



STHI LEGAL NOTES

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BARRISTERS & SOLICITORS · TRADEMARK AGENTS

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New Laws for a New Year

Once again a new year brings a number of new laws. Below are some of those laws that could affect you.

If You Drive

Alcohol

It is a criminal offence to drive in Ontario with a blood alcohol concentration over .08. But did you know it is also unlawful to drive if your blood alcohol concentration is .05 or higher. In the latter case, you face the following penalties:

- First Offence: 3 day licence suspension and a \$250 fine
- Second Offence (within 5 years): 7 day licence suspension and a \$350 fine
- Third Offence (within 5 years): 30 day licence suspension and a \$450 fine
- It should be noted that novice drivers and commercial drivers face these same penalties if they have **any** alcohol in their system.

As of December 18, 2018, police no longer require a reasonable suspicion to demand a breath sample from a driver. Now, anyone operating a motor vehicle who is lawfully stopped by police can be required to provide a breath sample, at the roadside, to detect potential alcohol in their blood. Failure to comply with this demand will also result in criminal charges which carry the same, or greater, penalties as driving while impaired.

Cannabis

While using cannabis may now be legal in Canada, it remains illegal to use or be under the influence of cannabis

while you are driving, whether it is by smoking, vaping or eating it. If you are found to be impaired, you face similar penalties as do those impaired by alcohol.

Distracted Driving

Distracted driving refers specifically to drivers using hand-held devices, the most obvious one being your phone. However, it is also unlawful to be holding devices such as an e-reader, DVD player or GPS while driving. If caught, you face the following penalties:

- a fine of \$615, if settled out of court and a fine up to \$1,000 (up to \$2,000 for a second offence) if you go to court and lose
- three demerit points (6 points for a second offence)
- 3-day suspension (7 days for a second offence)
- New drivers face a 30-day licence suspension for a first conviction.

If You are an Employer or an Employee

We have talked a lot about Ontario's Employment Standards Act over the last few years. There have been many changes during that period, including by the new Conservative government. The following are the latest changes and amendments.

While the **minimum wage** was set to rise to \$15 per hour on January 1, 2019, it will stay at \$14 per hour. The minimum wage will next increase in 2020 by the rate of inflation only.

The 10 days of paid **personal emergency leave** has been eliminated. Instead, employees will be entitled to 8 days of unpaid leave distributed in the following manner:

- three unpaid days for personal illness;
- two unpaid bereavement leave days; and
- three unpaid days for family responsibility leave.

Employers are once again permitted to require a **doctor's note** as evidence for entitlement to sick leave.

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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.*

Predatory Marriage - What You Need to Know

For many of us, it can be disconcerting when our divorced or widowed parent becomes involved in a new relationship. But what if that new person does not have your parent's best interests at heart, particularly if your parent is elderly or vulnerable? What if they choose to marry? What, if anything, can you do?

The term "predatory marriage" has recently begun popping up to describe a marriage that has been entered into so that one person can gain easy access to a vulnerable person's money, property and estate.

In Ontario, legally married spouses are automatically entitled to certain rights. For instance, if a person dies without a will, the surviving husband or wife is entitled to the first \$200,000 of the deceased's estate plus a share of the remainder, split with the deceased's children. Even if the person dies with a will but leaves little or nothing to the surviving husband or wife, the *Family Law Act* may entitle the surviving spouse to a significant portion of the estate. And if the will was drafted prior to the marriage in question, that will is automatically revoked, unless it was made expressing that it was in contemplation of the marriage.

Pursuant to Ontario's *Marriage Act*, there are very few requirements to marry. Two people wanting to marry must be of the age of majority and have the proper licence. The only other statutory condition is that a person cannot issue a licence or solemnize a marriage if they suspect one of the parties is under the influence of "intoxicating liquor or drugs." The threshold set out by the common law is simply that a person must have capacity to marry.

Two recent cases, one in Ontario and the other in BC, examine the issue of capacity to marry and whether a marriage can be declared void ab initio, i.e. void from the onset.

The Facts in the Ontario Case

In 2011, Kevin was involved in a very serious ATV accident. After four months in the hospital, including 18 days in a coma and extensive occupational and physiotherapy, 50-year old Kevin was released to the care of his two adult sons.

According to the pre-release medical summary, Kevin's brain injury affected his ability to recognize his cognitive impairments and this impaired awareness made it difficult to infer consequences of events which may jeopardize his personal safety.

The clinical psychologist assigned by Kevin's auto insurer found that he suffered from numerous impairments, including impulse control and judgement difficulties, as

well as impaired reasoning and problem solving abilities. In addition, a certificate of incapacity to manage his property and personal care was issued, wherein Kevin's sons became his guardians.

Prior to the accident, Kevin had been involved in an on again, off again relationship with Kathleen, though at the time of the accident they were not seeing each other.

A few days after his release from the hospital, Kevin went missing and his sons became concerned. They were eventually able to track him to a hotel in Collingwood. Unfortunately, by the time they found him he had married Kathleen. While Kathleen's family had attended the wedding, neither Kevin's sons nor his friends were even informed of the nuptials.

The Decision in the Ontario Case

The judge in the case recognized two competing issues in this type of situation, a person's right to personal autonomy versus the possibility that the person does not fully appreciate how marriage affects one's legal status or contractual obligations. The judge also confirmed that "a court should only reject a person's autonomy in the clearest of cases, where an individual lacks a 'clear, free and personal choice.'" He further, noted that "capacity is decision, time, and situation specific" and that "one is presumed capable unless and until the presumption is legally rebutted".

Relying on the extensive expert medical evidence as well as the testimony of the parties' family and friends, the judge concluded that Kevin lacked the ability to manage his own property and personal affairs as a result of his injuries. He went on to find that Kevin lacked the capacity to marry and as a result, the judge declared that his marriage to Kathleen was void ab initio, i.e. as if it had never happened.

The judge also found that since Kevin's sons were faced with many challenges in taking care of their father, that their efforts should not be continually undermined by Kathleen so he ordered a permanent non-communication order between Kevin and Kathleen.

The Facts in the BC Case

At the age of 66, Donna was diagnosed with Alzheimer's disease. She was divorced and had no children, however she was very close to her sister's children, particularly her niece Donna D. Donna was fiercely independent and in denial about her illness so her niece increasingly assisted her to live independently until that was no longer possible.

About a year after her diagnosis, Donna met Floyd at a local

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mall and they became involved. Several years later, unbeknownst to her family and physician, Donna and Floyd married. Both prior to and after the marriage, Floyd began taking steps to get Donna's money and property. He also began to fuel Donna's suspicions about her family.

Donna's Alzheimer's became progressively worse the fall after she married such that a certificate of incapability was issued. In addition, she was moved into a care facility. She eventually died at the age of 74.

Following her death, it was discovered that Donna had executed a new will naming Floyd as executor and leaving him a large gift as well as disinheriting Donna D.

Donna D. brought an application to have her aunt's marriage to Floyd set aside as well as the will benefiting Floyd.

The Decision in the BC Case

The judge in the case, recognized that "The starting point for understanding the test for capacity to marry is the notion that a marriage is a contract." She also confirmed that "a person is mentally capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and the duties and responsibilities it creates".

Like the Ontario case, the judge in the BC case had the benefit of extensive medical evidence as well as the evidence of family and friends to establish Donna's diminished capacity. In contrast, the judge found Floyd's evidence to be completely lacking in credibility.

The judge concluded that, as of the date of the marriage, Donna had no insight or understanding that she was impaired nor was she capable of weighing the implications of marriage to Floyd, even at the emotional level. As a result, Donna did not have the capacity to enter into the marriage and therefore it was void ab initio.

Since there was no valid marriage, the prior wills had not been revoked. With respect to the will naming Floyd executor, the judge ruled that Donna had not had the testamentary capacity to make that will.

Final Thoughts

While these two cases make it somewhat easier to have a marriage declared void from the get go, it is not an easy task. In addition, it might be too late to save your parent's money and property. However, these court decisions do potentially provide a tool if you suspect that a person is preying on your elderly or vulnerable parent or other family member. If you do have concerns in this regard, you should seek legal advice concerning your options. 

Employers are no longer required to provide **equal pay** for equal work on the basis of employment status (i.e. part-time, casual, and temporary) or temporary help agency status. However, there continues to be a requirement for equal pay on the basis of gender.

With respect to **scheduling**, where an employee who regularly works more than three hours a day is required to come into work but works less than three hours, despite being available to work longer, the employee will be paid wages for three hours.

Bill 148 prohibited the misclassification of employees as independent contractors and put the onus on the employer to prove that a person was a contractor and not an employee. Although the prohibition on misclassification remains, the employer is no longer required to prove that an individual is not an employee, if a dispute arises as to whether a worker is an **employee or an independent contractor**.

Change to EI

New parents are now entitled to an additional five weeks of **Employment Insurance parental benefits** when both parents agree to share them in order to take time off work. For those who choose the extended parental leave of 18 months, an additional eight weeks of EI benefits will be available to couples who share the time off.

Fishers and Hunters

The Ontario government has created one Outdoors Card to replace the previous fishing and hunting versions. You will now have to carry a "Licence Summary" for proof (digital is acceptable) of your current hunting and fishing licences.

If you are a veteran or an active Canadian Armed Forces service member and a resident of Ontario, you can now recreationally fish for free in Ontario.

Landlords and Tenants

The **2019 rent increase** guideline is 1.8%, the same as it was in 2018.

Landlords should remember that tenants must be given a written notice 90 days before the increase becomes effective and that they are entitled to increase the rent only once every 12 months, unless a tenant moves out, in which case landlords are entitled to make the new rent whatever they choose. 

Be at war with your vices,
at peace with your neighbours,
and let every new year find you a better person.

Benjamin Franklin

Cemeteries 101

"I have always enjoyed cemeteries. Altars for the living as well as resting places for the dead, they are entryways, I think, to any town or city, the best places to become acquainted with the tastes of the inhabitants, both present and gone."

Edwidge Danticat

After the Dance: A Walk Through Carnival in Jacmel, Haiti

Cemeteries are a place we don't often think about until someone we love has died. When you drive by a cemetery it seems like such a quiet and uncomplicated place. However, like so many things in life, there are a number of rules and regulations that govern cemeteries in Ontario.

Who owns the lot?

When you "purchase" a lot in a cemetery, you are not actually buying the lot, that remains the property of the cemetery. What you are buying are the interment rights for an assigned space, i.e. the lot. Subject to the cemetery's bylaws, you are also buying the right to install a marker on that space to memorialize the deceased. At the time of purchase, your name will be recorded in the cemetery's official Registry of Interment Rights Holders and you will be given a Certificate of Interment Rights. Be sure to put your Certificate in a safe place, you may need it at some point.

Can cemetery or crematorium services be cancelled?

After signing a contract, you have 30 days to change your mind and receive a full refund. If you cancel after 30 days, a cancellation fee may apply.

Can an unused lot be resold?

If the cemetery's bylaws do not prohibit reselling interment rights, you are free to sell unused rights to a third party.

Do Interment Rights automatically transfer to a spouse or children?

If the interment rights holder has died, provincial regulations and the cemetery's own bylaws outline how the interment rights are transferred. This can be a complex issue and it is best to speak to the operator of the cemetery you are dealing with. In addition, the cemetery probably has some sort of pre-authorization form that you can complete concerning future interments in the lot.

Who can be buried in the lot?

Unless the interment rights holder has provided written consent, no one but the interment rights holder can be buried in the lot. So if your hope is to have your spouse or your children buried with you, you need to make those arrangements in writing in advance.

Can a person of a different faith be buried in cemeteries administered by a specific religious denomination?

Although many faith based cemeteries allow family members of a different denomination or no denomination to be buried together, this is a question that only the particular cemetery can answer.

Can cremated remains be scattered?

Provincial law does allow for ashes to be scattered on private property with the written consent of the land owner. Ashes can also be scattered on unoccupied Crown lands and Crown lands covered by water so long as there are no signs prohibiting it. Many religious denominations frown on the practice of scattering ashes so you may want to check with your faith leader.

For more information about cemeteries visit the Bereavement Authority of Ontario's website at thebao.ca

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PRACTICE AREAS

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