



SMHI LEGAL NOTES

STEINBERG MORTON HOPE & ISRAEL LLP
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Not Married? No Will? Not Good.

If Stieg Larsson, author of the bestselling The Girl Who Kicked the Hornet's Nest, was still alive he would be a very wealthy man. His estate, which is reportedly worth in excess of \$40 million, is at the centre of a legal battle between his estranged father and brother and Eva, his common law wife of 30 years. All three are seeking control of the fortune created by his three bestselling books.

Although Stieg drafted a will when he was very young (he left everything to the Communist party in his Swedish hometown) it was never witnessed. Therefore, under Swedish law he died without a valid will and his estate goes partly to the state and partly to his family. Since he and Eva were never legally married she is not considered family and is not entitled to his millions. Unfortunately, Stieg was under the mistaken impression that Eva, as his common law wife would be entitled to his estate.

If the players were residents of Ontario would the outcome be any different? Basically no. Many wrongly believe that once you have lived together for a certain number of years the law considers your status to be the equivalent of married spouses. While this may be true for some limited purposes, such as support, there are many other cases where the law simply views a common law couple as two people living under the same roof.

When a resident of Ontario dies and has failed to make a will, the law steps in and provides a formula for distributing the

deceased's estate. Pursuant to the rules of intestacy, the first \$200,000 in the estate goes to the legally married surviving spouse. The balance of the estate will be divided between the spouse and any children of the deceased. If there is no spouse or children, then the estate will go to the deceased's parent(s) or to the siblings if both parents are deceased. A common law spouse is nowhere on the list of potential beneficiaries.

Therefore, the only real option¹ for someone in Eva's situation would be to bring a dependant's relief application. The common law spouse would have to show that the deceased had not made adequate provision for his/her proper support. The court awards support based on various factors, including the common law spouse's

- current assets and means as well as the assets and means that he/she is likely to have in the future;
- capacity to contribute to his or her own support;
- needs, in determining which the court shall have regard to his or her accustomed standard of living;
- proximity and duration of his/her relationship with the deceased;
- contributions made by him/her to the deceased's welfare, including indirect and non-financial contributions;
- contributions to the acquisition, maintenance and improvement of the deceased's property or business;
- contribution by him/her to the realization of the deceased's career potential.

Assuming an amount of support is awarded to the common law spouse, that amount may be significantly less than if a will had been made.

So while you may not be worth millions, you should nevertheless have an updated will. Regardless of your circumstances this document is important, but even more so if you are in a common law relationship. For assistance in preparing a will please contact our firm. 

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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.

¹A common law spouse could also bring a claim for unjust enrichment, constructive trust, or a quantum meruit claim against the estate, but all are an uphill battle and depend ultimately on proving some form of contribution to the estate.

Small Claims Court 101

May you have a lawsuit in which you know you are in the right.

Gypsy Proverb

Did you lend a friend money and now you can't get it back? Did a repairman ruin your carpet when he walked all over it with dirty work boots? Did your computer break down shortly after you bought it and the seller refuses to do anything?

If you have ever been faced with these or a similar scenario, you should know that you do have a recourse—Small Claims Court. One of the most attractive aspects of Small Claims Court is its simplified rules and procedures.

Most people's experience of Small Claims Court comes from television shows like *Judge Judy* and *The People's Court*. While these TV courts hear and decide real cases, they are first and foremost entertainment. On the other hand, Canada's Small Claims Court system is a serious court and is an integral part of each province's judicial system. In Ontario, the Small Claims Court is a branch of the Superior Court of Justice. What follows is a general overview of this court.

There are two categories of cases that can be brought before the Small Claims Court. The first is an action for the payment of money, for example:

- An unpaid loan.
- Unpaid rent.
- Goods or services that have not been paid for.
- Damages for personal injuries.
- Damage to your property.

The second category is for the recovery of possession of personal property. In both instances, the amount sought cannot exceed \$25,000¹.

Even if your claim fits within the above parameters and you are certain it is a slam dunk, there are several questions you need to think about before proceeding.

Will you be able to collect?

Although a judge will decide whether or not you win your case, it will be up to you to take steps to recover your money. Therefore, it is useful to consider if and how you will be able to collect once you have a judgment. (We go into more detail in the article "Collecting Those Outstanding Debts".)

For instance, does the defendant have a job and wages you can garnish? Is there real or personal property the sheriff can

seize? Is the defendant likely to have any of these in the near future? If the answer to these questions is no, you need to decide whether to simply cut your losses.

Where is the defendant?

If you do not know where the defendant is, you will have problems with service of documents. And even though the rules provide for this, as well as for default judgment, you are back to the question of how to enforce your judgment.

Another issue to consider is, whether the situation requires you to sue where the defendant lives, which may be nowhere near where you reside. If that is the case, you will have the added expense of travel and accommodations.

What about the expense?

There are court fees involved both for commencing a lawsuit and for enforcing a judgment. Although these monies are potentially recoverable, you must pay them up front. If your claim is over \$500 and you retain someone to represent you, you might be entitled to be reimbursed for some of that expense. But if the claim is less than \$500 you are not entitled to anything. Of course the larger your claim the less significant these issues might be.

Can you prove it?

If you make a claim you will have to be able to prove it. What sort of evidence do you have to support your allegations? Do you have photos, a written contract, a doctor's report? Or will it come down to your word against the defendant's? While your testimony is valid evidence, if it is the only evidence you have it makes proving your case more difficult.

Are you brave enough?

Small Claims Court is designed for lay people to represent themselves. However, you must still understand the issues, including what qualifies as evidence. You must be able to present your case in an organized and coherent fashion to a judge. Ideally you should also be able to poke holes in the defendant's case. If you are not up for the challenge you need to consider hiring a lawyer or a paralegal. Depending on the amount of your claim, this may not be cost effective.

The above comments are not meant to discourage you; rather they are intended to make you aware of factors that you need to take into account before you rush down to the courthouse. When you consider the entire picture, you may decide that pursuing a claim is not worth it—even if you know you are in the right.

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Collecting Those Outstanding Debts

Loans and credit have become an integral part of our day to day lives. Most of the time loans and credit are repaid in a timely fashion. However, when debtors fail to meet their financial obligations, creditors must resort to a variety of methods to collect.

Self-help Remedies

Depending on the type of creditor, there are a number of self-help remedies that are reasonably quick, cost efficient and do not require going to court. For instance, a creditor with a registered security interest under the *Personal Property Security Act*, can seize and sell the debtor's collateral. If the creditor is a commercial landlord and the debt is unpaid rent, the tenant's assets can be seized.

Going to Court to Collect

If a self-help remedy is not feasible, then the next step may be to sue the debtor. If this is the decision, the creditor should consider enlisting legal assistance. Although it means spending more money in the short term, if successful some of these costs may be recoverable.

In order to help your lawyer save time and your money, the creditor should provide all relevant documents and information as well as a brief summary of the facts. Your lawyer can help you decide whether the account is worth pursuing or whether it would simply be throwing good money after bad.

Once your lawyer is familiar with the case, a demand letter will probably be sent to the debtor. Even though the creditor has likely tried this, sometimes seeing the demand on law firm letterhead motivates the debtor to settle. There are a variety of ways to structure and secure that settlement and once again a lawyer can provide valuable assistance.

If a settlement is not forthcoming, a statement of claim can be issued. In a large percentage of these cases, the creditor will obtain a default judgment. In other words, the debtor does not defend the claim, there is no trial and the creditor gets a quick judgment in his/her favour

Enforcing a Judgment

Although the Court gives the creditor the legal authority to recover what is owing, the creditor and not the Court is responsible for actually collecting on the judgment. Assuming the debtor remains uncooperative, the creditor must take an active approach to enforcing the judgment. There are a number of available options, including an examination hearing, a writ of seizure and sale of personal property, a writ of

seizure and sale of land and garnishment of wages or other money owing to the debtor.

An **examination hearing** is a process that allows you the chance to question the debtor and/or other people who know the debtor, in order to find out what means the debtor has for settling the judgment. A judge may also make orders at an examination, for example an order as to payment.

A **writ of seizure and sale of personal property** is an order to enforce an order for payment of money. It directs the sheriff to, not surprisingly, seize and sell enough of the debtor's property to pay the judgment.

A **writ of seizure and sale of land** can be filed against a debtor in any county or district where the debtor may own land (including a house). The writ of seizure and sale of land can be very effective in the long run since it will be difficult for the debtor to sell or mortgage the land until the debt is paid.

A **garnishment order** is served on someone, the garnishee, who either owes or is holding money for the debtor. It directs the garnishee to pay the money into court, which in turn will pay what is owing to the creditor. The two most common examples of garnishees are employers and banks.

Collection can be one of the most frustrating parts of business. However, if you remain vigilant and have good collection policies, delinquent debtors should remain few and far between. If you would like further information please contact our firm. 

SMALL CLAIMS continued from page 2

For additional information about Small Claims Court visit the Ontario Ministry of the Attorney General's website at www.attorneygeneral.jus.gov.on.ca

For claims above \$25,000 you may want to contact our firm to discuss whether you should retain the services of a lawyer.

¹If the amount of your claim is more than \$25,000 you can still choose to sue in Small Claims Court, however you must give up any amount over the \$25,000 ceiling. Your other option is to sue in the regular Superior Court. Although there is a simplified procedure when dealing with the Superior Court of Justice, it is probably beyond the ability of most lay people.

Could You Pass the Driving Test?

Most of you have been driving for years and probably have a good handle on the rules of the road. But if you had to take a test about the laws governing our roads and highways could you pass it? Below are 10 true/ false questions to test your knowledge. Good luck!

A yield sign requires you to slow down, regardless of whether there are other cars in the vicinity.

True. You must slow down, stop if necessary and go only when the way is clear.

You may pass a car waiting to make a left hand turn by driving on the right shoulder so long as you can do so safely.

False. You may drive on the right shoulder only to pass a vehicle turning left and only if the shoulder is paved

If you are involved in a reportable accident, you must report this to your nearest provincial or municipal police within 24 hours.

True. Although you should contact the police at the time of the accident they may choose not to dispatch an officer to the scene. In such cases you must formally report the accident within 24 hours. A reportable accident is one that involves an injury, and/or the total damages to all vehicles and property is greater than \$1,000.

A speeding ticket in New York will affect your driving record in Ontario.

True. New York reports moving violations to the government of Ontario.

If you are stopped and your blood alcohol concentration is more than 80 milligrams in 100 millilitres of blood (.08) your licence will be immediately suspended.

True. In fact it will be suspended immediately for 90 days, in addition to the court process stemming from the crimi-

nal charges. If convicted, the minimum suspension is one year, and you could go to jail.

As a general rule U-turns are illegal.

False. U-turns are illegal only if posted or if you are on a curve or crest of a grade where the approaching traffic cannot be seen by you within a distance of 150 metres, you are on a railway crossing or within 30 metres of a railway crossing, or within 150 metres of a bridge, viaduct or tunnel where your view is obstructed.

If you are stopped by a police officer while driving, he/she can require that you produce a valid driver's license, motor vehicle ownership and liability insurance card.

True. In addition, contrary to popular belief, you do not have a 24 hour grace period to produce these documents.

When approaching an intersection where a traffic signal light is red and a police officer motions you to go through, you should stop to make sure he wants you to go through.

False. You should ignore the light and instead obey the police officer's signal and proceed.

If you change your name or if you move you must notify the Ministry of Transportation within 6 days.

True. This can be done online by going to the Ministry of Transportation's website at www.mto.gov.on.ca

In Ontario, unless there is a different posted speed, the speed limit in a city, town, village or built up area is 50 kms/hour and 80 kms/hour everywhere else.

True.

Steinberg Morton Hope & Israel LLP

5255 Yonge Street - Suite 1100
Toronto, Ontario M2N 6P4

T: 416 225-2777 F: 416 225-7112
www.smhilaw.com

LAWYERS

Irwin Steinberg
isteinberg@smhilaw.com

James C. Morton
jmorton@smhilaw.com

Jack W. Hope
jhope@smhilaw.com

David M. Israel
disrael@smhilaw.com

Michael E. Cass
mcass@smhilaw.com

M. Michael Title
mtitle@smhilaw.com

Shelley Brian Brown
sbrown@smhilaw.com

Taras Kulish
tkulish@smhilaw.com

Antonin I. Pribetic
apribetic@smhilaw.com

David A. Brooker
dbrooker@smhilaw.com

Olga Kanevsky
okanevsky@smhilaw.com

Victor A. Nikitine
vnikitine@smhilaw.com

PRACTICE AREAS

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