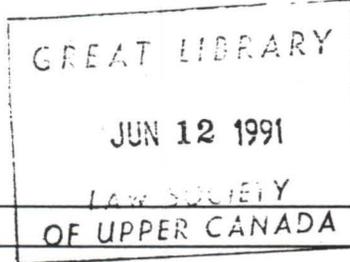


The Adviser



Published by
The Practice Advisory Service
The Law Society of Upper Canada
Osgoode Hall, Toronto
for the information of
its members

Number 13

September 1990

Incorporation Of Law Practices

Bill 45, the *Legal Profession Statute Law Amendment Act, 1990*, S.O. 1990, c.8, received third reading and was given Royal Assent on June 28, 1990. Only portions of the Bill have been proclaimed in force, however. A major purpose of the Bill is to provide for the carrying on of the practice of law by corporations, which practice is presently prohibited by s. 3(1) of the *Business Corporations Act, 1982*, S.O. 1982, c. 4 and s.50 of the *Law Society Act, R.S.O. 1980*, c.233. Those sections of the Bill which permit the incorporation of law practices have not yet been proclaimed in force, as the necessary rules and regulations required for the implementation of the Bill have not been made. These sections will not come into force until a day to be named by Proclamation of the Lieutenant Governor. An article in the "Law Times" of August 13-August 19, 1990 may have given rise to the mistaken impression that incorporation of law practices can now be undertaken; a future edition of the Adviser will provide an update on the status of the legislation and the rules and regulations thereunder.

We do, however, suggest that members entering into leases and other long-term obligations consider including a provision in the applicable documents that would allow the lease or other obligation to be assumed by or assigned to the corporation, when and if such corporation comes into being. Such a provision should be considered for leases of equipment as well as land.

The Practice Advisory Service will continue to inform members of the progress of the rules and regulations.

Goods And Services Tax

The department of Continuing Legal Education at the Law Society presented a program on the GST on June 25, 1990; materials from that program can be ordered from the department's publications clerk at 947-3380, at a cost of \$65.00, plus \$3.00 shipping.

Further CLE programs on this topic are being considered.

Those companies that provide various one-write, computerized and other accounting systems are, we understand, presently revising those systems to take into account the GST. Members should seek the assistance of their accountants with respect to the federal government's bookkeeping and remitting requirements.

More On Conflicts

Conflict of interest continues to be a significant issue underlying problems referred to the Practice Advisory Service, and multiple client situations are especially dangerous. In real estate transactions in particular, lawyers all too frequently agree to act for two or more parties who seem to have a common interest in completing the transaction, and we therefore draw the attention of our members to the following considerations:

1. The sale of the matrimonial home upon marriage breakdown gives rise to conflict of interest concerns. It seems to be common practice for a solicitor representing one of the spouses to act on the sale of the property, relying upon written directions signed by the spouses as to the intended distribution of the proceeds of sale. Even though the other spouse's solicitor usually reviews the documents and Statement of Adjustments, and attends upon the execution of the transfer by his or her client, the arrangement puts the solicitor acting on the sale into a solicitor-client relationship with both spouses. Difficulty arises where the "principal client" of the solicitor acting on the sale countermands the original instructions and specifically directs his/her solicitor to re-allocate the proceeds, or directs him/her not to release the proceeds at all. As the decision of the Divisional Court indicates in *Family Trust Corp. v. Morra et al.*, 60 O.R. (2d) 30, even an "irrevocable" direction, if given without consideration, can be revoked. The lawyer is consequently put in a position of having received conflicting instructions and being unable, therefore, to act in accordance with either party's direction. It would be improper for the lawyer to follow the instructions of the principal client, yet it may also be improper for him/her to ignore those instructions. In effect, s/he can do nothing, and must become merely a stakeholder of the proceeds of sale.

Conflict problems also arise where the sale cannot be completed on the terms contained in the Agreement of Purchase and Sale, and the solicitor has to advise on the alternatives available to the vendors. The estranged spouses may have very different priorities and the solicitor cannot impartially mediate the resulting dispute. Negotiating the issues with the purchaser becomes virtually impossible because of the uncertainties of the solicitor's position.

The Practice Advisory Service strongly recommends that a third, independent lawyer be retained to act on the sale of the matrimonial home in these circumstances. Although such a retainer may result in additional expense to the parties, the expense is likely to be less than the cost of resolving a dispute where a conflict of interest arises - and a resolution may

well be more expeditiously achieved. If, notwithstanding this recommendation, a lawyer for one of the spouses agrees to handle the sale of the property, clear instructions in writing should be obtained from both parties, and those instructions should include recognition of, and provision for, mediation of any dispute that may arise in the course of the sale.

2. Another common conflict of interest situation in real estate transactions can arise when a solicitor who acted for both the mortgagor and the mortgagee of a property is retained to represent the mortgagee in Power of Sale or other proceedings upon the mortgage going into default. Members should be aware that paragraph 13 of the Commentary to Rule 5 of the Rules of Professional Conduct specifically provides that a lawyer who has acted for a client should not thereafter act against that client in the same or a related matter. Having acted for both parties in the original mortgage transaction, the lawyer should not subsequently accept instructions from the mortgagee to take action against the mortgagor under the default provisions of the mortgage. There can be little doubt that this action is related to the original matter, and the solicitor so acting would have a clear conflict of interest. Both mortgagee and mortgagor should be referred to other lawyers.

Although these are two examples of concerns that have arisen in this area, members are urged to review very carefully the provisions of Rule 5, and to consider the possibility of a conflict of interest arising before agreeing to act for more than one client in *any* transaction.

Rule 9 Revisited

Rule 9 of the Rules of Professional Conduct governs the charging of fees and disbursements. That Rule was amended by Convocation in January and March of 1989, with the following consequences:

1. The Law Society is no longer dictating the specific charges to be levied for disbursements such as photocopies, mileage, FAX, etc. The Rule now requires that such charges, where they are likely to be significant (such as the cost of a title search) must be fully disclosed to the client in timely fashion, and be fair and reasonable.
2. A block charge for the expenses of postage, photocopies and telephone calls can no longer be levied. Accounts rendered to clients should contain a detailed statement of disbursements, separately identified.
3. Commentary 4(d) under Rule 9 has been deleted. That commentary had formerly required that a lawyer's fee include the fee rendered by an independent law clerk, conveyancer or other person for title searches and closing attendances. The deletion of this requirement has the effect of now permitting lawyers to pass on to clients the entire account charged by a non-employee clerk or conveyancer as a cost separate from and in addition to the lawyer's fee. The cost of conveyancers or law clerks who are employees of the lawyer presumably forms part of the lawyer's overhead, and is consequently reflected in the lawyer's

fee; this cost does not become an additional fee or disbursement for the client. Given that the fee rendered by an independent conveyancer for a search of title or attendance on a closing could be a significant amount, depending upon the complexity of the transaction, full disclosure of the anticipated fee to the client in timely fashion would be required.

Practice Advisory Service: Update

The Practice Advisory Service has undergone some significant changes in personnel over the past year. Alan T. Marshall, Q.C., former Director of the Service, has returned to private practice; Brenda A. Duncan, the former Assistant Director, has taken on new responsibilities as Director of the Law Society's Department of Continuing Legal Education. Connie Hood, who had acted as Systems Assistant, has also left the Service. The Service is now staffed by Sue McCaffrey and Don Godden, both of whom are former practitioners. Ms. McCaffrey was called to the Bar in 1983, and practised in Toronto in the areas of family, criminal and civil litigation. Mr. Godden was called in 1970; his practice was in the field of corporate/commercial and real estate law, in Waterloo.

The Service responds to enquiries about virtually any question that can arise in the practice of law, other than purely legal issues. Calls to the Service are sorted by topic and/or available staff person, and we request a brief description of the subject matter to be discussed, so that calls are returned by the staff person best able to respond. Callers are asked to give their name, year of call to the Bar and other information to confirm that we are responding to a member or a law firm, since the Service is provided for lawyers and their staff only. The Service is confidential, and the information requested is for our own Advisory Service records.



20 December 1990

LAW OFFICE ACCOUNTING SYSTEMS AND THE GST

Pursuant to the provisions of the Excise Tax Act, as amended, law firms are required to collect the 7% Goods and Services Tax on services rendered on or after January 1, 1991, and are responsible for remitting on a periodic basis to the Federal Government any amount by which the GST receivable (namely, billed by the firm) exceeds the GST payable (namely, invoiced to the firm).

Members of the profession are cautioned to consult their professional financial advisers for answers to any questions they may have regarding the GST and their practices. Any questions arising from the example contained herein may be directed to the Practice Advisory Service of the Law Society of Upper Canada. However due to the variety of accounting systems and procedures in use by members it is recommended that you consult your public accountant about the changes to be made to your particular accounting system. In addition, materials are available through the Continuing Legal Education Department of the Law Society, and the C.L.E. Department will be presenting a program on GST For Support Staff in January, 1991.

In order to provide some assistance to members at this time, the Law Society advises that, to comply with the GST regulations, GST information should be recorded in the following accounting records:

Fees Records

Record of all GST billed on each account to client

General Cash Disbursements

Record of GST paid on disbursements from general account
(input tax credits)

Trust Cash Disbursements

Record of GST paid on trust disbursements

General Ledger Accounts

Maintain separate GST accounts for:

- (i) recording GST billed on accounts.
- (ii) recording GST paid by law firm on client disbursements and office expenses.

It is your responsibility to amend your accounting records and procedures, both to collect the tax and to track, accumulate and claim input tax credits. Nonetheless, the following example sets out the accounting entries and the books of original entry to which the postings should be made. The amount of GST to be collected from the client is demonstrated by a hypothetical statement of account for fees billed. The GST billed to the client is credited to a GST payable account in the general ledger. The GST paid by the law firm on client and office disbursements is debited to the GST receivable account in the general ledger.

Sample Statement of Account

Client's Name [John Smith]
Client's Address

Re: Smith purchase from Jones - residential property

TO OUR PROFESSIONAL SERVICES RENDERED
in connection with the above-noted matter:

[Description of Services]

OUR FEE:		\$1,000.00
GST (7%):		<u>70.00</u>
		\$1,070.00

DISBURSEMENTS

Subject to GST

Courier	\$ 25.00	
Photocopies	20.00	
Telephone	15.00	
Conveyancer's Fees	<u>60.00</u>	
	\$120.00	
GST (7%)	<u>8.40</u>	128.40

Not Subject to GST (Agency)

Land Transfer Tax	\$900.00	
Registration Fees	<u>44.00</u>	<u>944.00</u>

TOTAL		\$2,142.40
Less: Received from Client		<u>2,000.00</u>
DUE ON ACCOUNT		<u>\$ 142.40</u>

GST Registration # _____

General Journal Entries

To record fees billed to client:

DR Accounts Receivable - Smith	\$1078.40	
CR Fees Income		\$1000.00
CR GST payable		78.40

To record disbursements paid from general account:

DR client disbursement - courier	25.00	
DR client disbursement - conveyancer	60.00	
DR client disbursement - registration	44.00	
DR GST receivable	5.95	
CR general cash bank account		134.95

To record client disbursements for photocopy and telephone expenses:

DR client disbursement - photocopies	20.00	
DR client disbursement - telephone	15.00	
CR photocopy expense		20.00
CR telephone expense		15.00

To record land transfer tax paid through trust account:

DR trust account - Smith	900.00	
CR trust bank account		900.00

To record transfer of funds from trust to general:

DR trust account - Smith	1100.00	
CR accounts receivable - Smith		1100.00

SAMPLE FEES RECORD:

<u>Date</u>	<u>Client</u>	<u>Fees Billed</u>	<u>GST Payable on Fees Billed</u>	<u>GST Payable on Client Disbursemnt</u>	<u>Total Payable GST</u>
Jan. 12	J. Smith	1000.00	70.00	8.40	78.40
Jan. 14	R. Jones	2000.00	140.00	10.00	150.00
Jan. 20	A. Roberts	1500.00	105.00		105.00
Jan. 25	J. Andrews	6000.00	420.00	40.00	460.00
		<u>10,000.00</u>	<u>735.00</u>	<u>58.40</u>	<u>793.40</u>

GENERAL CASH DISBURSEMENTS:

<u>Date</u>	<u>Disbursemnt</u>	<u>Bank</u>	<u>Client Disbursemnt</u>	<u>Office Expense</u>	<u>GST Receivable</u>
Jan. 12	Regis.Fee	44.00	44.00		
Jan. 15	Courier	85.60	80.00		5.60
Jan. 20	Telephone	470.00	40.00	400.00	30.80
Jan. 25	Conveyncer	160.50	150.00		10.50
Jan. 27	Stationery	107.00		100.00	7.00
		<u>867.90</u>	<u>314.00</u>	<u>500.00</u>	<u>53.90</u>

GENERAL LEDGER .GST PAYABLE ACCOUNT:

<u>Date</u>		<u>Debit</u>	<u>Credit</u>	<u>Balance</u>
Jan. 31	From Fees Book		793.40	793.40

GENERAL LEDGER GST RECEIVABLE ACCOUNT:

<u>Date</u>		<u>Debit</u>	<u>Credit</u>	<u>Balance</u>
Jan. 31	From Gen. Cash Disbursemnts	53.90		53.90

SAMPLE CLIENT'S LEDGER ACCOUNT:

JAMES SMITH

Trust

<u>Date</u>		<u>Debit</u>	<u>Credit</u>	<u>Balance</u>
Jan. 11	ABC Bank		90,000.00	90,000.00
Jan. 11	J. Smith		28,331.75	118,331.75
Jan. 12	Balance due on closing	115,431.75		2,000.00
Jan. 12	L.T.T.	900.00		
Jan. 31	Transfer from Trust to General	1,100.00		1,100.00
				--

General

<u>Date</u>		<u>Debit</u>	<u>Credit</u>	<u>Balance</u> (Account Receivable)
Jan. 12	Regis. Fee	44.00		44.00
Jan. 12	Fees	1,000.00		1,044.00
Jan. 12	GST	78.40		1,122.40
Jan. 15	Courier	25.00		1,147.40
Jan. 25	Conveyancer	60.00		1,207.40
Jan. 31	Telephone	15.00		1,222.40
Jan. 31	Photocopy	20.00		1,242.40
Jan. 31	Transfer from Trust		1,100.00	142.40