krishnaratne@devrylaw.ca

Employment lawyer Marty Rabinovitch hosted an informative online webinar on COVID-19 and how it's affecting Human Resources and Employment Law.

Marty Rabinovitch
416-446-5826 | marty.rabinovitch@devrylaw.ca

Note: We are in the process of organizing future webinars and we will be posting all upcoming events on our website

RECENT NEWS AND EVENTS

Planning and development lawyer, David White of Devry Smith Frank LLP sweeps a win for James Dick Construction Limited ("JDCL") in the much anticipated decision on the advancement of a 'hidden quarry' in Wellington County. The Local Planning and Appeals Tribunal has given the green light to proceed on land that was previously described as a resource for the use of manufacturing high-quality concrete and asphalt.

David White
249-888-6633 | david.white@devrylaw.ca

DSF is proud to announce the opening of an office in Innisfil. This new location complements our Barrie location and allows us to even better service Barrie and the surrounding area.

DEVRY SMITH FRANK LLP
Lawyers & Mediators

DSF recently hosted the Barrie Chamber of Commerce "Business After 5" network¬ing event for the local business community. The event was hosted at our Barrie location and was attended by over 100 professionals who enjoyed an evening of fun, live music, sumptuous appetizers and great networking opportunities.

COVID-19 - EMPLOYER AND EMPLOYEE FREQUENTLY ASKED QUESTIONS

Marty Rabinovitch
416-446-5826 | marty.rabinovitch@devrylaw.ca

Employers

1. Can my company screen its employees for COVID-19 prior to permitting them to enter the workplace, such as by asking them if they have symptoms, or by subjecting them to a mandatory temperature check?
An employer is required to maintain a safe working environment for its employees under the *Occupational Health and Safety Act*. Accordingly, an employer may introduce reasonable policies and procedures to make efforts to keep its workplace COVID-19 free.

Employers may wish to ask each employee prior to entering the workplace whether they are suffering from a fever, cough or shortness of breath, and if the answer is yes, to send the employee home. Some employers may even wish to require their employees to undergo a temperature check prior to entering the workplace, and if their temperature is 37.3 degrees celcius or more, to send them home.

A court is likely to conclude that these measures are permissible, provided that employees are provided with advance notice of the new requirements, the screening is conducted discreetly and as confidentially as possible in the circumstances and that all employees (including management) are subjected to the same screening.

While an employee who is prohibited from entering the workplace would arguably not be entitled to their wages for the day, an employer may wish to consider paying the employee for the day anyway to avoid disputes. If offered by the employer, the employee may also be eligible to take a paid sick day.

It is also important to remember that not all COVID-19 cases will present with a fever and many individuals who are infected will not experience any symptoms.

2. My company has introduced policies, such as social distancing, staggering shifts, prohibiting employees with symptoms to attend at work and encouraging employees to work from home to the extent possible. But some employees are still refusing to come to work on the basis that the workplace is unsafe and that they have a right to refuse unsafe work in accordance with the *Occupational Health and Safety Act.* How should the company respond?
An employee is entitled to refuse unsafe work. But subject to any disability that would trigger the employer's duty to accommodate under the Human Rights Code, a general fear of contracting COVID-19 is insufficient for the employee to justify their refusal to work. Rather, the employee must be able to point to a specific issue that the employer has not addressed. For example, if a hospital requires a medical professional to treat COVID-19 patients without providing sufficient personal protective equipment (PPE), the employee may be justified in refusing work. In addition, if an employer refuses to provide a plan to reduce the risk of an "at-risk" employee (ex. someone who is over 60 years old) of contracting COVID-19, that employee would likely be justified in refusing to work.

An employee who refuses to work without a valid legal reason could be disciplined, terminated or be considered to have abandoned their job.

In this scenario, the employer may wish to consider permitting the employee to take an unpaid leave of absence.

3. COVID-19 has caused business to decline significantly and my company is looking to save money, while continuing to employ as many employees as possible. What are my options?

The following options are available:

a. Reducing pay and/or hours of work

If the employee does not agree to the reduction, this could result in a claim for breach of contract. Depending on the amount of the reduction, this could also result in claims for constructive dismissal, since the employer is not entitled to unilaterally change key or fundamental terms of an employment contract.

However, given the state of the COVID-19 economy, many employees – in particular short service employees with a lesser severance entitlement - are likely to realize that it will be difficult for them to find a new job, and may be willing to accept the reduction, as long as it is intended to be temporary.

b. Work Sharing Agreements

These are arrangements in which two or more employees would share the hours and job duties of one position. This way, the employer will pay out less in wages and employees will be able to work some hours, rather than none at all. The employer and the employees must all agree to the arrangement.

If the agreement is registered with Service Canada, the employees would be eligible for an Employment Insurance (EI) "top-up".

A work sharing agreement must be submitted to Service Canada at least 30 days prior to the proposed start date.

c. Temporary Layoffs

There are provisions in the *Employment Standards Act, 2000* at section 56 which permit an employer to temporarily layoff employees. However, to date the courts have not recognized the right of an employer to temporarily layoff employees at common law. In other words, an employer is only permitted to rely on these provisions if there is an express contractual term between the employer and the employee which permits temporary layoffs. Otherwise, the employee may have a case for constructive dismissal.

However, given the state of the COVID-19 economy, many employees – in particular short service employees with a lesser severance entitlement - are likely to realize that it will be difficult for them to find a new job, and may be willing to accept the reduction, as long as it is intended to be temporary.

It is also possible that the courts may determine that employers are entitled to temporarily lay off employees in accordance with the *Employment Standards Act, 2000*, even without a contractual term, due to the unique and unprecedented circumstances which have resulted from the COVID-19 pandemic.

d. Canadian Emergency Wage Subsidy (CEWS)

The CEWS provides a 75% wage subsidy to eligible employers for up to 12 weeks, retroactive to March 15, 2020.

The maximum value of this benefit is $847.00/week per employee.

For an employer to be eligible for this benefit, they must be able to demonstrate that their revenue dropped by 15% between March 2020 and March 2019, or between March 2020 and the average revenue of January 2020 and February 2020. For continued eligibility, the employer must demonstrate a loss of revenue of at least 30%.

The CEWS may enable employers to continue to employ more of their workers without pay cuts throughout the pandemic.

Employers will be able to apply for the CEWS through Canada Revenue Agency's My Business Account portal.

e. Deferral of GST and HST Payments
Employers are permitted to defer GST and HST payments until June 30, 2020.

f. Canadian Emergency Business Account (CEBA)
This $25 billion program provides a $40,000.00 loan for certain small and medium-sized businesses that is interest free until December 31, 2022.

g. Deferral of WSIB Premiums
Employers may defer payment of their WSIB premiums until August 31, 2020.

4. My company has introduced reasonable and detailed policies and procedures to keep COVID-19 out of the workplace. One of my employees has advised that they were diagnosed with COVID-19 and is convinced that he must have been exposed at the workplace. Is my company liable?
If the employer has Workplace Safety and Insurance Board (WSIB) coverage, and the employee contracted COVID-19 while in the course of their employment, the employee would likely be entitled to various WSIB benefits, such as compensation for any wages incurred.

If the employer does not have WSIB coverage, it will depend on whether the employee can prove on a balance of probabilities that they contracted the virus while at work, and if so, whether the employer was negligent in the course of implementing and enforcing its Coronavirus policies. For example, if an employer implemented a social distancing policy which complied with the Public Health Ontario and Public Health Agency of Canada guidelines, but took no steps to enforce the policy, despite management's knowledge that the policy was regularly not followed and treated as a joke by its employees, the employer could be liable.

5. My company has not yet implemented a written Coronavirus policy. What should the policy include? This will depend on the nature of the business. The following list is not exhaustive.
We recommend that an employer's Coronavirus policy include the following:

a. The individual(s) at the company who employees should contact, if they have symptoms of COVID-19, or believe they have been exposed to or have contracted the virus;
b. A requirement that any employee who has symptoms of COVID-19, or believe they have been exposed to or have contracted the virus not be permitted to attend at work until they provide a medical note to the employer confirming that it is safe for them to return to work;
c. For companies that are considered essential businesses, a requirement or strong encouragement that those who are able to perform the duties of their job from home work primarily from home;
d. A prohibition of gatherings at work – for example, a statement that employees are not permitted to each lunch together in the company's lunchroom; and
e. A requirement that all employees stay at least two (2) metres away from each other when possible, in accordance with social distancing legislation and Public Health Ontario and Public Health Agency of Canada recommendations.

Since most employees are likely to be working from home, employers should review their working from home policies, in particular with respect to confidentiality, health and safety/workplace accident and productivity issues.

We encourage employers to seek legal advice with respect to implementing a Coronavirus policy.

Employees

1. If I am unable to work because I have COVID-19 symptoms, a family member has COVID-19 or I need to take care of my children who are home from school, is my employer required to pay me?
Unless the employer offers paid sick leave, or the employee is eligible for payment in accordance with another contractual term or employer policy, the employee would not be entitled to pay from the employer.

However, employees who are no longer earning income because of COVID-19 may be eligible for the Canadian Emergency Response Benefit (CERB). This benefit provides $500.00 for up to sixteen (16) weeks.

2. I am concerned that I may become infected with the novel coronavirus at work. Am I entitled to refuse to work? Is my employer required to pay me?
An employee is entitled to refuse unsafe work. But subject to any disability that would trigger the employer's duty to accommodate under the Human Rights Code, a general fear of contracting COVID-19 is not sufficient for the employee to justify their refusal to work. Rather, the employee must be able to point to a specific issue that the employer has not addressed. For example, if a hospital requires a medical professional to treat COVID-19 patients without providing sufficient personal protective equipment (PPE), the employee may be justified in refusing work. In addition, if an employer refuses to provide a plan to reduce the risk of an "at-risk" employee (ex. someone who is over 60 years old) of contracting COVID-19, that employee would likely be justified in refusing to work.

An employee who refuses to work without a valid legal reason is not entitled to payment. The employee could also be disciplined, terminated or be considered to have abandoned their job.

In this scenario, the employee may wish to ask their employer to take an unpaid leave of absence.

3. Can my employer fire me if I miss too much work for a COVID-19 related reason?
Absolutely not!

Employees are entitled to a protected unpaid leave of absence from work for employees who are unable to work for the following reasons:

a. The employee is acting in accordance with an order under the *Health Protection and Promotion Act*.
b. The employee is in isolation or quarantine in accordance with public health information or direction.
c. The employer directs the employee not to work due to a concern that COVID-19 could be spread in the workplace.
d. The employee needs to provide care to a person for a reason related to COVID-19 such as a school or day-care closure.
e. The employee is prevented from returning to Ontario because of travel restrictions.

For more details, please see section 50.1(1) of the *Employment Standards Act, 2000*, which was recently amended.

4. I have been diagnosed with COVID-19. Can my employer require me to disclose this diagnosis to them?
An employer has an obligation to maintain a safe working environment.

Normally, if an employee is sick and is seeking time off or an accommodation under the *Human Rights Code*, an employer would be entitled to know the employee's prognosis as it relates to employment, but not their diagnosis.

However, the medical evidence available suggests that COVID-19 is highly contagious. It is therefore important for an employer to know whether one or more of its employees have been diagnosed with COVID-19, so the employer can take the necessary steps to comply with its occupational health and safety requirements and public health guidelines so as to prevent the virus from spreading in the workplace. It would also be in the employees' interest to know whether one of their co-workers has been diagnosed with COVID-19 so they can monitor their own symptoms and self-isolate.

If an employer becomes aware that an employee has been diagnosed with COVID-19, the employer should take reasonable steps to maintain confidentiality. Rather than disclosing the identity of the individual to the entire workplace, the employer should communicate that there has been a confirmed case of COVID-19 in the workplace. To ensure compliance with public health guidelines, it may be necessary for the workplace to close and for all employees to self-isolate for 14 days.

5. My employer is threatening to temporarily lay me off from work, significantly reduce my hours or cut my salary due to a slowdown in business. Is this legal?

If there is a contractual term that permits an employer to temporarily lay off employees, then it can do so, provided that it complies with the temporary layoff provisions in section 56 of the *Employment Standards Act, 2000*. It is also possible that the courts may determine that employers are entitled to temporarily lay off employees in accordance with the *Employment Standards Act, 2000*, even without a contractual term, due to the unique and unprecedented circumstances which have resulted from the COVID-19 pandemic.

An employer is not permitted to unilaterally reduce hours of work or cut an employee's salary. This may constitute constructive dismissal and entitle the employee to a severance package.

However, given the state of the COVID-19 economy, many employees – in particular short service employees with a lesser severance entitlement - are likely to realize that it will be difficult for them to find a new job, and may be willing to accept the change in the terms of their employment, as long as it is intended to be temporary.

CANADIAN SPOUSE? TRAVEL TO CANADA DURING COVID-19

Maya Krishnaratne
416-446-5841 |maya.krishnaratne@devrylaw.ca

By now, you are probably aware that Canada like most other countries has implemented stringent travel restrictions on travellers to Canada in the midst of COVID-19. The restrictions affect everyone including citizens, visitors, workers, and their family members.

The travel restrictions have come down in the form of Orders in Council (OICs), i.e. legal instruments created by the Governor General. While these provide basic rules surrounding restrictions and exemptions, they leave room for a lot of confusion as to how they apply in practice.

This has been particularly so for spouses not currently living together in Canada where one spouse is a Canadian citizen or permanent resident and the other a foreign national. This has led to foreign nationals with Canadian spouses in Canada being frequently denied permission to travel to Canada.

According to the OICs, the basic restriction against foreign nationals travelling to Canada doesn't apply to spouses of Canadian citizens or permanent residents so long as the foreign national has no COVID-19 symptoms and can prove they're not coming here for a discretionary or optional purpose. Unfortunately, the OICs don't define optional or discretionary. This has led to many instances of spouses being denied permission to travel to Canada since the prevailing OICs came into effect at the end of March 2020. Airline personnel and officers of the Canada Border Services Agency (CBSA) have been tasked with assessing the travellers' purpose in a short turnaround time based on whatever information the traveler provides. This has been and continues to be a distressing problem that keeps spouses apart longer than they perhaps intended.

The Canadian government has been trying to provide further clarity by regularly updating its websites and practice directions, though these have at times led to further confusion. In perhaps what is one of the most useful updates so far, Immigration, Refugees and Citizenship Canada (IRCC) provided a substantial but non-exhaustive list of examples on April 29, 2020 of optional versus non-optional.

That list clearly indicates the following are non-optional; coming to live permanently with a Canadian spouse, coming to spend the pandemic period with their spouse and to ensure each other's wellbeing during this time, and to take care of ill family members who have no means to otherwise to do so. No doubt, spouses who fell into these categories were previously denied permission to travel up to now. Hopefully, this new direction from the IRCC will provide clearer parameters to airline personnel and CBSA officers making these tough assessments and will result in the reunion of spouses suffering the current hardship of being apart.

"Our articles are intended to inform. Its content does not constitute legal advice and should not be relied upon by readers as such. If you require legal assistance, please see a lawyer. Each case is unique and a lawyer with good training and sound judgment can provide you with advice tailored to your specific situation and needs."

FORCE MAJEURE IN THE COVID-19 ERA. CAN IT SAVE YOUR BUSINESS?

Miriam Tepperman
416-446-5093 |miriam.tepperman@devrylaw.ca

In these unprecedented times of COVID-19, business owners are facing unprecedented hardship and economic losses.

Contractually, how a party defines the parameters of Force Majeure/Act of God will be crucial to the interpretation. Legal consideration is highly recommended before a decision is made to not perform the terms of the contract. Heavy penalties can be granted for failure to live up to contractual obligations. However, if it is a valid Force Majeure event, your company may not be obligated to live up to the agreed upon contract. Similarly, if the party you contracted did not live up to its obligations you may have recourse depending on the wording of the Force Majeure clause.

Similarly a company should consider the insurance implications of a contract. Again, depending on how a company has contracted with its insurer, it may be eligible to receive business interruption benefits during this unprecedented time. This could mean the difference between bankruptcy and the survival of a business in these unchartered waters of COVID-19.

Force Majeure

According to the Black Law's Dictionary Force Majeure is defined as an "event or effect that can neither be anticipated or controlled". It is also referred to as an "Act of God".[1] This contractual term will help define a company's obligations under its contracts and whether a company may be entitled to insurance relief in this difficult time. There is little legislative or case law guidance on obligations for epidemics and potential pandemics. Legal advice should be sought to highlight your risks.

The Court places the burden of providing Force Majeure on the party intending to rely upon it to establish that compliance was impossible and not merely inconvenient or more difficult.[2]

Where to Begin

The first step is to look at the contract, whether it is a contract with a customer, supplier, vendor, etcetera.

Force Majeure clauses are not mandatory. If it is not included in the contract this would not be a viable defence for cancelling a contract. It may be that the Force Majeure clause will grant more time to fulfill a contractual obligation. It may allow a party to back out of the contractual obligation completely. It may provide relief that is contemplated in the contract. The Courts will look at the specific terms of the specific contracts.[3]

Once it is established there is a Force Majeure clause, the next step is to determine what types of situations it contemplates. Is it a broad clause? Does it using wording of a health emergency? Does it use wording of a national emergency? Does it include wording of a pandemic?

If the answer is that the contract contemplated a pandemic such as COVID-19, was the failure to complete the contract due to COVID-19? It may be that there were other circumstances such as not having put the necessary infrastructure in place at the outset of the contract, irrespective to the COVID-19 circumstances that would have caused the party to default on the contract. In such cases the Force Majeure clause would not be helpful.

Actions

The type of action taken will be dictated by the terms of the contract. For example, in the case where the contractual terms save the party from its obligations if a legislative authority cancels an event rather than the company itself, the company may wish to work cooperatively with the local authority to have it cancel an event instead of the company itself. This could make the difference between contractual penalties versus a valid cancellation.

Duty to Mitigate

Does the contract require you to mitigate your damages? Were you cancelled on? Did you cancel? Chances are the contract has a duty to mitigate provision, in order to mitigate the damages caused by the cancellation. This will lead to considerations of what steps were taken instead. Could services be provided but at extra costs? Could some money be recouped for example selling inventory in a different way or for a loss?

The Courts have Considered Force Majeure Clauses

The Supreme Court of Canada has considered the issue of Force Majeure in a contract in the case Atlantic PaperStock Ltd. v. St. Anne-Nackawic Pulp & Paper Co...[4] The Court considered a clause that contained the words "non-availability of markets" and found it generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The Court held that in considering such clauses, the common thread is that of the unexpected, something beyond reasonable human foresight and skill. If markets were unavailable, did they become so because of something unexpected happening? Was the change so radical as to strike at the root of the contract? Could the party, through the exercise of reasonable skill, have found markets in which to trade? In this case, the contract contemplated the following to be frustrating events: an act of God, the Queen's or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities.[5] In that case, it was not sufficient for a party to cancel a contract because it could not complete the work profitably. Similarly, a closed or declining market is not sufficient to trigger the clause.[6]

The Ontario Court has found that the Force Majeure clause can be triggered due to unforeseen humidity and a heatwave. [7] The province wide black out in 2003 was also considered a Force Majeure by the Court.[8]

The Ontario Court has found, however that the Force Majeure clause was not triggered where there was a dramatic drop in real estate values.[9] In this instance, a party was still required to complete the unconditional agreement of purchase and sale. Similarly the volatility of financing rates is not considered a Force Majeure.[10] Similarly a failure of a courier company to deliver a package on time was not considered a Force Majeure.[11]

The Courts do not appear to regard changes in economic or market circumstances itself as a Force Majeure. The Court does not analyze profitability to determine whether an event is a Force Majeure. The Courts require a higher threshold to be met of something unforeseeable in order to trigger the Force Majeure clause. Before relying on a Force Majeure clause, get legal advice to help determine if it is likely to be enforceable.

Is There Insurance Available to Help With Losses?

Once contractual obligations are considered, you should determine whether your insurance coverage can help compensate for losses. Many businesses carry business interruption coverage. Again, like with contracts between parties, the specific terms of the insurance policy will specify the coverages and exclusions. You should obtain legal advice to help determine whether you have coverage available to you. Courts tend to interpret insurance contracts more broadly so you may be found to have coverage under your insurance policy for COVID-19 losses.

Conclusion

In this COVID-19 era, many businesses face economic difficulties. Looking to your contracts will help the business determine if it has any recourse in its contracts for additional time, or the ability to cancel part or all of a contract. The wording of the contracts will be important. Legal advice is necessary to help guide that decision. Getting it wrong can have expensive consequences so be aware of the risks. Also at this time, consider whether you have any insurance coverage that could be triggered by COVID-19.

[1] Black's Law Dictionary, 11th ed, sub verbo "force majeure".
[2] Evan Bolla, "Force Majeure and Insurance Considerations for COVID-19 Cancellations" (18 March 2020), Risk Management Magazine, online: <http://www.rmmagazine.com/2020/03/18/force-majeure-and-insurance-considerations-for-covid-19-cancellations/>.
[3] Ibid.
[4] Atlantic PaperStock Ltd. v. St. Anne-Nackawic Pulp & Paper Co., [1976] 1 SCR 580.
[5] Ibid at para 4.
[6] Ibid at para 6.
[7] CAW-Canada, Local 252 v. Maksteel, 2012 CarswellOnt 6790 at para 26 (Ont Arb).
[8] Partnership for Public Lands v. Ontario (Director, Ministry of the Environment), 2003 CarswellOnt 5130 at para 12 (Ont Environmental Review Trib).
[9] Holst v. Singh, 2018 ONSC 4220 at para 6.
[10] Tom Jones & Sons Ltd. v. R., 1981 CarswellOnt 680 at para 15 (Ont HC).
[11] Iannuzzi v. Ontario (Ministry of the Environment), 2009 CarswellOnt 7555 at para 32 (Ont Environmental Review Trib), citing Miller v. Ontario (Director, Ministry of the Environment) (2008), 36 CELR (3d) 305 (Ont Environmental Review Trib).

HOW IS COVID AFFECTING CHILD AND SPOUSAL SUPPORT IN ONTARIO?

Andreina Minicozzi
289-638-3179 | andreina.minicozzi@devrylaw.ca

The coronavirus pandemic has brought far-reaching economic shock waves across the country. Over one million jobs have been lost in Canada due to COVID-19 in the month of March alone. As this crisis continues and more jobs and businesses evaporate, support payors and support recipients are going to feel the financial strain.

If you are a support payor pursuant to a court order, child and spousal support must still be paid despite the current state of affairs. Each region has its own notices and practice directions regarding support issuue.

Since April 6, 2020, the Notice to the Profession for the Central East Region which includes Whitby, states that the following matters are eligible for a hearing in writing or virtually before a judge:

1. 14B motions requesting consent Orders on issues such as support – a Support Deduction Information Sheet ("SDIC") is required to assist in completion of a Support Deduction Order ("SDO"). If one or more than one party is represented by counsel, a draft Order is to be submitted with the SDO.
2. Consent Motions to Change (Form 15D), if a party is represented by legal counsel then the SDIC and SDO are to be filed.
3. Case Conferences upon request by 14B, if granted, are limited to 30 minutes unless permitted otherwise by the triage judge and only 1 or 2 pressing issues can be conferenced which includes financial issues that do not meet the stringent urgency test.

Before proceeding with motions to the Court, first determine if you are eligible for any Federal government relief programs such as the CERB or Wage Subsidy Program. Eligibility may allow you to at least continue partial payments. Though, keep in mind that under Section 11 of the COVID-19 *Emergency Response Act*, CERB payments cannot be garnished by the Family Responsibility Office ("FRO") at this time.

The next step would be to explain your financial situation to the person you are paying support to. Cooperate as much as possible in an attempt to agree to a temporary reduction of support and/or to pay out any arrears with a modified payment plan if and when you are able to regain employment. Once an agreement is made, request a consent motion for an Order to reflect the temporary agreement regarding support arrangements during this time.

The Family Responsibility Office ("FRO") has confirmed that they will not be sending any new notices of driver's licence suspensions and are in the process of cancelling notices that were previously sent in order to reduce the number of urgent refraining motions. This means that motions to vary or stop support payments will unlikely be considered "urgent" enough to be heard by the court at this time unless the payor is in "dire financial circumstances".

In Theis v. Theis, 2020 ONSC 2001, the support payor mother brought an urgent motion requesting that her share of the sale proceeds of the matrimonial home be released. She was a small business owner who was forced to shut down due to provincial restrictions and her revenue had dropped to zero. Unfortunately, she failed to provide evidence of "dire financial circumstances" warranting an urgent motion including her:

1. her previous income before the restrictions;
2. her total income now from all sources;
3. her personal and business expenses;
4. the extent of her resources more generally;
5. an updated sworn financial statement; and
6. the results of any applications for federal relief funding and timelines.

As a result, due to the dearth of evidence in her motion materials, no finding of dire financial circumstances could be found and her motion was dismissed.

The key take-away is try to negotiate a temporary settlement and bring a motion on consent or as a last resort bring an urgent motion if you have enough evidence to demonstrate dire financial circumstances.

DSF IS GROWING

Elyse Mallins *B.A. (HONS)., LL.B*

Elyse joined DSF in 2020 as a partner in our Labour Law and Commercial Litigation groups. Elyse's experience has allowed her to sit on both sides of the table in a workplace dispute: she has been both the client and the counsel. This has given her unprecedented insights from both perspectives and the ability to predict and respond to issues before they escalate.

Miriam Tepperman *B.SC., LL.B., M.B.A*

Miriam joined DSF in 2020 as a partner in our Commercial Litigation and Insurance Defence Groups. As an insurance defence lawyer, Miriam has represented corporations across a variety of industries including construction, entertainment, hospitality, manufacturing and transportation. She has litigated claims in areas ranging from property and construction to professional liability, product liability, institutional abuse and workplace safety issues.

Amy E. Jephson *B.A (HONS)., J.D*

Amy joined DSF in 2020 as a Family Law associate in our Whitby office. She brings with her extensive experience in separation and divorce law. Amy is committed to helping her clients reach mutually beneficial solutions while avoiding protracted court battles.

LOCATIONS

Devry Smith Frank *LLP* - Toronto
95 Barber Greene Rd #100,
North York, ON M3C 3E9

Devry Smith Frank *LLP* - Barrie
85 Bayfield St 3rd floor,
Barrie, ON L4M 3A7

Devry Smith Frank *LLP* - Whitby
209 Dundas St E #401,
Whitby, ON L1N 7H8

Devry Smith Frank *LLP* - Innisfil (New Location)
1000 Innisfil Beach Rd.
Innisfil, ONL9S 2B5

LETTER FROM OUR MANAGING PARTNER

In these unprecedented times, Devry Smith Frank *LLP* ("DSF") continues to provide its clients with focussed and excellent service while adhering to government mandated COVID-19 heath guidelines.

To ensure the safety of our firm members and clients, we have been operating and continue to operate under restrictive measures. We have arranged for most of our lawyers and staff to work remotely, have reduced our office hours and have implemented work rotations to limit the number of in-office personnel. We are able to "meet" our clients over virtual platforms such as "Zoom" and "Web-ex". For those clients without easy access to technology at home, we have created safe and secure on-site reception and boardroom areas. These boardrooms also allow for "virtual in-office" meetings. We have secure drop-boxes outside each of our office's front door so that clients can make deliveries without entering the premises. We have increased our cleaning protocols in all our office locations to help maintain the health and safety of our staff and clients.

We recognize that the pandemic has created a myriad of legal issues. Each of our practice groups has the expertise necessary to help our clients navigate the new COVID-19 realities and to understand the new legal protocols that are developing. For example, our labour and employment lawyers can assist with issues related to staffing, temporary and permanent layoffs, hour reduction and constructive dismissal, occupational health and safety, CEWS and CERB benefit programs, and workplace sharing programs. Our corporate and commercial litigation teams can assist with COVID-related tax planning, landlord and tenant issues such as rent deferrals, non-payment of rent and lease terminations, and business transfer, reduction and closure issues. Our family law group can assist with applications to vary support payments due to job losses and salary adjustments, and issues arising in relation to custody and access arrangements impacted by stay-at-home and social distancing rules. We also have significant expertise in the areas of collections, bankruptcy and insolvency which we expect to play a significant role in a post-state of emergency financial environment.

Despite the pandemic, DSF continues to grow and our practice areas continue to broaden. We are pleased to welcome Amy Jepson, who practices family law in our Whitby office. We have also added depth in our Toronto office's insurance defence and commercial litigation groups by hiring Miriam Tepperman, who brings with her many years of experience in commercial insurance matters. These additions serve our goals of bolstering our collective talent and experience levels to service our clients, and further our commitment to provide top expertise in many legal fields.

We are grateful to all of our clients, with whom we have worked closely over the years and with whom we have built long-standing relationships. We look forward to continuing to foster, grow and strengthen these relationships. We also look forward to meeting and building relationships with new clients, as our practice areas expand. Stay safe, and stay healthy.

Larry Keown
Managing Partner
larry.keown@devrylaw.ca | (416) 446-5815

Devry Smith Frank *LLP*
Lawyers & Mediators