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Welcome!

Welcome to the Fall 2012 edition of our Client Update Newsletter. Here, we provide you with articles about recent developments in business law from a WeirFoulds perspective, and always with your interests in mind. Whether you are a new or existing client, we're certain that you'll find something of interest and value to you in these discussions.

Now is the perfect time for you to review new or recently revised legislation that can impact your business and personal dealings. This is precisely the theme of the current newsletter.

We hope you enjoy these insights and invite you to share this newsletter with your clients, colleagues and friends.

How the New *Anti-Spam Act* Will Affect Your Business

Ralph Kroman

As business professionals operating in Canada, you and your business will soon be subject to Canada's new "*Anti-Spam Act*", expected to come into force later this year or early 2013. The new legislation will greatly impact how you and your businesses treat the sending of electronic messages that encourage participation in a commercial activity ("commercial electronic messages") as well as other electronic threats to commerce.

In today's increasingly technological society, it's important for everyone to review this legislation and start evaluating your existing activities in order to prepare for compliance.

What are the main prohibitions?

The *Anti-Spam Act* ("the Act") prohibits more than just spam. It regulates certain activities that discourage reliance on electronic means of carrying out commercial activities.

Under the Act, you are prohibited from:

- sending commercial electronic messages without the recipient's consent (this includes email, social networking accounts, and text messages);
- altering transmission data in an electronic message, resulting in the message being

delivered to a different destination without express consent;

- installing computer programs without the express consent of the owner of the computer system or its agent, such as an authorized employee;
- using false or misleading representations online in the promotion of products or services;
- collecting personal information through accessing a computer system in violation of federal law ; and,
- collecting electronic addresses by the use of computer programs or the use of such addresses, without permission (address harvesting).

The consent requirement

The most important thing to keep in mind is the consent requirement, and remember there is a "reverse onus" obligation included in the Act.

If investigated, you must be able to prove you obtained consent, express or implied.

Consent is implied under the Act in some circumstances where there is an existing business or non-business relationship between

the sender and recipient or the recipient has published or disclosed an electronic address without stating the wish to not receive unsolicited messages. However, once the Act comes into force, there is a 3-year transitional period where implied consent with respect to these pre-existing relationships will only remain for 3-years if the recipient does not give notice that they retract consent.

All commercial electronic messages are also required to identify the sender, provide his or her contact information, and include an unsubscribe mechanism that can be readily performed by the recipient to indicate the wish to no longer receive any further commercial electronic messages.

Steps to protect your business

Don't be caught unaware. This is an Act you want to take seriously.

You could be fined up to \$1 million per violation as an individual, or up to \$10 million per violation as a business entity.

Below are some tips to help you prepare:

- Determine which of your electronic communications would fall under "commercial electronic messages" and be caught by the Act.
- With respect to communications caught by the Act, review your database of contacts in order to determine whether consent will be required for future communications.
- Establish procedures for obtaining recipients' express consent to receive electronic communications.

- Establish procedures to maintain lists of recipients who have given an implied consent, including removing recipients when implied consent expires (usually after two years, but subject to the transitional provisions).
- Prepare forms of communications to comply with the *Anti-Spam Act* so that they include all of the requisite information and the unsubscribe mechanism.

For more information on the *Anti-Spam Act*, visit www.fightspam.gc.ca.

Toronto's City-Wide Zoning By-law: Revisited

Uzo Rossouw

The City of Toronto ("the City") recently released a revamped version of its Comprehensive Zoning By-law, which will update land use controls on most properties in the City. Property owners need to be aware of this new By-law and understand how it will recognize or change current use permissions on their property, as well as their ability to redevelop in the future.

The Back-Story

You may recall that in 2010 the City released a new "Harmonized" Comprehensive Zoning By-Law ("Zoning By-law"), which was intended to replace the various pre-amalgamation zoning by-laws enacted by the former municipalities. That Zoning By-law updated antiquated zone categories and attempted to standardize zoning regulations across the City.

Adoption of this By-law resulted in hundreds of appeals before the Ontario Municipal Board and stalled the processing of development applications at the City. As a result, in May 2011,

Council repealed the By-law and directed staff to rework the document.

After months of consultations with interested stakeholders, a new, revamped version of the Comprehensive Zoning By-law ("Revised Zoning By-law") resurfaced in June 2012 before the City's Planning and Growth Management Committee. Information released about the Revised Zoning By-law suggests that staff have addressed many of the issues which had caused the most widespread concerns.

Understanding the Changes

Welcomed improvements to the Revised Zoning By-law include the expansion of the transitional provisions which will prevent the backlog of applications created by the last version, and clearer regulations dealing with legal non-conforming uses and legal non-complying properties.


Other key changes include:

- removal of Tall Buildings Regulations and Conservation Overlays;
- clarification of the policies regarding places of worship;
- re-organization of certain sections of the By-law to allow for greater clarity; and,
- slightly more permissive policies regarding eating establishments in certain Employment Industrial and Commercial Residential zones.

The Revised Zoning By-law, however, still contains a number of permissions that had given rise to concern in the earlier version. The most common of these is the prevalence of properties which are zoned "Not Part of this By-law" (the "holes"), which will continue to be governed by their current, pre-amalgamation, zoning by-laws.

Don't Be Caught Out

The Revised Zoning By-law is a major issue that affects almost every property



Moving is so much fun.
It means figuring out how to work the new coffee maker.

Aside from the new coffee maker, our new space is customized to better serve you. After all, providing a custom fit for our clients' needs is what we do every day.

Our new address is now:
WeirFoulds LLP
4100 - 66 Wellington St. W.
PO Box 35, Toronto-Dominion Centre
Toronto, ON M5K 1B7

Walk a Mile in Her Shoes

Walk a Mile in Her Shoes® is the international men's march to stop rape, sexual assault and gender violence.

WeirFoulds is proudly organizing a team of employees and clients - **WeirWalking for Women** - to participate in the Toronto Walk a Mile in Her Shoes® event this fall, hosted by White Ribbon Campaign, the largest effort in the world of men working to end violence against women.

Date: Thursday, September 27, 2012
Time: 12:00 - 2:00 p.m. (walk starts at 12:45)
Location: Yonge Dundas Square, Toronto

Gender based violence is not just a women's issue. So, let's put our best foot forward and get ready to step up and walk a mile for this good cause.

Click here to support WeirWalking for Women and join the team or donate. If you have any questions, please contact Shaila Pirani-Freitas at 416.365.6536 or spirani@weirfoulds.com.

located within the City. Accordingly, it is important that all property owners are aware of how it will affect their property in terms of the recognition of existing uses and or permissions for future uses. For those property owners who filed appeals against the former version of the By-law, it is essential to review the new zone provisions (permitted uses and regulations) to see if previous issues have been addressed, or new issues presented.

In order to preserve rights of appeal, new or outstanding concerns must be raised with the City before the Revised Zoning By-law is finalized. Prior appeals are of no force or effect. Staff have been directed to gather public input over the summer and report back to the Planning and Growth Management Committee in October 2012. A revised draft of the Zoning By-law is expected to be released on November 8, 2012, which will be followed by a Statutory Public Meeting, in accordance with the provisions of the Planning Act, in late November. The Zoning By-law is expected to be considered by City Council in January 2013.

WeirFoulds would be pleased to advise you on how the City's Revised Zoning By-law will affect your property and what you can do about it.

Health and Safety at Work: Prevention Starts Here

Carole McAfee Wallace

Employers across Ontario will soon be required to post in the workplace a new awareness poster released by the

Ministry of Labour (MOL): "Health and Safety at Work – Prevention Starts Here". The new requirement falls under the *Ontario Health and Safety Act (OHSA)* and MOL inspectors will begin enforcing this requirement as of October 1, 2012.

The poster:

- summarizes health and safety rights and responsibilities of workers, employers and supervisors;
- encourages workers to get involved in health and safety at the workplace;
- explains when and why to contact the Ministry; and,
- reminds employers that they must not take action against workers for following the *OHSA* or for raising health and safety concerns.

The development and creation of this poster resulted from a report released by an Expert Advisory Panel in December 2010 ("the Panel"). The Panel, appointed by the Minister of Labour in March 2010, consulted extensively with stakeholders across the province to review Ontario's occupational health and safety system and identify structural and operational improvements.

Their findings indicated that many workers had little or no understanding of the *OHSA*, including their rights and obligations as workers, and the responsibilities of their employers and supervisors. The creation of a mandatory health and safety poster was one of the Panel's 46 recommendations.

Post the poster today

All employers will need to adhere to the *OHSA*'s new requirement and download,

print and post the new health and safety poster in the workplace.

The *OHSA* can perform random workplace inspections, and they will look to see that your workplace health and safety posters are displayed. Don't wait until October to post this new awareness poster at your workplace. It is free to download and will show the MOL and your employees that health and safety is important to you.

The poster is available in 17 different languages and can be downloaded for free on the MOL's website.

Not at Fault? You May Still Pay

Faultless Owners of Contaminated Property Beware

Robert Warren

The recent decision of the Divisional Court in the case of *The Corporation of the City of Kawartha Lakes v Director, Ministry of the Environment* (the Kawartha Lakes Decision), is a reminder of the risks you bear, as owners or tenants, under the *Environmental Protection Act (EPA)*, for contamination which you did not cause.

The issue in the case was whether a property owner could be held responsible to clean up contamination it did not cause and which had emanated from another property.

Oil leaked from the basement of a privately-owned property and seeped onto property owned by the City of Kawartha Lakes ("the City"). The owners of the

private property had insurance, but the insurance was exhausted before the clean-up was completed. The Ministry of the Environment (MOE) ordered the City to clean up the contamination on its property and to prevent the discharge of contamination from its property.

The City appealed the order to the Environmental Review Tribunal (ERT). The ERT excluded any evidence dealing with the issue of who was at fault for the spill, on the basis that such evidence was irrelevant. The City's appeal was dismissed and the order against the City upheld.

What about the "polluter pays" principle?

The City's argument, both before the ERT and, on appeal to the Divisional Court, was that the order against it was contrary to the "polluter pays" principle. It argued that, as the innocent owner, and as a victim of an action on the part of others who could have prevented the spill from contaminating its land, it was unfair and unreasonable to have to pay the costs associated with remediating the contamination. In making those

arguments, the City was relying, in part, on earlier decisions of the Divisional Court which had held that questions of fault, or "fairness considerations", were relevant in determining whether an innocent party should be required to remediate contamination.

The Divisional Court held that the earlier decisions stood for the principle that, while the MOE may take fairness factors into consideration when deciding whether to issue an order against an innocent person, it is not required to do so. The Divisional Court pointed to the fact that section 157.1 of the EPA, which authorizes a provincial officer to issue an order "to any person who owns or who has management or control of an undertaking or property", makes no mention of fault. The Divisional Court also pointed to the MOE's "Compliance Policy" which provides that the current owner of property should be named in a control document, regardless of fault.

Don't Rely on Informal Policy

The Divisional Court's decision is not surprising, in light of the clear wording of

the EPA. Some comfort has been taken in the past from what was understood to be the MOE's informal policy issuing administrative orders based on fault or fairness considerations. The Kawartha Lakes decision is a reminder, to all property owners and tenants, that you can not rely on any informal policy on fairness considerations to govern MOE decisions.

The Divisional Court decision underscores the importance of taking every reasonable measure to ensure not just that the property you are purchasing or leasing is free from contamination, but that there is no contamination moving onto the property from adjoining properties. For example, even where there is no evidence that the property you are purchasing or leasing is contaminated, you may consider undertaking a Phase II environmental site assessment on the perimeter of the property in order to satisfy yourself that no contamination is migrating onto the property.

CONTRIBUTORS



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We would love to hear from you!

We invite your feedback, and welcome ideas for topics that may be of interest to you. Please contact Colleen Harasymchuk at charasymchuk@weirfoulds.com.

ABOUT THIS NEWSLETTER

For over 150 years, the lawyers of WeirFoulds have been proud to serve our clients in their most difficult and complex matters. We are the firm of choice for discerning clients within our core areas of practice: (1) Litigation; (2) Corporate; (3) Property; and (4) Government Law. Within these core areas, as well as key sub-specialties, we address highly sophisticated legal challenges. We have acted in some of Canada's most significant mandates and have represented clients in many landmark cases. Reflecting the firm's focus, our lawyers are consistently recognized as leaders in their chosen areas of practice and in the profession at large. To learn more about our firm, visit www.weirfoulds.com.

Information contained in this publication is strictly of a general nature and readers should not act on the information without seeking specific advice on the particular matters which are of concern to them. WeirFoulds LLP will be pleased to provide additional information on request and to discuss any specific matters.

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