



SMHI LEGAL NOTES

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BARRISTERS & SOLICITORS • TRADEMARK AGENTS

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The Law of Travel

With the holiday season fast approaching, we thought it timely to provide information to help make your vacation as hassle free as possible.

Whether you are dealing with an airline, a cruise, a hotel or a car rental it is important to always remember that you are entering into a legal contract. Therefore, if something goes wrong, you should look to the fine print of the contract to see how problems are to be resolved.

Air Travel

If you have purchased a full fare ticket, then you will have maximum flexibility in making changes to your itinerary or in obtaining a cash refund. On the other hand, if you have purchased a seat sale you are probably looking at significant restrictions. Each airline will have its own rules, so be sure to understand them before handing over your credit card.

Airlines print their conditions of carriage on the back of tickets and also makes them available on their websites. These conditions include such things as: check-in and boarding gate deadlines, advance seat assignments, changing your itinerary, baggage rules as well as liability for baggage and flight delays. The rules will generally apply even if you have not read them. Before filing a complaint, you should check to see if the airline has complied with its conditions of carriage.

Cruises

Your cruise ticket is your contract with the cruise line. As with

the conditions of carriage that apply to airlines, your cruise ticket will contain conditions about everything from delays to liability for baggage. The contract will also outline when and how you can bring a claim or lawsuit against the cruise line, as well as which country's laws apply to the contract. This latter information is particularly important, since many cruise lines are not registered in Canada or the U.S.

In addition to the agreement outlined on your ticket, maritime law applies to passengers aboard a ship. Maritime law is a very old system which governs issues and offences that occur while a ship is at sea.

The main thing you need to know about suing a cruise line is that it is likely to be an expensive uphill battle, particularly since it will probably have to be fought in another country. Therefore, if you do have problems during a cruise, you are best to try and resolve them directly with the crew while you are still on board the ship.

Travel Agents

Pursuant to the *Travel Industry Act, 2002*, travel agents and wholesalers, who operate in Ontario, are required to be registered with the Travel Industry Council of Ontario. To register with TICO, travel agents and wholesalers must meet a number of strict requirements regarding such things as advertising practices, finances and disclosure to clients. The *Travel Industry Act, 2002*, also sets up a compensation fund for travel services that have been paid for but have not been received due to bankruptcy or insolvency of the supplier

Like most professionals, travel agents are under an obligation to exercise reasonable care in performing their job, including advising you, booking reservations and confirming reservations. If the travel agent is negligent and you suffer harm or loss you may be able to bring an action against the travel agent.

Lodging

You may be doubt familiar with a confirmed reservation vs a guaranteed reservation. If you have guaranteed a reservation with your credit card, you have entered into a legally binding contract with the hotel. Therefore, regardless of when you show

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The articles in SMHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.

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up on the arrival day, the hotel is contractually bound to find you a room at their hotel or a comparable nearby hotel.

On the other hand, if you simply have a confirmed reservation and you show up after the cutoff time, you have breached the contract and the hotel is under no further obligation to you.

Car Rentals

When you enter into an agreement with a car rental company you are entering into a legal contract. Therefore, it is important that you review the contract carefully before initialling everywhere you are told. You should understand how many kilometres you are getting for free as well as the charge for additional kilometres. Make sure to ask about their gas policy and about charges if you are late returning the car.

If you are renting during the tourist season you may want to

consider guaranteeing your rental with a credit card. If you arrive at your destination and the rental agency has no car then they have breached the contract and they must find you a vehicle, even if that means providing you with an upgrade. Even if you do not guarantee your reservation, they will probably still be under an obligation to find you a car.

Most facets of your travel plans involve contracts, even though they do not allow for any real negotiation. Take the time to understand what you are agreeing to. Although the contracts are usually quite one sided, you have a right to insist that the other party provide you with the service you contracted for. Be firm but insistent and when possible exercise your rights immediately, since a legal battle is likely to be difficult and expensive.

Finally, remember that whether it is a car rental company, a hotel or a travel agent, all are competitive businesses and they all want happy customers. So stand up for yourself. 

Choosing an Executor

Who is going to carry out your final wishes following your death? This challenging and time-consuming job can be more of a burden than an honour. Therefore, it is important that you choose the right person to act as your executor.

Type of Executors

There are three categories from which to choose an executor.

- A trusted friend or family member (the most common).
- A professional, such as a lawyer or an accountant.
- A corporate executor, usually a trust company.

The complexity of your estate and the dynamics of your family will often dictate the type of executor or combination of executors that you choose.

When deciding who will administer your estate, there are a number of factors to keep in mind. The person you select should be someone you trust and who will get along with your family. It is also helpful if the person has some familiarity with your financial affairs. The person should have the time to devote to the job and be well organized since he or she will have to keep careful records. As a practical matter, he or she should live reasonably close to you. Finally, it is a good idea to select an alternate executor in case your first choice is unwilling or unable to do the job.

In the case of married couples the majority will name their spouse as executor. Most will name one or more of their children as an alternate executor. While this may be a good idea, for practical reasons, if you have many children you should

think twice before making all of them executors. When you do have more than one executor you should include a clause in your will to indicate how differences of opinion will be settled.

Once you have made your decision, be sure to discuss it with that person(s). This is not something you want sprung on him or her after your death.

The Responsibilities

An executor's responsibilities begin immediately following the death of the testator and may continue for more than a year. The job includes everything from finding the will, to cancelling the newspaper, to filing tax returns. In addition to the various duties, the executor may be personally responsible for financial mistakes he or she makes.

Compensation

The person, who undertakes this demanding job, is legally entitled to be compensated. As a general rule, an executor is paid 2.5% of various aspects of the estate. If you are using a professional or a trust company as your executor, they will probably have a standard fee schedule. If your executor is a friend or a family member you may set the amount of the compensation in your will.

Choosing who will manage and distribute your assets is a key decision when drafting your will. Think about it carefully and let your head, not your heart, guide you.

For assistance with your estate planning, contact our firm. 

The Matrimonial Home

For most people, a home will be the biggest purchase they ever make. For this reason, a homeowner will take various precautions to protect this asset, including buying insurance, installing an alarm system, or buying a dog. But what happens to this house when it is brought into a relationship, which subsequently breaks down.

In the province of Ontario, the *Family Law Act* governs property issues when a marriage ends, including the home occupied by the couple. Under this Act, the matrimonial home is subject to a number of special rules.

The matrimonial home is defined as the home ordinarily occupied by legally married spouses as their family residence. (The concept of matrimonial home does not apply to unmarried couples, regardless of the length of cohabitation.) It is possible that a couple may have more than one matrimonial home. For instance, a cottage or vacation condo may also be considered matrimonial homes.

Aside from having to be married, one of the main rules with respect to the matrimonial home is that both spouses have an equal right to possession of the home. In other words, one spouse cannot force the other to leave, even if the parties have decided to separate and even if the house is in the name of only one of the spouses. The right to possession however, ends if the parties divorce or have a court order or agreement which provides otherwise.

In the event of a marriage breakdown, spouses must calculate the value of their respective net family property.

A person's net family property is the value, at the date of separation, of all property he or she acquired during the marriage less debts, liabilities, the value of property owned prior to the marriage, gifts from third parties and inheritances. Following the breakdown of the marriage, the spouse whose net family property is the lesser of the two, is entitled to half the difference between the two net family properties.

In calculating one's net family property, the general rule is that property acquired prior to marriage is excluded from the calculation. The value of the matrimonial home is an exception to this rule. In other words, if one spouse brings a house into the marriage that is subsequently occupied by the spouses as their family residence, that house will be designated as the matrimonial home. The non-owner spouse will be entitled to half the value of the house.

It is possible to exclude the value of the matrimonial home from the calculation of net family property. To accomplish this, the spouses must enter into a marriage contract. In order

to be valid, a marriage contract must be in writing, signed by both spouses and witnessed. Each spouse should obtain independent legal advice before signing the agreement.

A second way to exclude the value of a house brought into the marriage is to dispose of it prior to separation. In this case, the owner of the property would be entitled to deduct its value on the date of marriage - even if the proceeds of the sale can be traced directly to a purchase of a successor home that becomes the matrimonial home.

Finally, as stated above, the concept of the matrimonial home does not apply to unmarried couples. If two people choose to live together and they buy a house as joint tenants then both are equally entitled to the house. If only one party owns the house, and the relationship ends, the other party will generally not be entitled to possession of the house or any value of the house.

For additional information about marriage contracts or cohabitation agreements contact our firm. 

Registered Disability Savings Plans

The federal government's registered disability savings plans (RDSP), which were introduced in 2007 budget, are now operational.

An RDSP can be set up for any Canadian who qualifies for the Disability Tax Credit. Money can be put into an RDSP to support a disabled person. Although the contributions to the RDSP are not tax deductible they may be supplemented by payments from the Canada Disability Savings Grant program. In addition, the income in the plan grows on a tax-free basis. Tax will only be payable when the disabled person withdraws the money. The contributions themselves can be withdrawn tax-free.

Contributions to the RDSP can be made by the beneficiary, their parents or family members, or by other authorized contributors.

Lower-income families may qualify for payments from the Canada Disability Savings Bond program without having to make a contribution to an RDSP.

For more information go to www.taxtips.ca 

How Far Must an Employee Go to Mitigate?

In our last issue of *SMHI Legal Notes* we explained the rules that apply when an employee is wrongfully dismissed and the employer acts in bad faith. In this issue, we consider an employee's obligation to mitigate his damages if he or she has been wrongfully dismissed.

An employer who decides to terminate the services of an employee, except in cases where there is just cause, must provide the employee with a reasonable notice period or damages in lieu of that notice period.

It is not uncommon for an employee to be terminated without having been paid damages by the employer or having been paid insufficient damages. In such cases, the employee will have to consider suing the former employer for wrongful dismissal. In addition to any legal action the employee may decide to take, the employee does have an obligation to make a reasonable effort to mitigate his or her damages by finding an alternate source of income.

An interesting question that was recently answered by the Supreme Court of Canada is whether this duty to mitigate includes returning to work for the employer who fired you.

Evans had worked as a business agent for the employer for more than 23 years. Following the election of the employer's new executive, Evans was sent a letter of termination. The two sides then entered into negotiations for a compensation package for Evans. Five months later, the employer requested that Evans return to his employment to serve out the balance of his 24 month notice period. Evans agreed to return, but only if the employer rescinded its termination letter, something the employer was not prepared to do.

The Court of Appeal found that Evans had failed to mitigate his damages by not accepting the employer's job offer. The

Supreme Court of Canada agreed with this finding stating, "...the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment, requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself."

The barriers to re-employment would include such things as whether the working atmosphere would be one of hostility, embarrassment or humiliation. Other elements which must be considered include any stigma and loss of dignity, the nature and conditions of employment and whether those conditions are substantially different, that the personal relationships involved are not acrimonious, the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or after the termination.

The Supreme Court recognized that an employee may find it difficult to continue working for the employer. However, the Court also recognized that "it is an accepted principle of employment law that employers are entitled (indeed encouraged) to give employees working notice and that, absent bad faith or other extenuating circumstances, they are not required to financially compensate an employee simply because they have terminated the employment contract."

In Evans' case, the Court found that the relationship between he and his employer was not seriously damaged and the terms of employment were the same. Therefore it was not objectively unreasonable for him to return to work to mitigate his damages. 

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