



STHI LEGAL NOTES

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BARRISTERS & SOLICITORS • TRADEMARK AGENTS

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Working With a Real Estate Agent

It is no secret that the real estate market in the GTA is red hot. It seems that every day brings news of bidding wars and higher purchase prices. As more and more people are getting into the market it is important to have a good understanding of the role that real estate agents play in the process. Take our quiz to see how knowledgeable you are.

To become a real estate agent, a person needs just a one day course.

False. To become a real estate agent in Ontario, a person must complete a number of courses, administered by the Ontario Real Estate Association Real Estate College, within an 18 month period. The courses include:

- Real Estate as a Professional Career
- Land, Structures and Real Estate Trading
- The Real Estate Transaction – General and Residential
- The Real Estate Transaction –Commercial
- Real Property Law

In Ontario, real estate agents, including salespeople and brokers, are regulated and must be registered with the Real Estate Council of Ontario (RECO), who oversee the profession on behalf of the Ontario government.

A purchaser of property must sign a listing agreement with a real estate agent.

False. It is the seller who will be asked to sign a *listing agreement*. A purchaser may be asked to sign a *buyer's representation agreement* prior to working with a real estate agent.

Different types of real estate contracts have been developed in order to protect the rights of the various parties involved as well as spell out the obligations of each.

Working with a Realtor is the one agreement both buyers and sellers must sign. This agreement, which establishes a contract with the brokerage, and not a specific agent, provides an outline of the different types of relationships you may enter into with the brokerage. It also spells out that the brokerage will have agreements with other buyers and sellers.

In order to ensure that your real estate agent will protect you and act in your best interests during the buying process, you should strongly consider signing the *buyer's representation agreement*. This agreement will generally give the brokerage the exclusive authority to act as the buyer's agent for a defined period of time and will establish the agent's commission.

If you are a seller you will be asked to sign a *listing agreement*. Like the agreement signed by the buyer, the listing agreement makes certain that the real estate agent will protect you and act in your best interests. It will also set out the broker's commission as well as the length of the agreement.

As with any contract, it is a good idea to have your lawyer look it over before you sign it. There may be certain clauses that you wish to negotiate. Even if you are not able to negotiate many changes it is still very important to understand what you are signing.

A real estate agent hosting an open house owes a duty to the seller not to potential buyers.

True. Once a real estate agent has signed a listing agreement with a seller, he or she is working for the seller and legally owes allegiance to the seller, whether the buyer meets the agent at an open house or contacts him/her directly.

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*The articles in **STHI 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.*

The Forfeited Corporate Property Act

Some laws are introduced with great fanfare and media coverage. Other changes to the law can be buried in an omnibus bill and escape everyone's notice, including those most directly affected. A law of the latter variety came into effect this past December entitled the *Forfeited Corporate Property Act* (FCPA).

Twenty Years

In Ontario, when a corporation, incorporated under the *Ontario Business Corporations Act*, is dissolved, all of its personal and real property is forfeited to and becomes the property of the Crown, i.e. the Government of Ontario. Prior to December 10, 2016, if an owner of a dissolved company revived the corporation within 20 years, the property reverted back to the owner. While the new Act preserves the 20 year period for reviving a corporation, if the owner does not do so within the first three years, any property is forfeited to the government.

Register of Ownership Interests in Land in Ontario

The other change introduced by the FCPA, and perhaps even more significant, is the requirement of Ontario corporations to now keep detailed records of ownership interests in real estate holdings in Ontario.

The FCPA requires that all corporations, incorporated under the *Ontario Business Corporations Act*, create and keep up-to-date a *Register of Ownership Interests in Land in Ontario*. This Register must identify each property and show the date the corporation acquired the property, and, if applicable, the date the corporation disposed of it. In addition, the new law requires that the corporation shall include with the Register a copy of any deeds, transfers or similar documents that contain any of the following with respect to each property listed in the register:

- the municipal address, if any;
- the Registry or Land Titles Division and the Property Identifier Number;
- the legal description; and
- the assessment roll number, if any.

Ownership Interest

Unfortunately, the Act does not define "ownership interest" and so it remains unclear the extent to which "all" properties must be recorded. We cannot be certain whether things such as:

- beneficial interests in land,
- leasehold interests and
- mortgages,

fall within the purview of the definition. As a result, the safest course of action is to record more rather than less.

The Logistics

The FCAP indicates that the Register can be "a bound or a loose leaf book or may be entered or recorded by any system of mechanical or electronic data processing or any other information storage device."

The Register and supporting documentation must be kept at the corporation's registered office. If the registered office is at a location other than the corporation's place of business, for instance the office of the corporation's lawyer or accountant, then the register must be maintained at that location.

Recognizing the work and effort that is being asked of businesses, the government has given corporations, created prior to December 16, 2016, until December 16, 2018, to complete the Register. No similar grace period has been given to corporations created after December 16, 2016, rather they must immediately begin to keep a register.

This new law does not apply to real estate located outside of Ontario, even if owned by an Ontario corporation, nor does it apply to corporations established federally or in another province, who may own real property in Ontario.

If a corporation fails to comply with the new law, it is guilty of an offence and could be liable for a fine up to \$25,000. In addition, each director or officer of the corporation is also guilty of an offence and liable for a fine up to \$2,000 and/or imprisonment.

Those corporations who do not hold real property or who have only a few holdings will not find the change too onerous. But for corporations whose main focus is to buy, hold and sell real estate, get ready to work. Although these corporations have been given some breathing space, creating the register should not be left until the fall of 2018, since it could take quite a bit of time to pull together all of the information that must be included. 📁

The best way to get a bad law repealed is to enforce it strictly.

Abraham Lincoln

Child Custody and the Hague Convention

The Hague Convention is an international agreement between 94 countries which provides an expeditious process for returning a child who has been abducted by a parent from the child's country of habitual residence to another member country.

Although most court decisions involving children are first and foremost about what would be in the best interest of the children, the Hague Convention does not address the underlying issue of a child custody dispute, including what would be in the best interests of the children. Rather a judge asked to adjudicate an application under the Hague Convention is simply deciding whether a child has been abducted or wrongfully retained within the meaning of the Convention.

The Convention provides that the removal or retention of a child is "wrongful" whenever:

- a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

A case that made headlines last fall helps to illustrate how the Hague Convention works. The case of *Balev v. Baggott*, which came to a conclusion in September 2016, involved two children taken from Germany to Canada.

The parents, who were both Canadian, married in 2000 in Toronto. The following year they moved to Germany where they eventually became permanent residents. Both children of the marriage were born in Germany.

The parties separated in 2011 and the father was granted interim custody. The parties resumed cohabitation in 2012. In 2013, the children were having difficulties in school so the parties agreed that the mother would temporarily move the children to Canada to attend school here. The father signed a "Consent Letter for Children Travelling Abroad". The period of their stay in Canada was from July 5, 2013 to August 15, 2014. In March 2014, the father revoked his consent and in June of that year he commenced a Hague Convention application in Ontario to have the children returned to Germany.

Since the Hague Convention does not deal with custody disputes, the only question at issue was where the children were habitually resident immediately prior to the retention by the mother - Ontario or Germany. The father argued that he never consented to the children's habitual residence becoming Ontario. The mother on the other hand argued that the children, who were 12 and 9 at the time of the original application, had settled in Canada and did not wish to return to Germany.

Article 13 of the Hague Convention does state that that even if the retention is wrongful, the court may "refuse to order the return of the child if it finds that the child objects to

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Generally speaking what the seller reveals in confidence to the real estate agent, for instance the reason for the sale, must be kept confidential from potential buyers. But, buyers can expect that the seller's agent will provide fair and honest service and that he/she will disclose pertinent information about the property. A buyer's agent is under a similar obligation with respect to his/her client.

A real estate brokerage can represent both the buyer and the seller.

True. Referred to as multiple representation, this practice is currently legal in Ontario, though not in most provinces. The buyer and the seller must both consent in writing to the arrangement because of the real potential for a conflict of interest. The brokerage must disclose how its obligations to promote and protect your best interests will differ compared to a situation where it represents only you. Although the

brokerage is representing both parties it must nevertheless do what is best for both the buyer and the seller.

If one of the clients refuses to provide consent to the arrangement, the brokerage must release one of the clients. If it releases you, you'll have to find another brokerage.

A seller does not have to pay commission to his real estate agent once the listing agreement has expired.

FALSE. Generally speaking listing agreements include a *holdover period* clause. During this period of time, usually 90 days, a seller will have to pay a commission if the buyer who purchases the property was introduced to the seller by the real estate agent. This of course is to prevent buyers and sellers from bypassing the realtor who did the work.

Shopping for a home is a huge financial undertaking. Knowledge, a solid plan and good legal advice are a must. We would be pleased to assist you. ☞

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being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”

Following a long and well-established line of court decisions to the effect that one parent cannot unilaterally change the habitual residence of a child, the application judge found that the children were habitually resident in Germany and that the mother’s retention was wrongful. Despite the children’s stay in Canada being for a year, the courts have consistently found that consent to such a time-limited stay, including agreements to an extension, does not change the child’s habitual residence.

In concluding that the children’s habitual residence was Germany the application judge pointed to a number of factors including that the parents had permanent resident status, had resided in Germany for 12 years, had been employed and owned property there. In addition, the children were born in Germany, had attended school, had engaged in extracurricular activities and had friends there.

With respect to the children’s stated desire to stay in Canada for reasons such as too much homework in Germany, loss of friends, loss of their dog, and that “Canada feels like home,” the judge concluded that the objections were neither substantial nor had the “strength of feeling” required that would take the objection beyond the level of expressing a preference for one place over another. The judge stated:

“To accede to such an objection would set the threshold much too low and certainly much lower than intended by the [Hague] Convention which provides that where there has been a wrongful retention, children shall be returned to their habitual residence unless the removing parent can establish that exceptional circumstances exist. Such circumstances do not exist in this case.”

The Court of Appeal agreed with the application judge, that the children habitually resided in Germany immediately prior to the wrongful retention by the mother, that the retention breached the father’s custody rights under German law and that the children were to be returned to Germany.

Although the court expressed sympathy for the mother and the children, particularly since three years¹ had passed, it went on to say,

“It is important to remember, however, that although this case involves the interests and needs of these two young children, it raises legal issues that transcend their interests and that affect the interests of countless other children and their parents. It is also important to remember that the mother’s actions were in direct violation of the father’s custodial rights.”

Unfortunately, situations like this are not entirely uncommon. If you find yourself in similar circumstances you should consider contacting a lawyer immediately. We have several family law lawyers who would be able to assist you. For additional information you may want to read the Government of Canada’s booklet *International Child Abduction: A Guidebook for Left-Behind Parents*. 

¹ Although the Convention requires that “institutions shall use the most expeditious procedures available to the end that final decision be made within six weeks from the date of commencement of the proceedings,” this particular case took three years and three court hearings. When the mother lost on the original application, she appealed to the Divisional Court, who reversed the application judge’s decision finding that the children’s habitual residence changed from Germany to Ontario during the consensual, temporary travel period and therefore the Hague Convention did not apply. The father then successfully applied to the Ontario Court of Appeal.

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PRACTICE AREAS

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