

LegalEase®

A straightforward look at law and business

Sorbara, Schumacher, McCann LLP is a fifteen-lawyer local law firm with offices in Kitchener and Guelph specializing in all areas of business law

Ontario Becomes Smoke Free Effective May 31, 2006

The *Smoke Free Ontario Act* ("SFOA"), which comes into force on May 31, 2006, is considered to be one of the toughest anti-smoking statutes in the world.

The SFOA prohibits smoking in all workplaces and enclosed public places that are not a place of residence including: restaurants, bars, banquet halls, entertainment facilities, healthcare facilities, public and private schools and on any school property, casinos, bingo halls, private clubs such as legion halls, common areas in residential buildings such as hotels or apartments, all offices and government buildings, work vehicles, and all enclosed public places including parking garages.

There are exceptions under the Act but they are limited. Residents living in a residential care facility, psychiatric facility or a facility for veterans will be permitted to smoke indoors in a controlled smoking area. Likewise, guests of hotels and motels are exempt from the Act if the room they are staying in has been designated as a smoking room and is also designated as primarily for sleeping. These

smoking rooms must be fully enclosed and have doors that separate them from areas where smoking is prohibited. If these criteria are met, a registered guest at the hotel or motel along with any invited friends of the guest may smoke in the room.

The SFOA sets out obligations for employers and proprietors of public places to ensure that their environments are smoke free. Employers and proprietors are responsible for posting no-smoking signs and notifying people within the space that smoking is prohibited. They are also obligated to ensure that no ashtrays are available to take action if someone violates the smoking ban.

The SFOA may not present such a drastic change for those in the Regional Municipality of Waterloo or other municipalities which have already enacted anti-smoking by-laws. However, the SFOA will still have an impact in these areas. For instance, the Regional Municipality of Waterloo smoking by-law had provided an exception for employees to smoke in designated smoking areas that were not accessible to the

public but, under the SFOA, these designated smoking areas are prohibited. In addition, organizations in Waterloo Region had been permitted under the by-law to apply for a private function exemption but these exemptions are also prohibited under the new Act. The SFOA will override any municipal by-laws on smoking and will bring uniformity to smoking policies throughout the province.

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Construction Clause

Justin Heimpel, a litigator with our Kitchener office, was recently involved in a case that has significance for those involved in the land development industry.

We acted for a local land developer who had sold a vacant lot to a builder. The agreement of purchase and sale included a standard construction clause that obligated the builder to commence construction on the subject property within two years from the date that title was transferred under the agreement. Specifically, the clause read as follows: “should the Purchaser not commence or cause to be commenced the bona fide construction of a dwelling house and garage approved by the Vendor within a period of two (2) years from the date the Vendor transfers title to the Lands to the Purchaser, the Vendor shall have the option or privilege of repurchasing the Lands described herein from the Purchaser at any time or times thereafter for the total amount of the original purchase price paid by the Purchaser to the Vendor”.

This type of construction clause is a standard provision in most land developers’ agreements of purchase and sale and is often included as part of the restrictive covenants registered on title in a subdivision. The purpose of this restriction is to ensure that subdivisions are completed within a reasonable period of time so that developers can be released from their obligations to the Municipality with respect to the subdivisions. This clause is also meant to prevent builders from engaging in land speculation by

purchasing vacant lots, retaining them for a number of years and then selling them as vacant lots after land values have increased.

In our case, the value of the land had increased significantly after the agreement of purchase and sale was completed. As the two year date approached, our client had not had any contact with the builder and she wrote to the builder to remind it of the construction clause and to provide notice that she intended to rely upon the same. The builder eventually submitted drawings to our client and completed a number of preliminary steps but it failed to commence physical construction on the property prior to the two year deadline. In fact, it had not even applied for a building permit prior to that date. Our client gave further notice of her intention to repurchase the lot in accordance with the construction clause. The builder failed to comply with this notice and instead excavated the property and poured a foundation on the property despite repeated warnings from our client not to do so. Our client was forced to register a Notice of Option to Purchase on title to the property and eventually commenced an Application before the Court to enforce the construction clause after the builder refused to comply with the agreement or otherwise resolve the matter.

The builder defended the Application on a number of grounds. Its primary argument was, however, that it had complied with the construction clause by completing drawings, surveying and fencing the property and

otherwise preparing it for excavation prior to the expiration of the two year period. It took the position that these preliminary steps constituted a start to the construction process and that they were sufficient to meet the “cause to be commenced” portion of the construction clause. In this regard, the builder attempted to interpret the construction clause as providing two options - either to commence construction which would mean the physical act of construction on the property or “causing construction to be commenced” which means preliminary steps in the construction process. The builder also argued that the clause ought not to be enforced since it would amount to an unjust enrichment to our client and that our client ought not to receive a reconveyance of the land but rather damages if she were successful.

We took the position that the clause was clear and unambiguous and that it clearly obligated the builder to commence construction on the property within the two year period. The term “cause to be commenced” in this context simply meant that the builder could undertake these steps itself or cause others (such as a subcontractor) to do so on its behalf. We further took the position that the commencement of construction was well known within the construction industry to mean the excavation of the property for the purpose of installing a foundation. We sought an order permitting our client to repurchase the property for the original purchase price and for damages associated with removing the foundation and restoring the property to its

original condition.

The Application was heard by Justice Gordon over the course of two days in January 2006. His Honour released a strong written decision in favour of our client in February 2006. In his reasons for judgment, Justice Gordon confirmed that the construction clause at issue in this case was not unique and that these clauses have been used in the industry for many years. He also confirmed that these types of clauses are commercially reasonable. His Honour ruled that the act of construction refers to the actual physical process of building and agreed with us that the commencement of construction is considered to be the breaking of ground for the purposes of installing a foundation. On the issue of unjust enrichment, Justice Gordon acknowledged that enforcement of the clause may result in an enrichment to the developer because of the increase in the value of the land but he ruled that this enrichment was not unjust and that the clause ought to be enforced.

In the end, Justice Gordon granted an order for the reconveyance of the property in favour of our client and ordered a trial on the issue of damages that might otherwise be owing to our client by the builder. The builder appealed this decision to the Court of Appeal but eventually abandoned that appeal.

This case represents a significant judicial pronouncement on the enforceability of standard construction clauses. Justice Gordon clearly acknowledged the commercial reasonableness of this type of clause and confirmed that they ought to be enforced in favour of developers, even if it would result in a profit to the developer.

Developers should, therefore, review their current form of agreement of purchase and sale and restrictive covenants to ensure that they contain appropriate construction clauses. They should also be sure to monitor the status of their subdivisions regularly to ensure that builders comply with this and other provisions

and so that they can take appropriate action in the event of a breach. Builders, on the other hand, should be mindful that these restrictions are enforceable against them if they fail to comply with their obligations. This case also demonstrates the need for effective communication when issues of this sort arise. Had the builder responded appropriately to our client's original notices or otherwise reacted reasonably, it is quite likely that it could have avoided significant losses associated with the lawsuit. This builder chose, however, to ignore the developer's warnings and forge ahead with construction despite its breach of the agreement. This response ultimately ended up costing the builder far more in the end.

Lawyers at Sorbara, Schumacher, McCann LLP have represented businesses and individuals involved in the local land development industry both inside and outside the courtroom for over 25 years. If you have any questions about this case or about the form of your current documentation, we would be

smoking continued

The SFOA also provides for limits on the sale, distribution and use of tobacco products, including stricter measures to ensure only those 19 years of age or older can buy cigarettes. Prior to the SFOA, proprietors were only required to obtain identification from patrons who appeared to be 19 years old or younger. This requirement has been extended under the SFOA to persons who appear to be 25 year or younger. Business owners will now be held personally liable for the actions of employees when an employee sells tobacco to someone

under the age of 19, unless the owner is found to have exercised due diligence to prevent such contravention. The promotion of tobacco products at entertainment facilities is also prohibited under the Act and, effective May 31, 2008, the SFOA will also prohibit the display of tobacco products and any promotion of tobacco products at retail outlets.

The potential penalties under the Act are severe. Fines under the Act depend on the type of offence and the number of earlier

convictions but range from a minimum of \$1,000 to a maximum of \$100,000 for individuals and from \$5,000 to \$300,000 for corporations. In addition to a fine, retailers who are convicted on two or more occasions for sales to minors or the sale of unmarked cigarettes under the provisions of the Tobacco Tax Act are automatically prohibited from selling, storing or accepting delivery of tobacco for a period ranging from 6 months to 1 year. [Legal Edge](#)

New Sign By-Law for Kitchener Causes Concern

A new sign by-law proposed by the City of Kitchener has sparked considerable concern amongst local businesses, particularly those involved in the land development industry. City officials held a public information meeting regarding the by-law on March 30, 2006 at Kitchener City Hall to address these concerns. This was intended to be the last meeting before the proposal will be brought to City Council in June 2006.

One of the main issues surrounding the proposed by-law is its treatment of third party signs. Third party signs are signs which are placed on another party's property or advertise for something that is not offered on the actual property where the sign is located. This advertising is popular in the land development industry as builders and developers will often advertise new homes and building lots within a subdivision by way of signs posted at the entrance to the subdivision.

Third party signs are prohibited under the current by-law but City officials have not enforced the by-law. Under the new by-law, these signs would again be prohibited and City staff has indicated that they intend to strictly enforce the new by-law. These signs are prohibited even if the builder or developer owns the land upon which the sign is situated if the sign's purpose is to point the public to a home on another piece of land.

Members of the Waterloo Region Home Builders Association expressed significant concern over this proposed treatment of third party signs at the information meeting. City staff informed those present at the meeting that they had met with the Region and other municipalities to discuss the issue of legalizing third party signs. They also confirmed that the concern that developed through these various meetings was that, if third party signs were allowed for one segment of the population such as home builders, the City would also be

required to allow it for everyone else including retailers, restaurants etc. and that this would lead to an abundance of signs everywhere. City staff argued that persons interested in utilizing a third party sign may apply to the Committee of Adjustments for a minor variance to allow for third party signs in certain circumstances and reasoned that this approval process was a way to control third party signs from getting out of control and provide exceptions where it is reasonable to do so.


Another concern raised at the meeting was in regard to the open house signs used in the real estate industry. These signs will be permitted by the new by-law as a Special Event Directional Sign. A Special Event Directional Sign is defined as a free-standing sign which is used solely for the purpose of directing traffic to the location of a special event. These signs may include the nature of the event, name of the event holder and the location, an arrow pointing to the event and/or the time of event but they shall not contain any other commercial message. These Special Event Directional Signs are only permitted to be displayed for a period of 5 hours per day and the maximum height is 0.9 meters. This latter requirement is actually an increase from the present by-law that has a height restriction of 0.75 m.

The City has also proposed a number of changes that will affect business owners in any industry including new definitions and treatment of Portable Signs which include Sidewalk and Sandwich Board, A-Frame, T-Frame, Trailer and Mobile Signs. The by-law will include new and clear definitions of illumination including a new section dealing with the effects of sign lighting on adjacent residential premises. This section of the by-law will outline the expectation for reasonable lighting between the hours of 10:00 p.m. and 6:00 a.m. The City has also proposed changes to the specific height and area restrictions of Ground Supporting signs

depending on the frontage of the property and requirements for municipal address, design criteria and a common marketing name for Ground Supporting signs. The new by-law will also include new criteria for Light Standard/Flag Pole Signs, Projecting Signs, Awning Signs, Banner Signs, Billboard Signs, and Fascia Signs.

With respect to enforcement of the new by-law, City staff indicated that the proposal will be that signs erected or displayed in contravention of the new by-law may be immediately pulled down or removed by the Director of Enforcement or his designate but it is also considering a 24 hour notice period before any removal unless the sign poses a safety issue. Any sign removed by the City will be stored for a minimum of 30 days and the owner or agent may claim the sign by paying a fee prescribed by Council. If the sign is not claimed within 30 days, the City may destroy or dispose of the sign without further notice to the owner. Any cost for removal, repair, transportation and or storage of any sign may be recovered from the owner of the property on which the sign was located by adding the fee to municipal taxes.

Once the sign by-law is passed by Council, City staff intends to explore the possibility of implementing a ticketing/fine system for the enforcement of violations of the by-law. This type of ticketing system would have to be approved by the Provincial Government and can only be pursued once the by-law has been passed.

The new by-law is scheduled to be presented to City Council in June 2006. If you are concerned about these changes and the effect that they may have on your business, you should express your concerns to your local Councilor so that they may be addressed when Council considers the issue. 

Around the Firm


The partners and staff at Sorbara, Schumacher, McCann LLP would like to congratulate Marcia Schieck, one of our corporate clerks, and her husband, Roger, on the birth of first child, Orrin Robert Schieck, on February 9, 2006. We wish the family well as they start this exciting phase of their lives.

We would also like to congratulate Kristine Schumacher, Mark Schumacher's wife, who was recently honoured by Unicef Canada as its National Volunteer of the Year. This tremendous honour has been bestowed on Kris in recognition of her dedication and countless hours of service to Unicef. Kris also finds time to volunteer for a



Marcia Schieck's new baby boy, Orrin Robert Schieck

number of other local organizations. Congratulations Kris and thank you for all of your hard work within the community!

On March 25, 2006, the firm chartered a bus to Toronto for dinner and a performance of the Blue Man Group. We enjoyed delicious Greek cuisine and witnessed a very unique and entertaining show before taking in some of Toronto's night life on the way home. The evening was a great success and a good time was had by all. 


Court Orders Man to Pay Support for Dog

In a rather unusual decision, the Alberta Court of Queens Bench has ordered a man to pay monthly dog support payments to his former common-law spouse who was left to care for his St. Bernard, Crunchy, after the couple separated.

The man was unable to take Crunchy with him when the couple separated because he could not obtain living accommodations that would allow for his dog. The woman had cared for Crunchy at her own expense since the date of separation and she made a claim in the amount of \$200 per month for support for Crunchy. The man had suggested that \$25 per month was a reasonable estimate of the cost of dog food on a monthly basis.

The court observed that a St. Bernard costs

more to maintain than the usual smaller variety of dog and concluded that \$200 per month was a reasonable sum to compensate the woman for the time and expense required to care for the dog. The court also awarded retroactive support to the date of separation. The court declined to order any visitation rights.

This case represents the first time a Canadian court has ordered support payments for a pet and otherwise elevated a pet above the status of a chattel in separation proceedings. Courts in the United States have already begun ruling on joint custody and visitation and access rights in addition to support payments in relation to pets. Only time will tell how far Canadian courts will be prepared to go in providing for support and custody of pets. 



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Provincial Ombudsman Slams Ontario's Property Assessor

Property taxes have been a fact of life in Ontario since 1793. Municipalities are responsible for determining how much property taxes are required to be collected and for collecting the same from property owners. The total tax burden is allocated amongst property owners with each owner paying according to the "market value" of their property. Municipal governments have not, however, been doing their own property assessments since 1970 – at that time the assessment process was taken over by the Province. In 1999, the Province assigned this task to a non-profit corporation, initially the Ontario Property Assessment Corporation which has now become the Municipal Property Assessment Corporation (MPAC). MPAC is responsible for evaluating more than \$1.1 trillion and is the largest assessment organization in Canada.

In 2005, the Ontario Ombudsman, Andre Marin, launched an investigation into the transparency of the property assessment process and the integrity and efficiency of the decision making at MPAC after his office received a large number of complaints about MPAC from members of the public. Mr. Marin recently released the results of this 5 month investigation in a scathing report entitled "Getting it Right". In this report, Mr. Marin confirms that there was a significant level of public dissatisfaction with MPAC and indicated that "never in the 30 year history of the Office has so many complaints been received in so short a period about a single public agency."

Marin noted that property owners were in a "David versus Goliath" battle with MPAC in relation to property assessment complaints and he observed that MPAC enjoyed a power imbalance during the appeal process. The Ombudsman was highly critical of MPAC throughout his report and made a number of troubling observations, including:


- MPAC has not made it easy for taxpayers to access the information it is prepared to share;
- MPAC has unwittingly chosen to trade its own credibility for confidentiality, by protecting aspects of its evaluation process;
- MPAC believes it knows better than the Assessment Review Board, the statutory body that hears appeals from its decisions, and therefore does not respect adequately the decisions made by that Board;
- MPAC is not as careful about recording information that might benefit the taxpayer as it should be; and
- At times without appreciation, MPAC enjoys a power imbalance during the appeal process that should be fixed.

Mr. Marin presented 22 recommendations that he feels should be immediately undertaken by MPAC in order to correct a variety of issues within the assessment process. MPAC responded to the report immediately by identifying 20 of the 22 recommendations to be within its jurisdiction and committing to implement 17 of them immediately. Generally, the recommendations MPAC committed to implement immediately involved: increasing taxpayer's access to MPAC information; improving accuracy and consistency of assessments; improving the fairness and integrity of the appeal process; and recognizing and carrying forward assessment reductions after appeals unless there are legitimate reasons to justify a change in the assessment. The three remaining recommendations were agreed to in principle by MPAC but it indicated that it required a further review prior to implementation. MPAC also committed to report back to the Ombudsman's office in 6 months to advise on its progress in implementing the recommendations.

The two recommendations that MPAC identified as being outside its jurisdiction are perhaps the most significant of all of Mr.

Marin's recommendations. The first relates to providing information to the public about the assessment process MPAC currently undertakes, which is currently protected as confidential intellectual property. The second involves shifting the burden of proof onto MPAC during the appeal process. Currently, a property owner is required to disprove MPAC's assessment and this recommendation would require MPAC to now support and defend its assessment decision under an appeal.

These items fall under the purview of the Provincial Minister of Finance, Dwight Duncan. The Minister has indicated that he intends to proceed with consultations on this issue including input from a variety of stakeholders including MPAC, Teranet and the Information and Privacy Commissioner in relation to the issue of disclosure of additional information to the public. With respect to the issue of shifting the burden of proof, the Minister intends to engage in discussions with other jurisdictions including Manitoba (where the onus remains with the assessor on the issue of value, even at the appeal level) to learn from their experiences.

The deadline for filing a Notice of Complaint for an appeal of property tax assessments is usually March 31st of each year. Upon the release of Mr. Marin's report, the Finance Minister promised to extend the assessment appeal period for 2006. Legislation was recently passed to extend the appeal deadline for property assessments for the 2006 tax year to June 30, 2006. This Notice of Complaint must be filed with the Assessment Review Board and there is a \$75.00 charge associated with the same for residential property owners. Property owners can also ask MPAC to reconsider their assessment free of charge by submitting a Request for Reconsideration to its offices. For more information about the appeal process, you can contact our office or visit the Assessment Review Board website at www.arb.gov.on.ca. 

Child Support and Shared Parenting Arrangements

Generally speaking, a non-custodial parent will be required to make monthly child support payments to a custodial parent after a couple separates. The amount of these payments is determined by the income of the payor pursuant to the tables provided for in the Federal Child Support Guidelines (the “Guidelines”). Under the Guidelines, a court may vary the amount of child support payable to the custodial parent if the non-custodial parent cares for the child at least 40% of the time. However, the Guidelines do not provide a set amount of support to be paid in such circumstances.

The Supreme Court of Canada recently addressed this issue in the case of *Contino v. Leonelli-Contino* and provided some direction for the calculation of the amount of support in situations of shared parenting. In this case, the father and mother had a shared custody arrangement whereby they each cared for the child fifty percent of the time. The father was, however, ordered to pay full child support based upon his income. He made an application to the court to vary the amount of child support such that support would be based upon a straight set-off equation of what he would regularly pay the mother less what she would be required to pay to him if he were the custodial parent.

The case was appealed all the way to the Supreme Court of Canada where the court ruled that more time spent with a child does not necessarily mean less child support payments. Instead, the court determined that a number of factors must be considered in tandem to calculate support in shared parenting arrangements.


In situations of shared parenting, there is a departure from the standard formula for the calculation of child support. Section 9 of the Guidelines provides three factors that must be considered in cases of shared custody: a) the amounts set out in the applicable tables for each spouse; b) the increased costs of shared custody arrangements; and c) the conditions, means,

needs and other circumstances of each spouse and of any child for whom support is sought.

A court is required to consider all three of these factors conjunctively once it has been established that the non-custodial parent cares for the child at least 40% of the time. The starting point in determining the amount of support is a straight set-off of the table amounts of support for each parent. However, a court is permitted to depart from this set-off amount where it would be inappropriate to take the set-off approach after considering the other two factors. If there appears to be increased costs as a result of the shared parenting arrangement, those costs are to be apportioned between the parents in accordance with their respective incomes. A court will also consider the resources and needs of both the parents and any children and allocate a level of support to set a similar standard of living for the child in each household.

In *Contino*, the Court found that there was no evidence that the fixed costs of the mother had decreased following the shared custody arrangement or that the increased time spent by the father had in any way increased his expenses. The mother had, however, moved into a new house because she believed it was in the best interests of her child and with the expectation that she would continue to receive child support from the father in the amount of \$563 per month. The Court eventually granted a reduction in child support and

ordered the father to continue child support payments in the amount of \$500 per month.

It is clear from this decision that there is no presumption in favor of reducing child support obligations downward from the Guideline amount in situations of shared parenting nor is there a presumption in favor of awarding at least the Guideline amount of support. The Court appears to have recognized the reality that shared parenting will almost always increase the total costs for the support of the child because of the necessity to duplicate certain costs between the households such as food, clothing and housing. In cases involving shared parenting, the quantum of support payments will very much depend upon the specific facts of each case ie. the specific costs in caring for the child and the differences between the parties respective standards of living. 

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.

Ontario Abolishes Mandatory Retirement

On December 12, 2005, the McGuinty Liberal Government enacted Bill 211, *An Act to amend the Human Rights Code and certain other Acts to end mandatory retirement*. This Act amends the definition of “age” for the purposes of discrimination under the Code. The Code previously defined “age” as “18 or more and less than 65 years”. The new definition is simply “18 years or more”. As a result of this amendment, mandatory retirement policies which obligate employees to retire at age sixty-five or older will be found to be discriminatory under the Code.


This legislation comes into effect on December 12, 2006, making Ontario the final province to abolish mandatory retirement.

Existing employment contracts, collective agreements or corporate policies that require retirement at age sixty-five will be unenforceable unless the employer can demonstrate that the imposition of mandatory retirement is a bona fide occupational requirement. In order to establish age as a bona fide occupational requirement, employers will have to establish that: an age-based retirement requirement is necessary due to the nature of the employment; the employee does not meet this job requirement; and, the employer is unable to accommodate the employee without incurring undue hardship.

While employers will no longer be permitted to insist upon an employee’s retirement at age 65, they will not be obligated at law to provide pension and group insurance benefits to employees over the age of 65. Employers who have group insurance plans that do not provide for coverage beyond age 65 are well advised to provide advance notice to employees of the cessation in benefits coverage at 65 so that employees can make appropriate arrangements to replace those benefits. While this information should be included in an employer’s policy or office manual, it would also be advisable for employers to provide individual notice to applicable employees well in advance of their 65th birthday.

It will be interesting to see whether or not this amendment will lead to changes to other legislation in which a retirement age of 65 is still presumed. Under the *Workplace Safety and Insurance Act*, for example, injured employees who are entitled to receive benefits are generally only permitted to do so until age 65. Likewise, it will be interesting to see how litigation develops regarding the issue of age as a bona fide occupational requirement and in relation to discrimination claims where employers seek to terminate the employment of older employees.

In the meantime, it is important to note that the new legislation does not prevent employees who wish to retire from doing so nor does it preclude employers from using retirement packages as an incentive to promote voluntary exit from the workplace.

Employers should begin to review their retirement and benefits programs and communicate with employees regarding future plans and policies well before the December 12th deadline to ensure legislative compliance and also to address any additional issues that may arise in the workplace as a result of this change. 



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