


HST continued...

In theory, the consumer ends up paying a hidden increase in the cost of goods as a result of the current PST tax regime. The idea behind the new HST regime is that it will remove that hidden increase in the cost of goods by implementing a flow-through tax. The tax savings will then be passed on to customers in the form of decreased prices.

In exchange for the new HST, the province will offer tax cuts, credits and exemptions, plus a one-time \$1,000 payment for most families with household incomes of less than \$160,000. The government will also be offering a total of \$400 million in one-time transition assistance to small businesses in the form of a transition credit. It is expected that Ottawa will also give Ontario \$4.3 billion in assistance to ease the difficult transition.

With the passing of this legislation, SorbaraLAW will be implementing changes to our accounting and billing procedures in order to comply with the new HST regime. As such, we simply ask that you keep in mind that these changes have been mandated by legislation when you begin to receive legal accounts that include an additional 8% tax. 

SorbaraLaw Supports Waterloo Region Small Business Centre

SorbaraLaw is pleased to announce its support of The Waterloo Region Small Business Centre (WRSBC) as a corporate sponsor for 2010. This partnership will support local small business owners and enhance the services offered to WRSBC clients.

The WRSBC is committed to encouraging and contributing to the enterprising spirit of entrepreneurs during start up or early growth stages of business. The core services at the centre include:

- Consultations (drop-in or scheduled)
- Business plan review
- Market research assistance
- Business name search and registration
- Workshops, seminars, small business events
- Canadian Youth Business Foundation (business loans for youth 18-34)

For more information contact: www.waterlooregionsmallbusiness.com

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Kitchener – 200 King St. W., 519.741.2604

Waterloo – 100 Regina St. S., 519.747.6265

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Sorbara, Schumacher, McCann LLP is the Region's largest local law firm with twenty-two lawyers and offices in Kitchener and Guelph specializing in all areas of business law.

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HST: The New Tax Regime

On December 9, 2009, the Ontario Legislature passed a controversial bill that provides for a Harmonized Sales Tax (HST). The HST will combine the current 8% Provincial Sales Tax (PST) with the 5% federal GST. The introduction of the HST, as of July 1, 2010, will have a profound effect on service-based businesses, as a range of items previously untouched by the PST – including real estate commission, air travel and of course, legal services – will now be taxed at the greater rate of 13%.

In general, the HST will apply to all goods and services that are currently subject to GST. However, HST will not be charged on:

- basic groceries
- prescription drugs
- some medical devices
- municipal public transit
- health and education services
- legal aid
- most financial services
- child care
- tutoring
- music lessons
- residential rents
- condo fees

In addition, the provincial portion of the HST will not be charged on the following items:

- children's clothing and footwear
- children's car seats and car booster seats
- diapers
- feminine hygiene products
- books (including audio books)
- prepared food and beverages sold for \$4 or less
- print newspapers

The new tax regime will apply much like GST in that businesses will be permitted input tax credits on goods and services they acquire, making the HST a flow-through tax that, in theory, is tax-neutral to businesses.

Under the current PST regime, as each business along the production chain sells a product to the next supplier on the supply chain, PST is added to the sale price of the product. For example, a supplier of raw materials adds the cost of the PST it has paid in supplying the raw material to the final cost of the raw materials sold to the manufacturer of the product. The manufacturer then adds the cost of the PST it has paid in manufacturing the product to the price of the product sold to the retailer, who in turn adds the cost of the PST it has paid to the final price of the product sold to the consumer. The consumer then pays PST again on the final cost of the product.

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Realtors May Soon Have New Competitors

Following an extensive two-year investigation, the Canadian Competition Bureau has released its findings with respect to an inquiry into the rules and practices of the Canadian Real Estate Association (CREA). According to the Competition Bureau, aspects of CREA's rules and practices prevent innovative business models from offering "unbundled" real estate services. The Bureau is concerned that these practices restrict consumer choice, which ultimately means that CREA has failed to comply with the *Competition Act*.


CREA is one of Canada's largest trade associations, representing more than 96,000 real estate Brokers and agents. CREA members include real estate professionals who are members of organized real estate councils. These professionals are required to comply with CREA's REALTOR® Code, which outlines the acceptable standard of conduct for all real estate practitioners.

CREA owns the REALTOR® trademark. As such, not all real estate professionals are

entitled to call themselves REALTORS®. Only those professionals who subscribe to CREA's REALTOR® Code are permitted to use the trademark. In addition, CREA limits access to its Multiple Listing Service (MLS) to REALTORS®. The MLS is essentially a database of property information on properties for sale across Canada. CREA's rules prohibit sellers from listing property information on the MLS without retaining a listing REALTOR® to act as their agent throughout the entire listing process. This prohibition thus restricts sellers from selecting the particular real estate services they wish to receive from the real estate professional. While a seller can elect not to use the MLS, its dominance in the marketplace means that seller's property will have far less exposure to potential buyers. From the Competition Bureau's perspective, these practices are cause for concern.

The Bureau has requested that CREA remove existing rules that require a REALTOR® to act as an agent for the seller through the entire time of the listing contract

posted on the MLS, and the requirement that the listing REALTOR® receive and present all offers and counteroffers to the seller. In addition, the Bureau suggests that CREA remove the prohibition against "mere posting" of a property. CREA currently prohibits listing members from relieving themselves from the obligations of a listing REALTOR®. CREA requires that a listing REALTOR® remain the agent of the seller throughout the term of the listing contract. With the removal of this obligation, a real estate professional could list a property on the MLS without being required to continue providing additional services to the seller. It is not yet clear whether these changes would also permit individuals to list properties on the MLS for a fee.

The Competition Bureau and CREA are now in discussions to reach a settlement with respect to these outstanding issues. The result of these discussions could dramatically change the way real estate is bought and sold in Canada. Watch for an update on this story in upcoming editions of *LegalEase*. 

Severance Pay Can Be Limited to Statutory Minimum By Contract

The Ontario Court of Appeal recently considered the enforceability of a standard termination provision in the context of an employment contract. The Court's decision in *Clarke v. Insight Components (Canada) Inc.* is a welcome clarification of the law for employers in Ontario.

Robert Clarke was first employed by Insight Components in 1995. In 2001, pursuant to a new company-wide policy, he signed a new written employment contract that contained the following termination provision:

Termination of Employment – Your employment

may be terminated for cause at any time in which event you shall be entitled to only the amount of your salary and vacation pay earned up to the effective date of termination. Your employment may be terminated without cause for any reason upon the provision of reasonable notice equal to the requirements of the applicable employment or labour standards legislation. By signing below, you agree that upon the receipt of your entitlements in accordance with this legislation, no further amounts will be due and payable to you whether under statute or common law.

With this new clause, Insight Components purported to give itself the right to terminate

Clarke's employment without cause and provide him with only the minimum statutory termination requirements. In most cases, these statutory minimums are significantly less than what the common law would require.

Later in that year, Clarke received a significant promotion, becoming the "Managing Director for the Canada Region." As part of this promotion, Clarke signed another agreement, again incorporating the above provision.

As a result of an internal reorganization, Insight Components terminated Clarke's employment without cause in 2004.

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Changes to Family Law a Step in the Right Direction

LegalEase readers might recall an article in our Winter 2009 issue titled "Proposed Overhaul to Family Law Legislation in Ontario" in which we discussed Bill 133 and its proposed changes to the family law system. On December 17, 2009, Attorney General Chris Bentley announced that the new *Family Statute Amendment Act* will come into force in March, 2010. The long-promised changes heralded by this Act are intended to make family law proceedings faster, less expensive and less combative. However, Mr. Bentley provided few details about how some of those goals will be achieved.

With the coming changes, Ontarians can expect to have better access to legal advice, and more options like mediation, arbitration and collaborative family law, which are much less combative than the traditional adversarial process. The changes will be implemented first in the courts in Brampton and Milton early in 2010. There, parties who have separated will attend mandatory information sessions where they will learn about their basic rights and the steps they need to take. It is hoped that the changes will let people know that they have options aside from the traditional, and costly, court procedures.

Many in the legal community believe this is a step in the right direction, with the government recognizing the importance of helping separated families resolve their differences through non-litigious means. However, some have expressed concerns about how effective the changes will be. For example, the new measures have been criticized for not including any increased funding, settling instead on a re-allocation of existing Legal Aid funds, or essentially "robbing Peter to pay Paul." The recent actions of Ontario criminal lawyers in boycotting the province's Legal Aid program illustrate just how problematic these funding issues can be. Without increased funding, many Ontario

family lawyers question how effective the changes can be.

Some legal experts suggest that the province should move toward implementing more Unified Family Courts, in which experienced family law judges deal with all aspects of a case. However, this would require the joint efforts of the Ontario and Federal Courts, as Superior Court judges are appointed federally.

The changes also deal with other procedural matters, like reforms to the evidence that must be before the court in child custody cases, including the requirement for parents seeking custody to submit a parenting plan. Further, non-parents will be required to submit a police records check and information about any Children's Aid Society involvement, and judges will have access to any Ontario Family Court file. These reforms are a response in large part to the tragic death of Katelyn Sampson, who was found dead in the home of a woman who had been awarded custody of the girl notwithstanding previous convictions for prostitution, drug trafficking and assault with a weapon.

The changes also include permitting a biological parent who has been left off a birth certificate to apply to have his or her surname added to the child's surname. In addition, breaches of restraining orders in family law matters will now be prosecuted as criminal offences.

Further reforms affecting spousal pension valuation and division have not yet been proclaimed, and this will not occur until the Ministry of Finance has completed the regulations. The regulations will describe how the new pension rules will work for the plan administrator, who will be responsible for providing the new family law pension value.

The changes to family law are welcomed by many in the legal community as a step in the right direction. But many Ontario family law practitioners hope that the Attorney General will continue to make ongoing reforms.

LegalEase

Responsible Communication in the Public Interest

The Supreme Court of Canada recently released two decisions involving libel suits against Canada's major newspapers. In these groundbreaking decisions, the Court delivered a victory for press freedom by increasing the protections afforded to journalists, internet bloggers and others against Canada's typically harsh libel laws.

The Supreme Court ruled unanimously to set aside two separate libel lawsuits. The first suit was brought by Peter Grant against the Toronto Star after the Star published an article in 2001 reporting that a development application brought by Grant was a "done deal," given Grant's close ties to then Premier of Ontario, Mike Harris. The trial judge ruled in favour of Grant, awarding \$1.45 million in damages.

The second suit was brought by OPP Constable Danno Cusson against the Ottawa Citizen. At trial, Cusson was awarded \$100,000 in damages with respect to an article published by the Citizen reporting that Cusson had misrepresented himself as an RCMP officer to authorities at the Ground Zero site in New York City in order to aid in the search for survivors

following the attacks of 9/11.

In ruling in favour of the newspapers, the Supreme Court created a new defence available to journalists and internet bloggers against claims of libel. The new defence of "responsible communication" on matters of public interest is now available to both traditional and non-traditional journalists so long as they work diligently to verify the accuracy of their reporting. Journalists' due diligence efforts will be judged having regard to a number of different factors, including the seriousness of their allegations, the public importance of the matter, and the status and reliability of the source. In essence, responsible journalists who make reasonable efforts to verify their facts should now feel more secure in their protection from libel lawsuits.

The Supreme Court's decisions follow similar legal developments made in other Commonwealth countries, bringing Canada's defamation laws in line with those of the United Kingdom and Australia.

The new defence seeks to balance the

individual's right to protect his or her good name with the public's interest in encouraging free and open debate. Writing for the unanimous court, Chief Justice Beverly McLachlin explained the need for striking a proper balance: "Freewheeling debate on matters of public interest is to be encouraged and must not be thwarted by overly solicitous regard for personal reputation.... While the law must protect reputation, the current level of protection – in effect a regime of strict liability – is not justifiable."

Lawyers representing Canada's major newspapers described the court's decisions as nothing short of groundbreaking. Paul Schabas, counsel for the Toronto Star, considers them a necessary development for a democratic society: "this is a great step forward in democratic and open discussion." Peter Jacobsen, counsel for the Globe and Mail, emphasized the chilling effect of the old law: "[Reporters] don't have to be afraid of being sued just because they got it wrong. Now, if they've done everything they can reasonably do to get it right, they can publish without fear of horrendous libel damages against them." [Legal Edge](#)

Severance Pay continued...

Relying on the termination provision, it claimed it was only obligated to provide him the statutory minimum termination entitlement. In response, Clarke brought an action for wrongful dismissal, arguing that the termination provision did not apply and he was thus entitled to full common law notice of termination.

At trial, the Judge held that the termination provision was indeed enforceable. Clarke appealed this decision on the following grounds:

1. the termination clause was ambiguous;
2. the termination provision was void as it excluded entitlements to claims that could arise under other statutes;
3. the termination provision was not

supported by consideration; and

4. the employer repudiated the agreement by failing to pay the minimum *Employment Standards Act* requirements related to Clarke's car allowance and bonus plan.

The Court of Appeal rejected all of Clarke's arguments and dismissed the appeal. Most importantly, the Court held that the termination provision clearly provided a reasonable notice period equal to the requirements of the applicable employment legislation, and specifically excluded any further amounts that could otherwise be claimed under the common law. Further, the introduction of the termination provision occurred contemporaneously with a promotion and significant increases to Clarke's

remuneration package. These were new benefits extended to Clarke in consideration for his agreeing to the termination clause. The case is thus distinguishable from other cases in which termination clauses are unilaterally added by the employer without such a corresponding benefit to the employee.

This decision of the Ontario Court of Appeal is an important victory for employers. It sends a strong indication that courts will uphold properly drafted termination provisions that limit the reasonable notice period to that provided by the *Employment Standards Act, 2000*. In response, employees should be cautious and always seek legal advice before signing employment agreements. [Legal Edge](#)

Saying "I'm Sorry" Becomes a Little Easier

Saying "I'm sorry" has never been easy, whether it is in business, politics, the courtroom, or in our personal lives. Not only is it difficult simply to utter the words, but there was often concern that an apology to a wronged person would be interpreted as an admission of guilt or liability for the wrongdoing. As such, when involved in accidents or situations of conflict, people have always been told: "Don't say anything that could incriminate you! Don't say 'I'm Sorry'".

Unfortunately, this philosophy toward apologies can make conflicts more painful for wronged parties, who often seek only some form of acknowledgment of the wrong and an expression of apology or regret from the wrongdoer. But with the risk of liability, apologies were seldom forthcoming.

That may be changing, however, with Ontario's new *Apology Act*, first introduced by David Oraziotti as a private member's bill. Statistically, private member's bills rarely become law. However, the *Apology Act* gained traction in the growing belief that encouraging people to apologize for their wrongdoings can reduce tensions in conflict situations, promote accountability between parties, and help the healing process.

With the *Apology Act*, Ontario becomes the most recent province to enact such legislation, joining Alberta, British Columbia,

Manitoba, Nova Scotia, Saskatchewan, and more than half of the states in the U.S. The legislation seeks to encourage parties to make apologies by providing that an apology:


- does not constitute an admission of fault or liability on behalf of a person;
- does not affect any insurance coverage or indemnity available despite any wording to the contrary in the contract of insurance (or any other law or regulation);
- shall not be taken into account in determining fault or liability in the matter; and
- is not admissible in any civil (court) proceeding, administrative proceeding or arbitration as evidence of fault or liability.

The Act describes an apology as an expression of sympathy or regret, a statement that a person is sorry, or other words or actions indicating contrition or commiseration.

The philosophy behind the *Apology Act* is the hope that making people feel more comfortable apologizing for their wrongdoings will promote more open communication between parties in disputes and lead to earlier resolution of such matters. Mr. Oraziotti suggests that apology laws in other jurisdictions have led to a reduction in overall lawsuits and claims in the court system, as people feel more free to discuss what took

place and bring closure to their disputes. The potential savings of cost, time and stress could be enormous.

Take heed, however: the Act does not apply in all situations. If an apology is made during an active civil court proceeding, an out-of-court examination, or during testimony in an administrative proceeding or an arbitration, the apology may still be admissible as evidence of fault or liability. It is also worth noting that the *Apology Act* does not apply to criminal proceedings, proceedings under the *Provincial Offences Act*, or proceedings of a civil or administrative nature that are related to a conviction for a criminal or provincial offence. Further, apologies may be used as evidence in disputes under the *Limitations Act*.

A simple apology may not resolve every dispute. But it can be a valuable tool in reducing animosity between parties in conflict. Though the words may never roll off the tongue with complete ease, "I'm sorry" just became a little easier to say. 

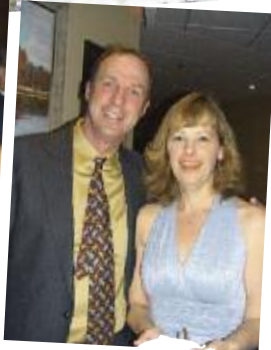
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Around the Firm

SorbaraLaw is pleased to announce and celebrate three significant staff anniversaries in 2009. Our office manager, Jennifer Forcellini, and Lisa Hummel, Sam Sorbara's assistant, each celebrated their 25th anniversary with the firm and Bonnie Caskenette, our receptionist at the Guelph office, celebrated her 10th anniversary with the firm. All three of these employees have been integral parts of our team and have demonstrated loyalty and a commitment to excellence in everything they do for the firm. We would like to take this opportunity once again to recognize and thank Jennifer, Lisa and Bonnie for their many contributions to our success.

These anniversaries were formally acknowledged at the firm's Christmas party on December 19, 2009 at The Inn at Christie's Mill in Port Severn, where

Jennifer, Lisa and Bonnie were presented with special gifts. The Inn at Christie's Mill was a wonderful



setting for a special evening that included a gourmet meal, socializing and dancing. A great time was had by all. We would like to thank our friends at The Inn for making the event so special.

We are also pleased to announce and celebrate the recent marriage of Seth Jutzi, our newest litigation associate, and his spouse

Alicia McFadden. Seth and Alicia were married on October 16, 2009 in a ceremony at Eglinton St. George's United Church followed by a reception at the Eglinton Grand Theatre. Congratulations to Seth and Alicia!



Our congratulations also go out to Susan Liu, our International Business Consultant, and her husband, Richard Zhang, on the birth of their second child, Daniel Runhan Zhang. Daniel was born on January 4, 2010 at 1:20 p.m., weighing 9 lbs. 3 oz. and measuring 21 3/4" in length. Congratulations!



gathering at The Bauer Kitchen for our staff and their spouses. The event was a great success and enjoyed by all in attendance. Congratulations to Carl and Joe for their victory in the pool tournament and a special thanks to James & Brenda and the entire social committee for organizing the event.



Last but not least, we also wish to extend our congratulations to Gary Keller, his wife Jan, and his daughter Janine (a former SorbaraLaw employee) on the birth of Janine and Cheong's first child, Jalela Soong Jing Ng. Jalela was born on Saturday, October 3, 2009, weighing 6 lbs, 8.5 oz. and measuring 19 inches in length. Welcome Jalela!



SorbaraLaw once again participated in the Kitchener-Conestoga Rotary Club and House of Friendship's annual Christmas turkey drive. We matched each turkey donation made by our staff and arranged for the amount of each donation to be deducted from payroll as requested by the staff. We would

like to extend our thanks to all of the staff who generously participated in this drive. Together, we were able to donate almost 100 turkeys to the House of Friendship.

On February 18, 2010, SorbaraLaw hosted a pool night at Dooly's followed by a social



Home Inspector Ordered to Pay \$200,000

In a recent decision of the British Columbia Supreme Court, a home inspector, Imre Toth of Aldergrove, B.C., was ordered to pay nearly \$200,000 in damages to a Vancouver couple stemming from a faulty home inspection. The potential impact of this case has sent shock waves through the home inspection industry.

In *Salgado v. Toth*, the Plaintiff purchasers entered into an agreement of purchase and sale to buy a \$1.1 million house. The agreement was subject to the completion of a home inspection. At the recommendation of their real estate agent, the purchasers retained the services of Toth. Following a brief inspection of the house, Toth provided both a written report and a verbal report, including an estimate of \$20,000 to repair a number of structural deficiencies. Content with this estimate, the purchasers completed the purchase and took possession of the property.

After closing, the purchasers discovered serious problems with the structure of the house, far beyond those identified by Toth, including extensive rotting of the structural beams. The actual cost of restoring the house was more than \$200,000, ten times the estimate provided by Toth.

At the conclusion of a five-day trial, the judge ruled that Toth had been negligent in failing to inspect all “readily accessible and visible areas” of the property – including the structural beams – as required by the contract between the parties. Alternatively, Toth had been negligent in failing to draw attention to the fact that he had not had the opportunity to access and inspect those portions of the property.


Further, the judge ruled that Toth’s repair estimate was “woefully inaccurate.” While it was not possible to conclude that the purchasers had relied on this estimate, the relatively low figure had lulled the purchasers into assuming that the rot was of no particular importance. The judge concluded that the purchasers would not have bought the house had the full extent of the rot been known and brought to their attention. As a result, the purchasers were awarded the difference between Toth’s estimate and the final repair bill.

At trial, Toth argued that any finding of liability must be limited to the cost of his service, \$450, in accordance with the limitation of liability clause set out in the inspection contract. Among other things, the contract provided that: “The inspection and report are not intended to reflect on the market value of the Property nor to make any recommendations as to the advisability of the purchase.”

The judge rejected this argument, finding that, despite this clause, Toth made recommendations that were relied upon by the purchasers. The evidence established that very little time was given to the purchasers to read and understand the home inspection contract. By the very nature of the home inspector relationship, the need to rely on what is said by the inspector is critical. As a result, if there had been any suggestion that the purchasers could not rely on what Toth said, the purchasers would not have signed the contract.

Finally, the judge held that limitation clauses must be drafted with complete clarity and that the principle of *contra proferentum* – a

clause to a contract is to be construed against the party insisting on its inclusion – must be applied. As a result, Toth could not hide behind the limitation clause.

It is expected that this case will bring an end to the “quickie” home inspection. Clearly, there is a disconnect between the reliance that purchasers seek to make on their inspection reports and the level of liability the inspectors intend to assume. We can now expect to see inspectors across Canada scrambling to manage this new risk of increased liability, possibly through stronger language in the exclusion clauses, enhanced insurance coverage, and/or other options. At the very least, this decision should make all parties – inspectors, purchasers and vendors – take extra care in assessing home inspection reports. 

LegalEase is circulated seasonally to over 1,000 businesses and individuals in and around Waterloo Region and Wellington County. If you would like more information about *LegalEase* or are interested in contributing to upcoming issues, please feel free to contact Justin Heimpel at our Kitchener office.