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July 2022, ISSUE 17

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IN THIS ISSUE:

Now Serving Collingwood!

Devry Smith Frank *LLP* ('DSF') is happy to announce the opening of our Collingwood office, conveniently located at 25 Huron Street, Collingwood, ON, L9Y 1C3. We are walking distance from the town square and are available to serve individuals and business clients based in Simcoe County and its surrounding areas.

We are integrated into the Collingwood community. Several DSF lawyers live and work in the Collingwood area. As with the other offices within our full-service firm, our Collingwood office offers legal services in family law; education law; employment law; commercial and civil litigation; residential and commercial real estate; municipal law; wills, estates and estate litigation; bankruptcy and insolvency law; business and corporate law; immigration law; personal injury; secured lending; tax law; and more.

DSF is well-equipped to keep pace with Collingwood's dynamic growth. With access to the expertise and resources of over 70 lawyers across our multiple offices, our Collingwood legal team is committed to continuing to provide the outstanding level of service to which our clients are accustomed.

Events & Sponsorships

Our sister firm, Derfel Injury Law, is a proud sponsor of Brain Injury Association of York Region. The charity aims to foster and maximize quality of life for brain injury survivors and their caregivers. It educates those impacted by a brain injury and helps them gain insight into the resulting changes.

DSF sponsored the Georgian College Golf Classic Tournament. The proceeds raised go to support the College's student awards and scholarships program.

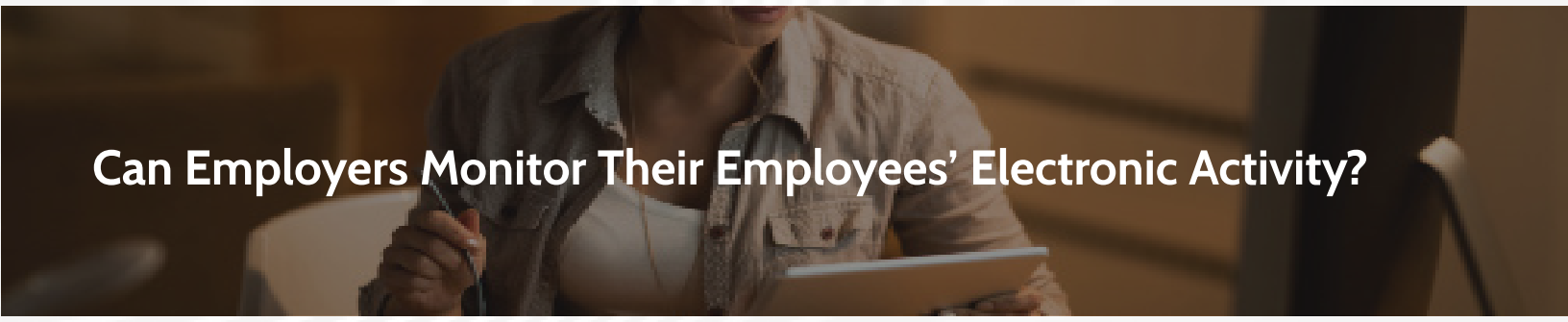
Woitzik Polsinelli *LLP* ('WP Law') sponsored the Lakeridge Health Foundation Annual Gala 2022, a stunning celebration of healthcare excellence. The proceeds raised go to the Cancer Care Center of Lakeridge Health.

WP Law sponsored two Keller Williams Realty events: the Keller Williams Annual Awards Ceremony honouring the work and accomplishments of the Keller Williams group of real estate agents, and Keller Williams' Red Day. The Red Day proceeds go towards the maintenance of Simcoe Hall Settlement House in Oshawa.

WP Law donated Raptors raffle tickets to Par For The Cause, a charity golf tournament organized by The Princess Margaret Cancer Foundation. The proceeds raised by the tournament go to support research into GTX cancer treatments.

WP Law sponsored the Kathy Classic Memorial Golf Tournament. The proceeds raised go to the Krembil Brain Institute (UHN Foundation).

Blogs



Can Employers Monitor Their Employees' Electronic Activity?

Bill 88, the *Working for Workers Act*, represents one of many attempts by the Ontario legislature to respond to the unique challenges arising during the COVID-19 work-from-home era. One element of this bill will amend the *Employment Standards Act*, 2000 ("ESA") to account for the use of electronic monitoring software by employers. As of October 11, 2022, employers with 25 or more employees are required to have a written policy which addresses the electronic monitoring of employees.

Background
Bill 88, a supplement to the 2021 version of the same name (which you can read more about here) received Royal Assent on April 11, 2022.

Electronic monitoring software, though not exclusively used by employers of remote workers, is typically used to surveil the attendance and productivity of those working from home. It is this remote relationship that the new *ESA* provisions intend to regulate, although in-person employees will still be entitled to notice if such software is being used to monitor them.

What are the implications for employers?
Employers are not prohibited from utilizing monitoring software. They must, however, have a policy which addresses the following:

1. Whether the employer electronically monitors employees and if so,
2. A description of how and in what circumstances the employer may electronically monitor employees,
3. The purposes for which information obtained through electronic monitoring may be used by the employer,
4. The date the policy was prepared and the date any changes were made to the policy.
5. Such other information as may be prescribed.

A copy of the policy must be provided to employees before October 11, 2022, and when changes are made to the policy, updated copies which reflect those revisions must be provided within 30 days of the date on which the changes were made.

When a new employee is hired, they must be provided with a copy of the policy within 30 days of their start date. If using the services of a temporary help agency, those employees must be provided with a copy within 24 hours of the start of their assignment, or within 30 days from the day the employer is required to have the policy in place, whichever is later.

What are the implications for employees?
While there is a presumption that employees have a reasonable expectation of privacy, this presumption can be displaced through the employer's electronic monitoring or other policy.

There is no recourse under the *Working for Workers Act* if an employee finds the content of the policy or scope of monitoring to be unreasonable, although certain common law remedies may be available depending on the facts and circumstances. Employees may complain, however, if they are not provided with a copy of the employer's electronic monitoring policy in accordance with the applicable time frames.

What should be included in a monitoring policy?
The legislative requirements center around transparency when using electronic monitoring rather than limiting the use of this technology. Thus, employers are simply required to state whether or not they will be using such technology and if so, they must explain in what circumstances they intend to do so. The policy must also include the date it was prepared and the date of any changes made to the policy.

While the current requirements are minimal, the legislation requires that the policy include "such other information as may be prescribed," hinting at the potential expansion of the legal requirements for electronic monitoring policies.[1]

Employers should consider the following when drafting their policy:

- Is the use of monitoring software reasonable and necessary? (Is there a specific need for it? Will it fulfill this purpose and if so, how?)
- What is the scope of the software? (Does it monitor all activity, or simply record when people sign on to their computer, and sign out when they are finished working?)
- How will the information collected be used? (For example, will it be used to determine employee productivity? To confirm attendance? To keep records of how long an employee is away form their computer during the day?)
- How can the employer ensure all employees are made aware of the existence of the policy and its content? (The policy could be made available online and employees notified of the date on which becomes effective. The employer could require the employee to acknowledge in writing that they have read and understood the content of the policy).

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This blog was co-authored by Summer Law Student, Chloe Carr

[1] [1] Bill 88, An Act to enact the Digital Platform Workers' Rights Act, 2nd Sess, 43nd Leg, Ontario, 2022 (assented to 11 April 2022), ON 2022, c 41.1.1(2)3.

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Income Tax Act and Bill C-208

What is Bill C-208 and what does it attempt to accomplish?

On June 29th, 2021, Bill C-208 ("C-208") received royal assent and amended section 84.1 and section 55 of the *Income Tax Act* ("ITA"). The objective of C-208 was, ostensibly, to facilitate fairness in our taxation system – previously, certain intergenerational transfers of small businesses would result in the loss of the transferor's ability to claim the Lifetime Capital Gains Exemption ("LCGE"). The objective of C-208 is to facilitate bona fide intergenerational transfers of a business while preventing tax avoidance that undermines the equity of our tax system.[1] As a result of C-208, several anti-avoidance rules in the ITA were modified to provide specific exceptions that will facilitate the transfer of property between family members, to allow the transferor to claim the same benefits, or close to, that they would receive in an arm's-length sale.

Section 55 is a specific anti-avoidance rule that is meant to prevent capital gains stripping and has the effect of applying to intergenerational transfers. Amended section 55(2) allows for siblings to convert taxable capital gains into a tax-free intercorporate dividend.[2] Section 84.1 is another anti-avoidance rule designed to prevent converting corporate surplus, which would otherwise be a taxable dividend, into a tax-free return of capital by using non-arm's length transactions. Now, section 84.1 provides tax relief to those who wish to transfer (sell) shares of their farm, fishing or small family business to their adult children or grandchildren and be treated equally to those who were passing on their businesses to an unrelated (arm's length) corporation.[3] This means that parents or grandparents selling shares to a non-arm's length (related) corporation, say a corporation owned by a child or grandchild, can now access the LCGE to reduce or eliminate the income tax on the resulting disposition so long as they meet certain specifically enumerated criteria.[4]

Concerns surrounding Bill C-208

Although C-208 is officially law, the government expressed its intentions on making changes to it due to the pitfalls and gaps surrounding it. In a press release on July 20th, 2021, the Department of Finance addressed its intention to bring forward amendments to C-208 that will clarify its vagueness and safeguard against tax avoidance loopholes, such as surplus stripping.

As an aside, to put it simply, surplus stripping is when retained earnings, which are normally treated as dividends under the Act are converted to capital gains by way of "incestuous" sale between related parties to take advantage of the lower tax rate without any genuine transfer of the business actually taking place. For example, a shareholder seeking to "surplus strip" may incorporate a new holding company and sell their shares of an operating company to realize a capital gain on the sale of shares, but remain the ultimate owner of the same. This allows the shareholder to extract corporate surplus by way of capital gain and results in significant tax savings. Such behaviour is the purpose of many of the anti-avoidance rules in the Act, including section 84.1.

With respect to the Department of Finance's concerns about the vagueness of the language in C-208, after years of languishing in committees and at various points in the legislative process, it was ultimately passed into law without an "application date", presumably to prevent its application from the date of passing. However, according to section 5(2) and section 6(2) of the *Interpretation Act*, a statute or amendment that receives royal assent and does not have an application date is effectively the law and enforceable on an immediate basis. From a technical legal perspective, this means that C-208, including the "vague" language contained therein, is the law. This is a unique circumstance in that the Department of Finance has announced plans to amend the rules, but for now, the law remains as drafted. This type of grey area can lead to aggressive tax plans that could perhaps in some circumstances be "nullified" if the Department of Finance and Parliament choose to enact retroactive changes to C-208 and the ITA. Caution is thus advised for anyone considering utilizing the new rules in a "creative" manner without regard for the CRA's stated position that there is a "scheme" against surplus stripping inherent in the ITA. The Court to this point has explicitly repudiated CRA's statement, so some creative planning opportunities may in fact exist.

Upcoming amendments to Bill C-208

Evidently, the law hopes to achieve fairness for "genuine" intergenerational transfers, yet it lacks a genuineness test. Questions pertaining to legal control, factual control and duration of control over the company remain unanswered. The Department of Finance attempted to confront the abovementioned concerns in a press release by indicating that amendments would address the following issues:[5]

- The requirement to transfer legal and factual control of the corporation carrying on the business from the parent to their child or grandchild
- The level of ownership in the corporation carrying on the business that the parent can maintain for a reasonable time after the transfer
- The requirements and timeline for the parent to transition their involvement in the business to the next generation
- The level of involvement of the child or grandchild in the business after the transfer

The amendments should apply after Nov. 1, 2021, or "the date of publication of the final draft".[6] Yet, to the date of this newsletter, the legislation has not been amended to reflect "genuine intergenerational transfers".

Overall, C-208 presents a valuable new opportunity for family businesses and is an improvement to the harsh treatment that small business owners were subject to when choosing to pass a business on to their children. There are now many tax planning opportunities for those businesses, farms or fishery owners that were historically unavailable. With the current state of the law, creative accounting mechanisms are available to gain a tax advantage through carefully planned sales. These opportunities are counterbalanced by the precariousness of C-208's future amendments and undoubtedly come with uncertainties. If you are interested in determining if you can take advantage of the new changes, proper legal advice is paramount before implementing any changes.

This blog was co-authored by Summer Law Student, Katherine Berze

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[1] "Government of Canada clarifies taxation for intergenerational transfers of small business shares" (July 19 2021), online: The Department of Finance <https://www.canada.ca/en/department-finance/news/2021/07/government-of-canada-clarifies-taxation-for-intergenerational-transfers-of-small-business-shares.html>
[2] *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.), s. 55
[3] The Department of Finance, supra note 1.
[4] *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 84.1(2)
[5]The Department of Finance, supra note 1.
[6] Ibid.

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Federal Foreign Buyer Prohibition on Residential Properties – A Viable Solution to Combat Soaring Housing Prices?

Introduction
The COVID-19 Pandemic has only complicated the real estate market in Canada. With lower lending rates accompanied with the highest inflation rate in over 30 years, residential dwellings in Canada have risen by over 20% since 2021. The national average of a home is now nine times more than the average household income. Both the federal and provincial governments across the country have been struggling to keep prices at an affordable rate. The quick surge in price has left many prospective first-time purchasers on the sidelines waiting for stability.

The most recent tactic for the government to stabilize housing prices has been to restrict foreign nationals from investing in residential real estate. In Ontario, the provincial government decided to raise the Non-Resident Speculation Tax (NRST) to 20% in an effort to both deter foreign residential real estate investments and raise additional funds for the government. However, it was clear that more measures would be taken by the federal government due to both the Liberal's and Conservative's 2021 Federal Election campaign promises.

2022 Federal Budget

This past April, the federal government released their 2022 budget, with one of the key goals being to make housing more affordable for all Canadians. While most measures focused on the supply of housing, the Trudeau government introduced a proposal to curb foreign investment; a measure to control demand. The proposal was to prohibit foreign enterprises and people from acquiring residential property in Canada for 2 years, with some exceptions[1].

Bill C-19 (Part 5, Division 12)

On April 28th, 2022, the Liberal Party introduced Bill C-19 titled "An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022, and other measures".

Section 235 of the Bill outlines the prohibition. Subsection 235(4)(1) states that "despite section 34 of the *Citizenship Act,* it is prohibited for a non-Canadian to purchase, directly or indirectly any residential property". The penalty for doing so is a fine of not more than $10,000 and, on the application of the Minister, a court order for the property to be sold. If sold, the offenders are not to receive more than the purchase price they paid.

Moreover, the Bill leaves the Minister significant discretion to prescribe matters by regulation. In particular, the Minister is able to exempt certain classes of individuals from the ban and is able to change how key terms, such as "purchase", are defined. These alterations can considerably change how the ban works in practice.

It is important to note that the Bill is not yet law as it is still in its early stages in the House of Commons. If the bill is to pass through the House, it still must go through the Senate and then receive Royal Assent from the Governor in Council. There is no listed effective date for section 235, rather it will come into force on a day fixed by the Governor in Council. Section 236, the repeal section, is to come into force on the 2nd anniversary of section 235 coming into force (repealing and limiting the ban to two years).

Constitutional Implications

One potential issue related to the legislation is that it infringes on provincial power. Pursuant to the *Constitution Act*, 1867 and common law principles, real estate is of provincial jurisdiction. If challenged, the Federal government will likely argue that it is within their criminal law power to legislate over the matter. Furthermore, from a Charter perspective, it can be argued that the law discriminates based on nationality. While these constitutional challenges may have substance, it remains to be seen whether they would be successful in an application to the court.

Impact on Housing Prices in Canada

The real question is whether this ban will actually succeed in combatting surging housing prices. Most economists and real estate experts argue that the ban will have a minimal impact. The ban aims to decrease demand, but it appears that foreign demand is not the biggest issue for the housing market. Foreign buyers accounted for 1% of all purchases in 2020 compared to 9% in 2015. The 2019 CMHC Report also stated that only 3.3% of Ontario homes have at least one non-resident owner.

Tackling surging housing prices is a difficult task for the government. With only so much control over the supply, the government appears to be taking desperate measures to control demand. Whether this ban will actually lower housing prices is a question that will remain uncertain for some time.

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This blog was co-authored by Summer Law Student, Jaimin Panesar

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[1] Temporary residents within the meaning of the *Immigration and Refugee Protection Act*, non-Canadians who purchase with a Canadian spouse or people registered under the *Indian Act* are all exempt from the prohibition.

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Wedding Bliss Includes Planning For The Future

It's wedding season! There are new laws that impact your marriage and your future!

You are planning a wedding – the checklist is complete – but have you thought about your Will? Do you have a Will? Have you considered what happens when you get married?

There are many hard conversations that happen when you get married! Your wishes for the future are one of those conversations. Getting your estate in order, after marriage, is important to ensure your new spouse and/or children are provided for financially in the future.

You are not only changing your legal status, but your future financial status will be changing also. As a married person, you may now file taxes together, share your income and expenses together, and buy property together – most importantly, you will now be recognized by the government as a married individual whose assets (upon death) need to be allocated according to certain laws. Once you understand these laws, your future estate plans can be shaped accordingly.

As of January 1, 2022, Bill 245 came into effect. *The Succession Law Reform Act* has a variety of changes – one notable one is the changes to the marriage provisions.

In order to determine how to plan your future with your spouse, you will need to determine which criteria apply to you –

1. I have an Existing Will
It might surprise you to know that before January 1, 2022, if you had a Will and later married – your Will was automatically revoked. This is not the case now – your marriage Will no longer revoke your Will.

Now, if you get married, your Will stays intact and whomever your Will assigns as beneficiaries, will remain.

This is an important time in your life. Marriage brings about many changes and documents to sign – one important one to consider is your Will. Ensuring your intentions are met for your future is an important consideration.

2. I don't have a Will
If you die intestate (without a Will), your spouse will receive the first $350,000 of your estate. The remainder will be distributed between your spouse and your children. A lawyer can assist you in developing a plan for your future that meets all your intentions.

3. I want to make a New Will
With a wedding under your belt, and looking towards your future, it is a great time to discuss what you can control about your future. Is your wish to ensure that your spouse and your future children (or existing children) are protected and provided for? Then you will need to specify this in a new Will.

4. I have a previous spouse – Separation and Divorce
Under the previous legislation, a separated spouse had property rights. Under the new legislation, even if you are not divorced yet, separation will be treated as if you are legally divorced when it comes to your estate. You will be considered separated if you have been living separately and apart for 3 years, have a separation agreement, or a court-ordered separation agreement.

If you left any gifts to a separated spouse, these will now be revoked. The Will will be viewed as if the separated spouse predeceased you (unless there is wording to the contrary in the Will).

Under the *Family Law Act,* these changes also reflect the entitlement to reflect as $0.

Don't let writing up a Will confuse you; our friendly lawyers are here to assist.

This blog was co-authored by Summer Law Student, Kathleen Judd.

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Parental Mobility Rights – When does Relocation become Parental Child Abduction?

RELOCATION

When a parent with primary decision-making responsibility for a child decides to relocate after a separation due to a new job, proximity to family, or a relationship, the move will certainly affect the access parent.

RECENT AMENDMENTS TO THE DIVORCE ACT

The law pertaining to the relocation of a child is found under section 16.9 of the *Divorce Act.* The new section 16.92(1) requires the court to consider additional factors when deciding whether a relocation should be permitted:

- The reason for the relocation
- The impact of the relocation on the child
- The parenting time and involvement that each person has with the child
- Whether the person planning the relocation has given the proper notice
- Whether there is a court order or agreement that says a child is supposed to live in a certain place
- Whether the proposal to change the parenting arrangement is reasonable, and
- Whether the people involved have been following their court order or agreement.[1]

The exceptions to providing notice prior to moving are 1) if you have permission from the court not to give notice if there is family violence, or 2) if you have a court order saying you do not have to give notice of a move.[2]

PARENTAL CHILD ABDUCTION WITHIN CANADA

In Canada, the most common form of child abduction is by a parent or guardian. The term parental child abduction refers to when a

parent/guardian takes, detains, or conceals a child from the other parent/guardian. It is not uncommon for other family members to assist the abducting parent/guardian with removing or concealing the child[3].

If the child is believed to have been abducted locally, it is important to contact local law enforcement immediately. The matter can often be resolved through the civil courts. As a parent/guardian, you can apply to the family court to have the child returned to you.

In Ontario, you will need a parenting order under the *Children's Law Reform Act* ("CLRA"). Sections 36 and 37 of the CLRA allow the courts to grant a parental order where the child is unlawfully withheld and to prevent unlawful removal of the child respectfully.[4]

If the child has been abducted to a different province, a parenting order or agreement is necessary to have any decision-making responsibility and parenting time arrangements enforced.[5] If you do not have a parenting order or parenting agreement in place, you may need to apply for a parenting order in family court.[6] The order should be obtained in the jurisdiction where the child resided, often referred to as the "habitual residence."

If you are divorced or getting a divorce, but a parenting order has not yet been made, the parenting order needs to be sought under the *Divorce Act.*[7] If you already have a parenting order, you may be able to have it enforced in another Canadian province or territory. According to section 20(3) of the *Divorce Act*, the court can make a parenting order have legal effect throughout Canada.[8]

If you have an informal agreement in place, it may not be enforceable by the courts and therefore it is recommended that you apply for a parenting order pursuant to section 16.1(1) of the *Divorce Act*.[9] If you are not getting a divorce, then provincial laws will apply.

RELOCATION OR PARENTAL ABDUCTION? – CASES TO CONSIDER

Parental Abduction

In *R v Finck, OJ No 2692*, the mother died almost one year after the birth of child and left instructions that her brother should have decision-making responsibility and assume parental responsibilities. The father commenced proceedings to alter the parenting order. Ultimately, parental responsibility was awarded to the mother's brother, with generous rights of access granted to the father. The father took the child to Nova Scotia and kept the child there until he was apprehended. The child was returned to the mother's brother and the father was charged with abduction in contravention of the parenting order with intention of depriving the legal guardian of possession of the child.

Relocation

In *Buckner v Card, 2007 ONCJ 51*, the parties were the parents of a 22-month-old child. Since the child's birth, the mother had been his primary caregiver while the father exercised access on a casual basis. Without notice to the father, the mother had moved to Alberta with the child. The court granted the mother sole decision-making responsibility as she had been the child's primary caregiver. While the mother should not have moved unilaterally, the court found that she wished to move for legitimate reasons and not to frustrate the father's access. The father's proposed plan was to continue working full-time and he would delegate his childcare responsibilities to others during his work absence, which was considerable. The mother was better off in Alberta financially and the father's present accommodations and plans were "sketchy". It was not in the best interest of the child for the mother to be forced to return to Red Lake, Ontario. The distance (22-hour drive) was deemed not insurmountable for the father to exercise access. The court held it was in the child's best interests that he remains in his mother's care in Alberta.

In the recent case of *Fawcett v Slyfield, 2021 ONCJ 459*, the mother moved the children from Woodstock, Ontario to Manitoba following the parties' separation, over the objections of the father, without a written agreement or court order, and without making arrangements for any meaningful parenting time for him. While the father contested mobility and also decision-making and primary residence, the court ultimately allowed the mother to relocate with the children to Manitoba, pending trial.

PENALTIES FOR PARENTAL ABDUCTION

Parental abduction is a serious criminal offence and is governed by sections 281 and 282 of the Criminal Code. A parent or guardian convicted of abducting a child can face up to 10 years in prison.[10] However, abduction does not automatically revoke the offender's right to access. Parental abduction will be considered in determining whether sole decision-making responsibility is appropriate. Canadian courts take a holistic approach in assessing what is in the "best interests of the child".[11]

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This blog was co-authored by Summer Law Student, Owais Hashmi

[1] Ibid at s 16.92(1).
[2] Ibid.
[3]
[4] *Children's Law Reform Act*, RSO 1990, c C.12, s 36-37.
[5] "Child abduction by a family member" (26 October 2021), online: Ontario.
[6] Ibid.
[7] Ibid.
[8] *Divorce Act*, RSC 1995, c 3 (2nd Supp.), s 20(3).
[9] Ibid at s 16.1(1).
[10] Criminal Code, RSC 1985, c C-46, s 281(a).
[11] "Defining the Best Interests of the Child" (07 January 2015), online: *Department of Justice.*

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What Happens To The Deposit When A Real Estate Transaction Doesn't Close?

It is routine in real estate transactions for a seller to provide a deposit to the buyer as a 'guarantee,' serving to incentivize the completion of the sale. But what happens to a deposit if the sale falls through, further, what if it is not the buyer's fault for the sale failing to be completed?

In the event, an agreement of purchase and sale is "repudiated"–meaning one party chooses not to fulfill their obligations under the contract–the determination of who is entitled to receive the deposit will usually depend on which party is at fault.

If Buyer is at Fault:

Deposits typically are provided as security for the buyer's performance of a contract, thus where a sale has fallen through and the buyer is at fault, the seller is presumptively entitled to keep the deposit as compensation for their lost opportunity.

In *Azzarello v. Shawqi* the Ontario Court of Appeal stated "[it] is well-established by case law that when a purchaser repudiates the agreement and fails to close the transaction, the deposit is forfeited, without proof of any damage suffered by the vendor".[1]

Even if an agreement does not explicitly state what is to happen to the deposit if the transaction fails, the law will presume that the deposit is forfeited by the at-fault buyer unless there is a basis to rebut this presumption.

If Seller is at Fault:

As is provided in most standard agreements of purchase and sale, where a seller is at fault for a transaction not closing, the buyer will

be entitled to have their deposit returned to them absent exceptional circumstances,

In Kalis v. Pepper, the Ontario Superior Court was tasked with determining which party in a failed home purchase was entitled to keep the deposit. Ultimately, the deposit was returned to the buyer due to a lack of clear evidence that the buyer has repudiated the agreement.[2]

Exceptions to the Presumptive Rule:

While the above assumptions apply when determining who gets to keep a deposit in a failed real estate transaction, the default outcome may be overridden in some circumstances. If parties have specifically negotiated an alternative outcome for what will happen to the deposit in the event of a breach, and it is reflected in their agreement of purchase and sale, then courts will often respect that clause.

Additionally, the courts have the discretion to displace the presumption that the non-breaching party will be entitled to the deposit. Section 98 of Courts of Justice Act provides "[a] court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise are considered just".[3] The court has exercised this discretion in circumstances where the amount of the deposit is disproportionately larger than the harm suffered as a result of the transaction failing, or in instances of unconscionability (where the agreement is the result of substantial unfairness and inequality of bargaining power).[4]

For example, in Lucas et al v 1858793 ON the court ruled that the buyer did not have to forfeit its $90,000 deposit on the purchase of a condo unit because that amount was "grossly disproportionate to the harm if any, that the [seller] suffered".[5] Further, the Application judge felt the seller had only used the breach of the contract (allowing a friend to live in the unit for free – which the seller claimed was leasing the unit without their consent, contrary to their agreement) as an excuse to terminate the agreement before closing and keep the deposit.

This article is intended to inform. Its content does not constitute legal advice and should not be relied upon by readers as such. If you require legal assistance, please see a lawyer. Each case is unique, and a lawyer with good training and sound judgment can provide you with advice tailored to your specific situations and needs.

This blog was co-authored by Summer Law Student, Chloe Carr

[1] *Azzarello v Shawqi*, 2019 ONCA 820 at para 45.
[2] *Kalis v Pepper,* 2015 ONSC 453 at paras 13-14.
[3] *Courts of Justice Act*, RSO 1990, c C 43, s98.
[4] *Uber v Heller*, 2020 SCC 16.
[5] *Lucas et al v 1858793 Ontario Inc. o/a Howard Park et al*, 2020 ONSC 964 at para 55.

For all your queries please feel free to contact Graeme via email at graeme.oddy@devrylaw.ca or call 416-446-5810

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DSF is growing!

Colin Lyon, *B.A., J.D*

Colin Lyon joined DSF in February 2022 as an associate lawyer in our real estate department at WP Law. He completed his B.A. from the University of Toronto and holds a J.D. from Osgoode Hall Law School. Colin was called to the Bar in 2018. Prior to joining DSF, Colin worked for the City of Vaughan where he gained years of experience in complex real estate matters. He handled transactional real estate matters for the City and is well-versed in resolving historical title issues such as conflict of ownership and Land Title conversion issues.

Graeme Oddy*, B.A., J.D.*

Graeme Oddy joined DSF in March 2022 as an associate lawyer in our commercial litigation department in Toronto. He holds a B.A. (Hons) and a J.D. from the University of Toronto. Graeme was called to the Bar in 2018. Prior to joining DSF, Graeme articled at a boutique law firm in Toronto and then became a sole practitioner, offering a broad range of services to both individuals and businesses in litigation, corporate/commercial law, tax planning, and real estate.

Moyo Adekusibe*, B.A., LL.B*

Moyo Adekusibe joined DSF in March 2022 as an associate lawyer in our real estate department in Barrie. He completed his B.A. from York University and obtained his LL.B (Hons) from the University of Birmingham in the UK. Moyo was called to the Bar in 2017. Prior to joining DSF, Moyo worked at boutique law firms in Toronto where he gained experience in a wide range of real estate matters including residential purchases, sales and pre-construction transactions, private mortgage transactions (including private construction loans), title transfers, and survivorship applications.

Dara Khoeum*, B.A., J.D.*

Dara Khoeum joined DSF in April 2022 as an associate lawyer in our family law department in Toronto. He holds a B.A. (Hons) from the University of Toronto, a J.D. from Bond University, Australia and has completed two certificate programs at Osgoode Hall Law School: the Family Law Skills and Practice Program, and the Intensive Trial Advocacy Workshop. Dara was called to the Ontario Bar in 2015.

Colleen Dermody*, B.PHE (Hons), M.P.A, J.D*

Colleen Dermody joined DSF in May 2022 as an associate lawyer in our real estate and wills and estates departments in Haliburton. She holds a BPHE (Hons) and MPA from Queen's University and a J.D. from the University of Windsor. Colleen was called to the Bar in 2022. Prior to joining DSF, Colleen summered and articled for a global law firm in Toronto where she gained extensive experience in litigation. She also assisted with drafting contracts, legal memoranda and submissions along with conducting extensive research on her case files.

Eli Smolarcik, *J.D.*

Eli Smolarcik joined DSF in May 2022 as an associate lawyer in our commercial litigation department in Toronto. He holds a J.D from Osgoode Hall Law School. Eli was called to the Bar in 2016. Prior to joining DSF, Eli worked at a Toronto-based boutique litigation firm. Eli's expertise includes liquidated and non-liquidated debt recovery, contractual disputes, real estate disputes, and shareholder disputes.

Charlie Fuhr*, BSc (Hons), J.D (Dual)*

Charlie Fuhr joined DSF in June 2022 as an associate lawyer in our commercial litigation and insurance defence departments in Toronto. He holds a BSc (Hons) and a double J.D. from the University of Windsor and the University of Detroit Mercy. Charlie was called to the Bar in 2020. Prior to joining DSF, Charlie worked at a boutique firm in Toronto, practicing in the areas of personal injury, and civil and commercial litigation.

Hyland Muirhead, *LLM, LLB*

Hyland Muirhead joined DSF in June 2022 in our commercial litigation, collections and mortgage recovery, and bankruptcy and insolvency departments in Toronto. She holds an LLB from the University of Leicester and an LLM from the University of Miami. Prior to joining DSF, Hyland articled for a boutique law firm in Toronto, practicing in the areas of commercial and civil litigation.

David Heppenstall*, B.Comp, J.D*

David Heppenstall joined DSF as a law student and has returned as an associate lawyer in our commercial litigation department in Toronto. He received his Bachelor of Computing from the University of Guelph. During his pre-law, technical career, David developed solutions for complex customer issues at Dell EMC. He transitioned to law and received his J.D. from Osgoode Hall Law School in 2021. David was called to the Bar in 2022.

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Letter from our managing partner

Devry Smith Frank *LLP's* new Collingwood location is a natural addition to our firm as we continue to expand to serve the needs of our clients in central Ontario. Our accessible location is within walking distance from the town square. We are happy to welcome businesses and individuals who are in need of quality legal service in multiple areas of law, including family law, real estate, education, commercial litigation and employment law.

DSF/WP Law is also pleased to welcome many new hires to our multiple office locations: Colin Lyon, Graeme Oddy, Moyo Adekusibe, Dara Khoeum, Colleen Dermody, Eli Smolarcik, Charlie Fuhr, Hyland Muirhead and David Heppenstall.

Colin joined our real estate department practicing from our WP office. He brings years of experience working for the City of Vaughan in complex real estate matters.

Our commercial litigation department has increased its depth of practice by welcoming multiple lawyers to our team. Graeme, Eli, Hyland, Charlie and David each bring a broad range of experience in litigation matters including contract disputes, shareholder and partnership disputes, professional negligence claims, disciplinary proceedings, and more.

Dara is a part of our Toronto family law department, bringing with him valuable experience in many family law matters by working for multiple boutique firms in the GTA.

Our Barrie office is pleased to welcome Moyo, whose experience encompasses an array of real estate matters ranging from residential purchases, sales, pre-construction transactions, private mortgage transactions, title transfers, and survivorship applications.

Lastly, we welcome Colleen to our Haliburton office. She will be practicing in the areas of real estate and wills and estates to serve the pressing needs of our clients in that region and surrounding areas.

Through our continuous expansion, we hope to meet the demands of our ever-growing clientele around the GTA. Together we look forward to a bright summer ahead!

Larry Keown
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Devry Smith Frank *LLP*
Lawyers & Mediators