

LegalEase®

Summer 2010

A straightforward look at law and business

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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What's in a Name?

In business today, name recognition can be difficult to achieve, but is invaluable once obtained. The vast number of litigation battles, pitting corporations against each other in trademark and copyright disputes, illustrate just how important a business name can be to the success of a corporation. The importance of name recognition is why businesses go to such great lengths, and costs, to protect their public images.

It is a little known fact, however, that not all battles over business names need to be fought in the courtroom. Recently, SorbaraLAW was successful in obtaining an order from the Ministry of Government Services on behalf of our client, Spartan Electric Limited ("Spartan Electric Guelph"), requiring a competing business, Spartan Electric Inc. ("Spartan Electric Toronto"), to change its business name.

Our client, Spartan Electric Guelph, is a general electrical contractor, incorporated in 1977, supplying services out of its head office in Guelph, Ontario. During its many years in business, Spartan Electric Guelph developed a loyal customer base and significant name recognition, including a trademarked "Spartan head" logo and a unique catch-phrase. In the spring of 2008, however, it discovered that another business was operating under the name Spartan Electric Inc. in Toronto. This other business was a general electrical contractor,

used a picture of a "Spartan head" as its logo, and even used a similar catch-phrase on its website and advertising. Spartan Electric Guelph soon discovered that this competitor even supplied services to the same customers as Spartan Electric Guelph. When one such customer mistakenly forwarded payment to Spartan Electric Toronto for services performed by Spartan Electric Guelph, our client decided to take action.

Pursuant to the *Ontario Business Corporations Act*, a company may not use a name that is similar to the name of another company if the use of that name would be likely to deceive the public. It is important to note here that an *intention* to deceive is not required; it is only the *result* that matters. Instead of pursuing costly and time-consuming litigation through the courts, SorbaraLAW filed a complaint with the Minister of Government Services to require Spartan Electric Toronto to change its name. Following the initial complaint, we gathered the necessary evidence and prepared our client's case. A written hearing was held at which Spartan Electric Toronto argued that there was no public confusion between the two names.

Ultimately, the Director found that there was indeed a likelihood of deception or confusion in the minds of customers and potential customers of the two companies.

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What's in a Name continued...

The Director also found that the manner in which Spartan Electric Toronto used its name in advertising and signs was relevant; it had a similar logo to our client -- the "Spartan head" - - and even had a similar slogan (which it had attempted to change after we filed our complaint).

Even though the Director found a likelihood of deception, the Director could have elected to permit Spartan Electric Toronto to continue use of its name. This discretion is exercised by balancing the public interest in not being subject to confusion through the use of a

similar name, against the interests of the companies involved and the relative hardships faced by a decision requiring a name change.

Ultimately, less than 18 months after we filed the initial complaint, the Director granted an Order changing the corporate name of Spartan Electric Toronto to a numbered company, leaving it the further right to choose another name in which the word "Spartan" did not appear. The company has since changed its name to Pros Electric Inc. and has ceased using www.spartanelectric.org.

Although it was a lengthy process, our client was able to protect its business name and public recognition without the necessity of commencing even lengthier and more costly litigation.

We would like to thank our client, Spartan Electric Limited, for allowing us to tell our LegalEase readers about this very interesting and successful example of corporate name protection. [LegalEase](#)

HST New Housing Rebate

Are you buying or building a new home after July 1, 2010? If so, make sure you're aware of the New Housing Rebate.

Beginning on July 1, 2010, new home sales in Ontario will be subject to the new Harmonized Sales Tax (HST). The HST combines the 5% Goods and Services Tax (GST) and the 8% Provincial Sales Tax (PST) to create a single 13% tax.

Fortunately, the New Housing Rebate is available to anyone who builds or buys a new house. This rebate allows you to recover a portion of the federal component of the HST that was paid on the purchase price or the cost of building the new house.

The following types of housing qualify for the rebate:

- a house that you built, substantially renovated, or on which you built a major addition when you renovated the existing house, on land that you own or lease (you can do the work yourself or hire someone to do it);
- a new mobile home (including modular homes) or a new floating home that you

bought from a builder (this includes a manufacturer or vendor);

- a new or substantially renovated house or condo unit that you bought from a builder (building and land);



- a new or substantially renovated house that you bought where you lease the land from the builder under the same agreement to buy the house, and where the lease is for 20 years or more or gives you the option to buy the land;
- a share of the capital stock in a co-operative housing corporation (co-op) that you bought; or

- a non-residential property that you converted into your home.

Unfortunately, the new housing rebate cannot be claimed if you do not intend the house to be your (or a relation's) primary place of residence. As a result, the rebate cannot be claimed for investment properties and cottages.

Not to be left out, the Province of Ontario is proposing an enhancement to the New Housing Rebate. This enhanced rebate will provide additional savings to purchasers of the same types of new residential properties set out above. The provincial rebate will effectively lower the provincial component of the HST from 8% to 2% on the first \$400,000 spent on the purchase price of a new home, providing for a rebate of up to \$24,000.

Visit the Canada Revenue Agency website (www.cra-arc.gc.ca) and the Ontario Ministry of Revenue website (www.rev.gov.on.ca) for more information about the New Housing Rebate, the provincial enhancement and the new HST.

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Changes to the Mortgage Rules

The rules relating to government-backed insured mortgages have changed. In February, the Honourable Jim Flaherty, Minister of Finance, announced a number of new measures designed to try to head off a potential housing bubble. The changes went into effect on April 19th.

In particular, the new rules state:

1. All borrowers must meet the standards for a five-year fixed rate mortgage even if they choose a mortgage with a lower interest rate and shorter term. The former rules required borrowers only to meet the standards for a three-year fixed rate mortgage. The purpose of this new requirement is to ensure that Canadians can afford to keep their homes when interest rates increase in the future.
2. Canadians can withdraw a maximum of

90% of the value of their homes when refinancing their mortgages, as opposed to the former 95% limit. This new requirement is intended to help Canadians use real estate as an effective means to save equity.

3. Non-owner-occupied properties require a minimum down payment of 20% for government-backed mortgage insurance. Consequently, those looking to purchase any investment properties, or second properties, must find extra capital to invest in the property.

Although there were discussions about increasing the minimum down payment from 5% or decreasing the 35-year maximum amortization period for a mortgage, ultimately, the Federal Government did not implement changes to these rules.

It is not expected that these new changes will affect many home buyers, as many financial institutions were already screening potential customers on similar criteria. Further, for those individuals seeking to purchase a second property, there are no new rules affecting how the funds required to purchase such properties are to be obtained. Thus, homeowners can withdraw equity on their primary residence, borrow money from family, or otherwise obtain the funds from other sources to meet the 20% requirement under the new rules. However, those on the fringe of qualifying under the new rules may need to get creative when applying for a mortgage, perhaps seeking out lenders offering uninsured mortgages.

Please don't hesitate to contact our offices for more information on the changes to the mortgage rules. [LegalEdge](#)

Interest Charges on Invoices: Are They Collectable?

Transactions happen quickly in today's business world – a telephone call is made inquiring about a service or product and the work is commenced or the product is delivered within days, sometimes even hours. Invoices and paperwork tend to follow completion of the work, with the result that parties often don't exchange formal terms of the transaction until after the work has begun or has been completed.

Consequently, this new regime is affecting the ability of parties to understand fully the deals they make. Nowhere is this more apparent than with regard to interest charges.

Companies often deliver invoices with a notation across the bottom indicating that "payment is due in 15 days, 2% interest charged on all outstanding balances," or similar wording. These interest charges then become part of the dispute between the parties when it comes to settling accounts.

Courts have examined the ability of a party to charge interest in this manner, demanding such interest be paid on invoices delivered after the fact. The current trend in the case law suggests that commercial parties may not charge interest on outstanding accounts where the parties have not previously agreed upon such charges. Parties must include interest provisions in their quotations, e-mails and telephone discussions about the charges related to their products and services. Failure to do so may result in the inability to collect interest on late payments or outstanding balances at the rates intended. In other words, courts are unlikely to require a customer to pay interest where the customer was advised of the charges only upon delivery of an invoice after the product or service was delivered.

Of course, parties are entitled under the *Courts of Justice Act* to request pre-judgment interest as part of the relief they seek in any

court action. Where successful in obtaining a judgment at trial, the successful party usually will be entitled to pre-judgment interest. Unfortunately, the pre-judgment interest rate is debtor-friendly, currently sitting at 0.5% per annum.

As a result, parties to transactions – particularly vendors – are advised to set out clearly, as part of the terms of the agreement, whether or not, and at what rate, interest will be charged on overdue accounts. In fact, in most cases, this issue can be addressed by making minor changes to existing quotation documentation to ensure that the purchaser is put on notice of potential late payment charges.

Contact us to discuss how we can help to review your company's documentation and policies to clarify the terms regarding interest charges. [LegalEdge](#)

Bill 65 – Ontario’s Not-For-Profit Corporations Act

The Ontario Minister of Consumer Services introduced Bill 65 on May 12th of this year. The intended effect of Bill 65 is to promote the professional and efficient operation of Ontario’s not-for-profit organizations: charities, volunteer organizations, professional and trade associations, and other not-for-profits. The proposed legislation passed second reading on May 17th.

Currently, Ontario’s not-for-profit sector employs about 16% of all Ontarians and generates approximately \$50 billion in annual revenue. At this time, an estimated 8 million people volunteer for not-for-profits in this province.


The proposed changes to the Ontario law were based on extensive consultation with stakeholders across the province using a combination of consultation papers, a web advisory panel and regional workshops.

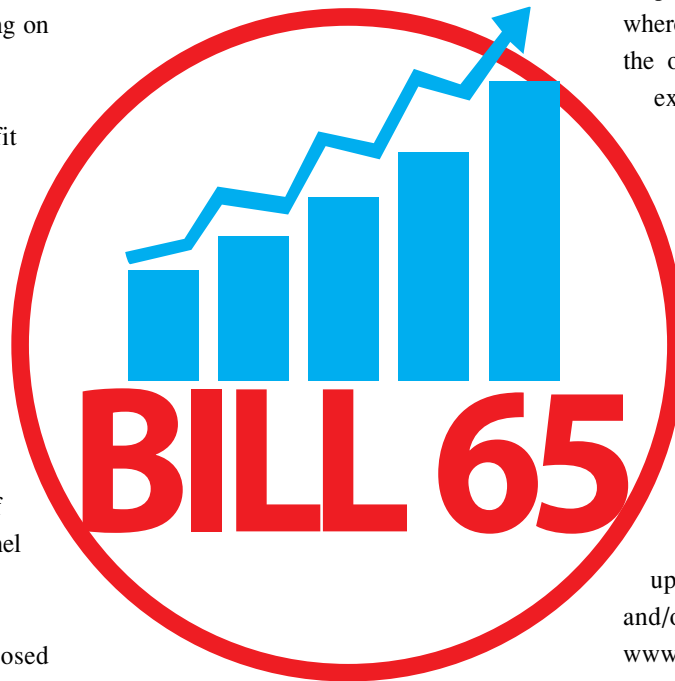
The announcement of this proposed provincial legislation comes on the heels of similar changes to legislation governing federal not-for-profits. The *Canada Not-For-Profit Corporations Act*, which received Royal Assent on June 23, 2009, will replace the *Canada Corporations Act* in the future, although the precise effective date is not yet known.

Currently, Ontario not-for-profits are governed by the *Corporations Act*, which was enacted in 1907 and which has remained virtually unchanged since that time. Accordingly, Bill 65 represents a long-overdue overhaul of this legislation.

These changes should lead to enhanced corporate governance and accountability. Under the new framework, members of organizations are granted greater access to records and are given more powers to ensure directors act in the organizations’ best interests. The legislation also allows not-for profit corporations to engage in commercial activities where the revenues are reinvested to advance the organization’s purposes, and to use less expensive review engagement financial statements (as opposed to performing a full audit) in appropriate circumstances.

The Ontario Government suggests that the changes proposed in Bill 65 will add to the growth of key economic sectors and promote an environment in Ontario to allow businesses to thrive.

We will continue to monitor the advancement of this legislation. Look for updates in future issues of *LegalEase* and/or on our regularly-updated website, www.sorbaralaw.com. 



Under Bill 65, the incorporation process for not-for-profits will be simplified and should take only days as opposed to the lengthy process currently in place. The legislation provides for a statutory duty of care for directors, but at the same time provides directors with specific protections.

LegalEase is a seasonal publication and is intended only as a source of general information on a broad range of interesting and important subjects. The views expressed are those of the author and are not intended to constitute legal advice. Before acting on any information contained in *LegalEase*, Sorbara, Schumacher, McCann LLP urges readers to obtain professional legal advice, as each situation has its own unique set of circumstances. For further information on any of the material contained in this issue, please feel free to call or write to us. ©2010 Sorbara, Schumacher, McCann LLP. All rights reserved. Your privacy is very important to us. Your personal information may be used to send you this newsletter. It will also be used for Sorbara, Schumacher, McCann LLP’s internal marketing research purposes. We may also use third parties to process some aspect of the personal information for your use, provided that they similarly agree to protect your privacy. If you have a privacy question or do not wish to receive future issues of our newsletter, you may contact Greg Murdoch in writing at: Sorbara, Schumacher, McCann LLP, 300 Victoria St. North, Kitchener N2H 6R9 or email gmurdoch@sorbaralaw.com.

Around the Firm

Let's take another look around the firm...

We are pleased to announce that 2010 marks the fifth year that three of our SorbaraLAW family members have been with us. Denise M. Kocher joined SorbaraLAW in May 2005 as an associate lawyer.



Over the past five years, Denise has become an integral member of our corporate/commercial and real estate group. In addition to her work with SorbaraLAW, Denise remains active in the community as a current board member for a local non-profit daycare organization and through volunteer work with the Waterloo Region Small Business Centre. Denise is the proud mother of two beautiful girls. We are very happy to have Denise with us here at SorbaraLAW.

As well, our litigation assistant, Lynn Majek, and our commercial clerk Cathy Annoni-Galvez, joined the firm in 2005 after spending many years with a national firm in Kitchener-Waterloo. They brought considerable skills and experience with them to SorbaraLAW and have been vital parts of our team. We thank Lynn and Cathy for their contributions to the firm and to our clients, and we look forward to many more years with them as members of the SorbaraLAW family.

As we celebrate five years with Denise, Lynn and Cathy, we also welcome a new member to the team. Jackie Johnson will be joining the firm as an articling student in July 2010. However, Jackie is already well acquainted with us, seeing as she



worked for the firm for four summers during her university and law school studies. Jackie was honoured with a number of academic awards during law school and is now eager to start her articles with the firm.

SorbaraLAW enjoyed a very special night on June 10. Most of the staff from our Kitchener and Guelph offices, and several of their family members, took a bus trip to Mohawk Racetrack in Campbellville for an evening of fun at the track. We enjoyed a lovely buffet dinner while most of us learned (or tried to learn!) the ins and outs of racing and betting. Many firm members tried their luck on the races, some successfully and others not so successfully. Mohawk dedicated a feature race – the fifth – to the SorbaraLAW visit and six members of the group enjoyed the privilege of visiting the Winner's Circle to present a personalized SorbaraLAW horse-blanket to the winning horse, Windsun Galaxie. It was an exciting event for all who attended, and is destined to become a regular outing for SorbaraLAW.



SorbaraLAW is a proud sponsor of the Waterloo Region Small Business Centre (WRSBC), a local organization providing




business assistance services to entrepreneurs and small businesses in the region. On June 15, we attended the WRSBC's Annual Meeting for an opportunity to get caught up on the Centre's activities and achievements in 2009 and to meet some of the people who help make it all possible. Our own James Gittens (third from right in photo) accepted a Sponsorship Appreciation Award given by the WRSBC to SorbaraLAW and several other local sponsors. We thank the Centre for all its work in helping small businesses in Waterloo Region. For more information, see the "News and Events" section of our website.

We are pleased to announce Grace Sun and Jennifer



Black have completed the Collaborative Family Law Level

II Training, the highest level of training available under the Collaborative Family Law Association of Waterloo-Wellington. Grace and Jennifer received their certification in April of this year and are continuing to take Collaborative Law cases. We are happy to be able to provide this valuable service to our family law clients. See our website for more information on Grace and Jennifer and their Collaborative Law practices. 

New Workplace Violence and Harassment Laws

The management of health and safety in the workplace is a responsibility shared by employers, supervisors and workers. The prevention of workplace violence and harassment is an important aspect of this shared responsibility. However, some recent legislative changes now impose new obligations on Ontario employers in particular. The new amendments to the *Occupational Health and Safety Act* came into effect on June 15, 2010, and now require employers to take a number of steps aimed at responding to and reducing violence and harassment in the workplace.

Important changes include the following:

- **Initial assessment:** Employers must conduct an assessment to determine the risk of workplace violence arising based on the nature of the workplace and the type of work performed, and must develop measures and procedures to control those risks.
- **Implement policies and procedures:** Employers must implement workplace violence and harassment policies and procedures to control any risks identified in the initial assessment, and to report and investigate any incidents of workplace violence or harassment. These policies must be reviewed regularly (at least annually). Policies and procedures are required regardless of the size of the workplace or number of employees and must be posted where there are 6 or more workers regularly employed by the workplace. Further, employers should take steps to ensure that all workers are aware of the policies and programs in place.

- **Employer’s disclosure obligations:** Where reasonably necessary, employers and supervisors may be required to disclose personal information to a worker about individuals with a known history of violent behaviour if the worker is likely to encounter the individual(s) in the course of his or her work, and there is a risk that the worker will be exposed to physical injury.
- **Employer’s obligations extend beyond the workplace:** If an employer “ought reasonably” to be aware of domestic violence that could likely expose a worker to injury in the workplace, the employer must take steps to ensure the safety of the worker.

Directors and officers should be aware that they may have personal liability under the *Ontario Health and Safety Act*, in that they are required to take “all reasonable care to ensure that the corporation complies” with the Act. As of June 15th, the liability of directors and officers will extend to these new workplace violence and harassment requirements.

Further, employers who fail to comply with these new requirements risk exposure to fines of up to \$500,000 and, where applicable, criminal sanctions for “recklessly breaching” their duty under the Canadian *Criminal Code* to take reasonable steps to ensure the safety of workers.

Thus, it would be prudent for *all* employers to review these amendments and to take steps to comply, including:

- undertaking risk assessments to determine the possibility or prevalence of workplace

- violence or harassment;
- creating written workplace violence and harassment policies and training employees on such policies;
- providing ways for employees to report instances or risks of workplace violence and harassment;
- disciplining employees for not following workplace violence and harassment policies or for committing workplace violence or harassment;
- ensuring that proper security measures are in place at the workplace to protect workers from members of the public or customers; and
- keeping detailed records of any workplace violence or harassment, investigation or work refusal.

If you are concerned about your rights and/or obligations under these new amendments to the *Occupational Health and Safety Act*, please contact us to discuss your situation and to see if we can help. [LegalEase](#)

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.

Does an Employee Really Have to Give Two Weeks Notice?

It is well known by employers that they must provide a significant amount of reasonable notice when dismissing a senior employee with a lengthy service record. It is less known, however, how much notice the same senior employee must give his or her employer when quitting.

While the law recognizes an employer's right to receive reasonable notice of resignation, in practice, the employee rarely provides anything more than minimal notice, usually in the range of two to four weeks. However, as a result of a recent decision of the Ontario Superior Court of Justice, key employees now must give serious thought to whether the typical "two weeks notice" is sufficient, given their status and importance.

GasTOPS v. Forsyth

In *GasTOPS Ltd. v. Forsyth*, the defendants, Bradley Forsyth, Douglas Brouse, Jeff Cass and Robert Vandenberg, were employees of the plaintiff, GasTOPS, until they resigned together to commence employment for a newly incorporated competitor, the corporate defendant, Mxl Technologies Limited. In their letters of resignation, Forsyth and Brouse provided GasTOPS with two weeks notice.

Since its incorporation in 1979, GasTOPS had achieved immense success in its design, development and application of aviation maintenance software, targeted towards both military and commercial markets. At the time of their resignations, both Forsyth and Brouse held senior management positions, while Cass and Vandenberg were employed in important technical roles.

Fiduciary Duty of Key Employees

In his more than 400-page decision, Justice Granger provided a detailed review of the law of fiduciary duties. All employees owe their employer a general duty of loyalty and good faith. It is an implied term of every contract of employment that an employee must, at all times during the employment relationship, protect the

employer's interest. A fiduciary duty elevates this common law duty, but it is grounded in the same policy.

The Supreme Court of Canada has provided three defining characteristics of a fiduciary employee:

1. the fiduciary has scope for the exercise of some discretion or power;
2. the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

When determining whether an employee is a fiduciary, rather than focus on job title, courts look at the relationship between the parties, the job function and the responsibilities performed. In certain cases, courts have extended fiduciary obligations to lower level employees where they are found to be "key employees" with responsibilities that are essential to the employer's business.

After reviewing the particulars of the *GasTOPS* case, Justice Granger determined that the defendants were highly skilled, were primary contacts with customers, worked with minimal supervision, and had access to confidential information. As their resignations left the employer particularly vulnerable, these "key" employees were fiduciaries.

Insufficient Notice

In Canadian law, a departing fiduciary employee is held to his or her fiduciary responsibilities post-employment. As a result, beyond the duties of loyalty and good faith owed by all employees to their employers, fiduciary employees are limited in their ability to compete with their former employer. A departing fiduciary cannot take advantage of a corporate opportunity that ripened during the course of his or her fiduciary employment. The question, though, remains: for how long is the former

employee bound by his or her fiduciary duties?


In *GasTOPS*, the Court followed a line of cases suggesting that an employee's duties ought to last for the period equal to the amount of notice the employee should have given his or her former employer. This "reasonable notice" period is meant to give the employer time to hire and train a replacement. If the employee fails to provide adequate notice, the employer will be entitled to an award of damages.

Decision

Justice Granger held that Forsyth and Brouse knew the likely effect of their resignations on GasTOPS and, therefore, were under an obligation to provide at least *10 months notice*. As a result of their failure to provide reasonable notice, these defendants were found responsible for the damages resulting from that failure.

By using GasTOPS' confidential business information and trade secrets, and by providing the same to Mxl in order to compete unfairly, the defendants were in breach of the fiduciary duties properly owed to their former employer. As a result, Justice Granger awarded damages to GasTOPS in the amount of \$11,401,571, which he calculated to include the profits improperly earned by Mxl on sales to various military customers including GE and the U.S. Navy.

The *GasTOPS* decision will be welcome news for employers. Historically hesitant to sue former employees, employers now can rely on the *GasTOPS* decision as authority for the principle that the employee must provide sufficient notice to allow the employer to hire and train a suitable replacement. This obligation will be exacerbated in circumstances where the employee is a fiduciary and uses his or her knowledge of the employer's confidential information for his or her own benefit.

Similarly, key employees contemplating a job change would be well advised to consider their obligations in light of the *GasTOPS* decision. 

Like a Good Neighbour... State Farm is There


Be careful this summer before letting your favourite family pet off the leash. In addition to the intense emotions of grief and sadness that typically follow the loss of a dear family pet, add the possibility of finding a hefty insurance bill in your mail. Or so was the case for the Flemming family of Aurora, Ontario.

Earlier this Spring, the Flemmings lost their beloved twelve-year-old Labrador Retriever, Jake, who they often let roam free around their home. One evening, Jake apparently wandered into the street and was struck and killed by a car.

Much to their surprise, nearly two months later, the Flemmings received a bill from State Farm Insurance for \$1,732.80. As explained by the accompanying letter, State Farm had received a claim from the driver for the damages caused to the car by Jake's 70-pound frame. In turn, State Farm was looking to the Flemmings for reimbursement. The damages

claim includes costs for repairing the bumper of the vehicle and a rental car.

Following an investigation that included interviews of the driver of the car and a police officer, State Farm determined that the Flemmings were "100% responsible" for the alleged damages. In an interview with the Toronto Star, State Farm spokesperson, John Bordignon, said it was the Flemmings' negligence, in failing to ensure that their dog was not roaming the roadway, that caused the damage to the car.

The Flemmings, State Farms asserts, can look for coverage for this cost through their homeowner liability insurance. For their part, the Flemmings have informed State Farm that they have no intention of paying the \$1,732.80 bill. It is not yet known whether State Farm will pursue this claim further against the Flemmings. We will continue to monitor this interesting case and provide an update in a future issue of *LegalEase*. 

Mervyn Villemaire Receives Coulter A. Osborne Award



SorbaraLAW is proud to announce that our very own Mervyn J. Villemaire, Q.C. was honoured on April 10, 2010 with the Waterloo Law Association's Coulter A. Osborne Award. We congratulate Mervyn for earning this honour.

The Coulter A. Osborne Award is awarded annually by the Waterloo Law Association to a member "whose integrity, comity and beneficence in professional practice and public life uphold the highest traditions of the profession and enhance the reputation of the Association and its members."

The award is particularly distinctive because it is

awarded based on nominations and votes by Waterloo Region lawyers. It is a true indication that Merv has earned the respect and admiration of his peers in the legal profession. He has consistently demonstrated honesty, courtesy, civility and generosity to his clients, colleagues, family, and the community throughout his 55 years in the private practice of law in Waterloo Region, his past service as a member of Kitchener City Council (1964 to 1979) and Waterloo Regional Council (1972 to 1978), and his numerous appointments to various boards for local hospitals, universities and non-profit organizations.

This honour was recognized in a recent article in **Grand Magazine**, discussing Mervyn and the Coulter A. Osborne Award. Look for the article in the current issue, or visit the **Grand Magazine** website at www.grandmagazine.ca.

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