



STHI LEGAL NOTES

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Door-to-Door Sales

Who does not dread door-to-door sales...the sales pitch, the pressure, not knowing if it really is a good deal or whether you even need the product or service being offered. Earlier this year, Ontario introduced new rules to govern door-to-door sales with a view to protecting consumers.

The New Rules

As of March 1, 2018, sales people are no longer allowed to sell the following items at your door or by phone, although they can leave advertising flyers.

- Furnaces,
- Air conditioners,
- Air cleaners,
- Air purifiers,
- Water heaters,
- Water treatment devices, including water softeners, purifiers, filters and
- Duct cleaning services.

If a salesperson attempts to sell these items to you at your home or by phone and you sign a contract, the contract is not valid. This means you will not have to pay anything, you will not be responsible for returning the item or for taking care of it. If you have signed such a contract and have paid, you can demand that your money be returned so long as you do it within one year.

Of course there will be times when you actually need these services or appliances and you invite a salesperson to your home, this is perfectly acceptable. It is also acceptable for your current provider to offer to come to see you in order to offer you a new contract. However, in such cases, the

contract must include a special cover page that explains your rights and confirms that you invited the seller to come to your home.

The Other Rules You Should Know

There are also a number of general rules that apply to door-to-door sales for products or services worth more than \$50, including those listed below.

The seller must provide a *written contract* that contains various pieces of information including:

- The seller's name, telephone number and address,
- Your name and address,
- An accurate description of the goods or services you are buying,
- The price of each item, as well as shipping costs, handling costs, and taxes,
- When and where the goods will be delivered, or when the services will start, how they will be done, and when they will be completed and
- A list of your consumer rights under the law.

If the seller fails to provide the above information in the written agreement, you can cancel the agreement at any time within one year of signing it.

You are entitled to a *cooling off period* which allows you to cancel the contract for any reason so long as it is done within 10 days of receiving a signed copy of the contract.

If the seller used *unfair practices* to get you to sign on the dotted line you can cancel the contract. Examples of unfair practices include telling you that the product is of better quality than it really is or taking advantage of any language difficulty you may have.

If the seller does not *deliver* the product or item that you have purchased within 30 days, you can cancel the contract.

If you cancel the contract for one of the above reasons, the seller must give you a full refund within 15 days. If you

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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 Fiduciary Duties of a Power of Attorney

We have often written about the subject of powers of attorney for property and powers of attorney for personal care. We do this to stress the importance of having these documents, to help you understand these documents and to explain the role and responsibilities of the attorney or substitute decision maker.

Recap

A power of attorney for property allows someone to deal with your money and your property, generally in circumstances when you are unable to. A power of attorney for personal care allows for someone to make decisions about your personal life, including health care decisions, if you are mentally unable to do so.

The case of *Tarantino v. Galvano* explores the powers, duties and limitations of both a power of attorney for property and personal care. It underscores the importance of the fiduciary nature of the attorney, specifically that he or she is obliged to act only for the benefit of the donor, putting their own interests aside.

The Facts

Other than the time she was briefly married, Nellie had always lived with her parents. After her father's death in 1986, Nellie continued to live with and look after her mother, Rosa. The home they shared was owned 80.38% by Rosa and 19.62% by Nellie.

By 2008, Rosa had Alzheimer's and needed more and more care. Rosa had wanted to remain in her home and Nellie did everything she could to make that possible, going so far as to shut down her business. She continued to care for her mother even when she became incontinent, could no longer walk or speak and had to be fed through a feeding tube.

The Transfer of the House

According to Nellie, she and her mother entered into an oral agreement whereby Nellie would care for Rosa in her home and Rosa would transfer her interest in the house to Nellie as well as a portion of her pension income. Nellie and Rosa then went to see a lawyer who reduced the agreement to writing and transferred the house to Nellie.

During the visit, the lawyer expressed concern that Rosa did not have the mental capacity to manage her financial affairs. For this reason Nellie signed the agreement personally and also signed on Rosa's behalf as her power of attorney.

Following Rosa's death, her granddaughters who were beneficiaries along with Nellie, sued Nellie. Among other things, they sought to have the transfer of the house to Nellie set aside.

The Decision

The court agreed that the transfer should be set aside for two reasons.

The first reason the court gave was that it had no evidence to corroborate Nellie's claim concerning the oral agreement. Although there was evidence that Rosa had wished to be looked after at home, no one, other than Nellie, had any knowledge of the alleged financial arrangement.

The second reason the transfer was set aside was that Nellie had breached her fiduciary duties as a substitute decision maker, even though there was no malicious or fraudulent intent. She did this when she used Rosa's power of attorney to sign the agreement on her mother's behalf.

Ontario's *Substitute Decisions Act* states that:

A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit. (Emphasis added)

As Rosa's power of attorney for personal care, Nellie's overriding obligation was to consider Rosa's wishes for care, and Rosa's best interests. As her attorney for property, Nellie could make the financial arrangements that were "reasonably necessary" for Rosa's support and care in the home.

To determine what is reasonably necessary for a person's support and care, the power of attorney must consider the value of the incapable person's property, the accustomed standard of living of the incapable person, as well as other potential legal obligations. Using this criteria, a power of attorney can make expenditures that are in the incapable person's best interests, even if they have the potential to reduce the size of the estate available to the beneficiaries of the Will.

The court found that Nellie's decisions to transfer Rosa's share of the house to herself along with 75% of Rosa's pension cheques were not "reasonably necessary". In fact it was an imprudent arrangement which benefitted Nellie beyond what was "reasonably necessary" to provide adequately for Rosa's care, even taking into account Nellie's need for some kind of financial compensation while she cared for her mother. In this specific situation, there was no link between the value of the house and pension and the financial care Nellie required.

In addition to the transfer of the house, the court also considered whether Nellie had breached any other of the

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fiduciary duties that she owed to her mother as her power of attorney.

The duties of an attorney as fiduciary include:

- A fiduciary is under a duty to account,
- A fiduciary has a duty not to commingle trust funds with the attorney's property, and to provide an accounting if they are commingled,
- A fiduciary must not make a profit or to put himself/herself in a position where his/her interests and his/her duty conflict unless the trust instrument expressly so provides,
- As a fiduciary, an attorney for property is not entitled to exercise that power for his or her own benefit unless expressly authorized to do so, and
- The fiduciary bears the onus of establishing that the management and disbursement of funds is consistent with the terms of the power of attorney.

The court found that Nellie was under a duty to account for any monies of Rosa's that she had used to care for her, particularly as she had commingled Rosa's pension with her own funds. However, the court also went on to find that Nellie had accounted for the income and expenses and that she had not appropriated any money for her own benefit, and that moneys were appropriately spent.

The Quantum Meruit Argument

Although Nellie, as power of attorney, was obliged to place her mother's best interests, both financial and personal, above her own, she was not obligated to put herself into a worse financial position. Therefore, to counter the argument of her nieces, Nellie successfully argued that she was entitled to compensation equivalent to the reasonable value of the services (quantum meruit) that she had provided to her mother from 2008 until her death in 2012.

The court calculated the value of the services provided by Nellie at the rate of a personal support worker, which was \$15.40. The result was that the estate owed her more than \$273,000 with respect to the personal care.

Valuable Advice

Providing care for a sick person or elderly person can be taxing and for this reason it is really important to set up a record keeping system immediately if you are also that person's power of attorney. A ledger or journal of your decisions, particularly the financial ones, along with receipts will prove invaluable if at some point you are called upon to account for your decisions.

If you need information about powers of attorney for property or personal care, our lawyers would be happy to speak to you. ☞

Drug Testing in the Workplace

According to the Prime Minister, Canadians will be legally able to consume marijuana recreationally beginning October 17, 2018. The imminent legalization of this drug raises many questions, including workplace drug testing.

Although the issue of drug testing employees is not a new one, it has moved to the forefront. In Canada, an employer's right to test employees for drug and alcohol is actually quite limited. In 2013, the issue of random drug and alcohol testing in the workplace was put to the Supreme Court of Canada.

The case in question involved a grievance filed by the union against the employer, Irving Pulp & Paper. Although there was no evidence of an existing alcohol problem, the employer had made the unilateral decision to impose mandatory alcohol testing for its employees in safety sensitive positions. Under the policy, 10% of the employees in safety sensitive positions would be randomly selected for unannounced breathalyser testing over the course of a year. A positive test would lead to disciplinary action, including possible dismissal.

The grievance eventually made its way to the New Brunswick Court of Appeal who found that the interests of the employer and employees were reasonably balanced by the random testing in an inherently dangerous workplace.

The union successfully appealed to the Supreme Court of Canada. The high court began by recognizing that "Privacy and safety are highly sensitive and significant workplace interests. They are also occasionally in conflict. This is particularly the case when the workplace is a dangerous one." Ultimately, the court concluded that Irving had exceeded the scope of the management rights clause under the collective agreement by imposing the random testing given the lack of evidence of an alcohol problem in the workplace.

Although this case involves a union setting, the decision does provide some guidance to employers in general. The court reminds us that mandatory, random and unannounced alcohol and drug testing, even in a dangerous workplace, is an unjustified affront to the dignity and privacy of employees. Therefore, there must be a reasonable cause for drug

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and alcohol testing, such as general substance abuse in the workplace.

In addition, employers in Ontario who wish to test for drugs and alcohol need to be mindful of the *Ontario Human Rights Code*. Such testing becomes particularly delicate if you are dealing with an employee who suffers from an alcohol or substance abuse addiction. In such cases, the addiction is likely to be viewed as a disability and if the person with the addiction is negatively affected then the testing may be considered discriminatory.

Developing a drug and alcohol testing policy can be extremely tricky and should not be undertaken without professional legal advice. Our lawyers would be happy to assist you draft this or any other workplace policies. ☞

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have already received the items, the seller has to pick them up or pay the cost for you to return them. If you do cancel the contract, be sure to do it in writing and to keep a copy of the letter. Also make a note of the date that you mailed the letter.

Visit the the Ministry of Government and Consumer Services' website (www.ontario.ca/mcs) for sample cancellation notices or to lodge a complaint. The Ministry can also be contacted by phone at 416-326-8800.

Electricity and Natural Gas

One of the most common door-to-door sales pitches involves “cheaper” electricity or natural gas offered by energy retailers. Although licensed energy retailers are legal it is important to understand that an energy retailer is not your utility, the government or the Ontario Energy Board, so be sure to do your homework. Here are a few tips.

- The energy retailer's salesperson must give you a business card and show their company ID badge.
- Although energy retailers can come to your home and give you information, they cannot leave a copy of a contract with you.
- An energy contract may or may not save you money so take the time to review and compare.
- If at a later date you decide to move forward with an energy contract, the retailer must give you certain documents so that you can make an informed decision, including the energy contract, a disclosure statement and a price comparison. Be sure to read and understand the information.
- Although there is a 10 day cooling off period that allows you to cancel the contract, you cannot forget that an energy contract is a legal agreement between you and an energy retailer so when you sign, you have rights and responsibilities.
- Your home will continue to have natural gas or electricity whether or not you enter into an energy contract.

The Ontario Energy Board (www.oeb.ca) has an excellent consumer protection section on their website, which includes a list of electricity retailers and natural gas marketers and whether there are complaints against them.

While there is nothing wrong with speaking to a door-to-door sales person or a sales person who contacts you by phone, you do need to take the time to research and do your homework. If the seller says the deal will expire if you don't buy immediately, then you probably need to let it go. ☞

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