WeirFoulds LLP

Legal and Regulatory Issues Facing Building Owners and Property Managers – March 27, 2019

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This paper includes information on the following topics:

Property Assessment and Taxation

Assessment Act, R.S.O. 1990, Chapter A.31; **Municipal Act, 2001**, S.O. 2001, Chapter 25;
City of Toronto Act, 2006, S.O. 2006, Chapter 11, all as amended

The *Assessment Act*, *Municipal Act, 2001* and *City of Toronto Act, 2006* govern all aspects of real property valuation and municipal taxation in Ontario, subject only to special Acts that govern specific properties or municipalities. Generally, all real property, structures and fixtures are liable to assessment, with specified exemptions from municipal taxation such as for government and some agency properties, hospitals, public schools, certain charities, and machinery and equipment used for manufacturing purposes. Retroactive assessments can be made for the two years prior to the taxation year in the case of property not previously assessed, but this is limited to omitted assessment, and does not include a change in the assessors' opinion of value. The provincial Municipal Property Assessment Corporation (MPAC) is responsible for the assessment (valuation) of real property.

All real property is valued at its "current value", which is to reflect the estimated sale price of the "fee simple if unencumbered" interest as of the valuation date. For the taxation years 2013-2016, this valuation date was January 1, 2012 (2012 CVA). For the taxation years 2017-20 the valuation date is January 1, 2016 (2016 CVA), with any increase in value from the 2012 CVA being phased in at 25% in each year, so that the full 2016 value will be effective for 2020. There is no phase in of any reduction in value. For the next cycle of taxation (2021-2024) the valuation date is January 1, 2019 so as to permit more time.

All assessed real property is classified by MPAC for municipal taxation purposes, including, but not limited to, residential, multi-residential, commercial and industrial classes, according to definitions in regulations. Multi-residential, commercial and industrial taxes are generally significantly higher than residential. However, hi-rise residential condominium units are not valued or taxed as multi-residential units but as houses. The province levies a business education tax on commercial and industrial properties significantly higher than that on residential properties, which it is reducing gradually. Municipalities are responsible for setting the tax rates applicable to the different tax classes, which are subject to "ranges of fairness" so that the multi-residential, commercial and industrial tax rates, which are usually higher than residential tax rates are not permitted to exceed a certain multiple of the residential tax rates.

The introduction of "current value" assessment in 1998, and the increases in value experienced for the 2009-2012 taxation years and generally for 2013-2016 have been and are subject to a complicated municipal "capping and clawback" tax system that reduces increases on taxes arising from new assessments, yet also "claws back" reductions arising from reduced values. For changes to properties resulting from re-zoning, demolition, or new construction or alterations, the phasing in of increased assessments is separately regulated and complicated. However, given that the "new" current value has been in place for 18 years, most properties are now at or close to their current value so that they are unlikely to be subject to significant capping or clawback, except for commercial, industrial, or multi-residential properties in Toronto that received tax increases of more than 10%, primarily as a result of being assessed not on their existing use, but on their highest and best use for future development.

Assessment values and tax classifications may be appealed to the Assessment Review Board. Appeals for multi-residential, commercial and industrial properties for the new cycle of assessment values for 2017-2020 must have been made by March 31, 2017 for the 2017 taxation year, March 31, 2018 for the 2018 taxation year, and April 1, 2019 for the 2019 taxation year. Once made, appeals are deemed to apply for any subsequent taxation years so long as no hearing has taken place and no new assessment notices have been issued for the property. For the new assessment cycle for 2021-2024 taxation years, a new appeal must be brought commencing in 2021 or later, as prior year appeals (i.e. for taxation years 2017-2020) will not be deemed for a new assessment cycle. For properties in the residential class, even if only a portion, a request for reconsideration must first be made to MPAC (Municipal Property Assessment Corporation) by March 31 of the year in question, and only after MPAC has responded to the request (which must be by September 30 of the year or later by agreement) can an appeal be then made to the Assessment Review Board within 90 days of the mailing of the MPAC response. Supplementary assessments for new construction which commence upon occupancy, for a change in classification or for land or buildings omitted from assessment, must be appealed within 90 days of the mailing of the notice of supplementary assessment. Municipalities are statutory parties to all assessment appeals, and may initiate their own appeals, on notice to the assessed owner, if they feel an assessment is too low. The larger municipalities have their own assessment departments to monitor and initiate appeals, generally when a property has been sold for more than the assessed value.

Applications for tax rebates may be made for commercial or industrial vacancy, non-profit tenants, newly exempt properties, demolition and heritage properties (if municipality permits), or to correct gross and manifest errors. Municipal rebate applications, generally must have been made by, by February 28, 2019 for qualifying events in 2018.. Applications (other than vacancy rebates) can be made for the year prior to the year in which the qualifying event occurred if MPAC agrees that a mistake was made. Recent amendments have enabled municipalities to phase out or eliminate vacancy rebates. Tax incentives exist for brownfield redevelopment, and for certain properties within community improvement areas as designated by the municipality.

Excise Tax Act, R.S.C. 1985, c. E-15, as amended

The *Excise Tax Act* ("**ETA**") governs the application of Goods and Services Tax ("**GST**") and Harmonized Sales Tax ("**HST**"), which applies at the blended rate of 13% in the province of Ontario. GST/HST is a form of value-added tax on commercial and consumer transactions that the recipient of consumer and commercial property or services is generally required to pay based on the value of consideration paid for the property or services. This tax is generally collected by the supplier and after deducting available input tax credits, the net tax is remitted to the Canada Revenue Agency ("**CRA**").

Real property is "property" for purposes of the ETA and where the property is located in Ontario, the applicable tax is HST. The recipient of supplies of property in Ontario must pay HST on taxable supplies of real property (which include rentals and sales). Supplies of commercial real property are generally taxable. The purchase of used residential property and most residential leases are exempt supplies and as such, HST is not payable on these supplies. This applies to used single-family homes, duplexes, mobile homes, condominiums and multi-unit residential buildings, including both walk-up and high-rise apartment buildings. The purchase of a new residential property or a new residential rental property,

however, is a taxable supply to which HST applies, although certain rebates may relieve some of the cost of the HST.

Generally, GST/HST is paid by the recipient to the supplier. However, where the recipient is a GST/HST registrant, in most cases the recipient will be able to self-assess the HST on a taxable real property purchase.

Things to watch out for:

- HST cannot be collected as "rent", but Landlords can reserve remedies as if it was payable as rent;
- Landlords and Tenants must be careful about whether payments (i.e., allowances, etc) are inclusive or exclusive of HST – If a lease is silent (i.e., does not contain an overriding clause with respect to HST), the general rule is that HST is not included in the amount set out as payable in the lease; and
- The relevant GST/HST rate on supplies in respect of real property will be driven by the province in which the real property is located.

***Income Tax Act* (Canada),** R.S.C. 1985, c.1 (5th Supp.) as amended
Taxation Act, 2007, S.O. 2007, c. 11, schedule A, as amended

The *Income Tax Act* (Canada) and regulations thereunder govern liability for Canadian federal income taxation. The *Taxation Act, 2007* governs liability for provincial income tax in Ontario, but generally parallels the Federal statute and is also administered by the Canada Revenue Agency.

A few things of note in relation to common forms of consideration connected to a commercial lease:

- Depending on the circumstances, a tenant inducement payment by a landlord can result in either a current deduction, amortization of the expense over the term of the lease or an addition to the capital cost of the building. The determination of what is the appropriate method is driven by what provides the most accurate picture of income;
- While tenants may prefer an amortized rate with a payment schedule reflective of having a rent-free period, a landlord will generally prefer an explicit rent-free period as it should not be required to include any rental income in respect of such period. Further, a rent free period allows a landlord to have a higher face rate;
- Security deposits are generally not taxable to the landlord unless and until the tenant no longer has a right to be refunded the deposit. Similarly, while a prepayment of last month's rent is required to be included in the landlord's income in the year of payment, the landlord will generally be entitled to an offsetting reserve and, accordingly, will effectively be required to include the amount in income in the year such month falls;
- Lease cancellation payments made by a tenant to a landlord are required to be included in income of the landlord.

- Provided the leased property is owned by the landlord at the end of the applicable taxation year (or by a person with whom the landlord was not dealing at arm's length), lease cancellation payments made by a landlord are generally deductible by the landlord on a pro-rated basis over the lesser of (i) the remaining term of the lease (including all renewal periods) and (ii) 40 years. Where the landlord (and each person with whom the landlord was not dealing at arm's length) does not own the leased property at the end of the year, the landlord will generally be entitled to deduct either (i) half of the lease cancellation payment that was not previously deducted, if the leased property was capital property, or (ii) the full amount of the lease cancellation payment that was not previously deducted, in any other case.

Green Initiatives

Smoke-Free Ontario Act, S.O. 1994, c. 10, as amended

The *Smoke-Free Ontario Act* prohibits smoking in enclosed public places and all enclosed workplaces including restaurants, bars, schools, private clubs, sports arenas, work vehicles, offices and entertainment venues, including casinos, bingo halls, bowling and billiard establishments. The Act permits residential care facilities to operate controlled smoking areas so long as they are specially designed to ensure that no one outside the room is exposed to second-hand smoke. The Act stipulates who may enter a smoking area and under what conditions, and further sets out requirements for engineering design, function and maintenance of these areas. Further, the Act governs and prohibits tobacco sales to minors as well as the display and promotion of tobacco products.

Technical Standards and Safety Act, 2000, S.O. 2000, c. 16, as amended

The *Technical Standards and Safety Act, 2000* regulates fuel suppliers, storage facilities, transport trucks, pipelines, contractors and equipment or appliances that use fuels. The Act aims to protect the public, the environment and property from fuel-related hazards such as spills, fires and explosions. The Act provides for rules with respect to the authorization required in order to carry out certain activities prescribed by the Minister, safety and compliance orders, and inspections. It further sets out the powers and duties of directors, inspectors and investigators under the Act.

Liquid Fuels Handling Code, 2007, as amended

The *Liquid Fuels Handling Code* is made under the authority of the *Technical Standards and Safety Act*. The Code regulates the storage and handling of gasoline and associated products at bulk plants, marinas, retail outlets and private outlets. The Code also contains requirements for environmental remediation, equipment installation and operating requirements for gasoline facilities.

Zoning Regulations and By-Laws

Municipal Act, 2001, S.O. 2001, c. 25, as amended

The *Municipal Act, 2001* is a comprehensive act that provides municipalities broad authority in ten spheres of jurisdiction, specifically highways (including parking and traffic); transportation systems; waste management; public utilities; culture, parks, recreation and heritage; drainage and flood control; structures; fences and signs; parking; animals; and economic development services. The Act also provides municipalities with the power to tax, to regulate or to licence businesses and to regulate or prohibit public nuisances.

The *Municipal Act, 2001* was most recently amended in May 2017. Some key changes include new municipal powers to pass by-laws respecting the protection of the environment and climate change; various amendment to expand the jurisdiction of Integrity Commissioners in investigations under the *Municipal Conflict of Interest Act;* Codes of Conduct are now mandatory for all municipal councils, and the power to impose administrative monetary penalties for failures to comply with municipal by-laws has been extended beyond parking by-laws.

Things to watch out for:

- Municipalities have the power to pass by-laws prohibiting weeds and regulating the use of pesticides;
- Municipalities have the power to declare things to be public nuisances and to apply to the courts to close down premises that are being used for activities that are public nuisances;
- Municipalities can pass by-laws restricting the hours of operation of retail businesses; and
- Municipalities can provide tax rebates to owners of commercial or industrial properties that have vacant portions – rebates equal to 30 and 35 per cent respectively, or as prescribed by the Minister of Finance.
- New advertising device / sign by-laws are no longer required to grandfather existing signs.

City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A, as amended

The *City of Toronto Act, 2006* gives the City of Toronto its own Charter and recognizes the City's status as "an economic engine of Ontario and of Canada". The City's authority is not restricted to the ten narrowly construed spheres of jurisdiction set out in the *Municipal Act, 2001*. Rather, the Act enables Toronto to exercise governmental powers (i.e., license, regulate, prohibit, require, raise revenues, etc.) with respect to broadly defined municipal purposes, subject only to certain restrictions. The Act specifically sets out general powers with respect to highways; transportation; waste management; public utilities; culture, parks, recreation and heritage; drainage and flood control; parking; economic

development; licences; closing of business establishments; health, safety and well-being; natural environment; animals; structures, including fences and signs; land use planning; and various regulations.

Things to watch out for:

- In addition to the powers other municipalities have, the City of Toronto can regulate "urban design", i.e., the aesthetics of buildings.

Development Charges Act, S.O. 1997, c. 27, as amended

The *Development Charges Act, 1997* gives municipalities the authority to enact a development charge by-law, which can impose a charge against land to be developed where the development will increase the need for municipal services, such as roads, water and wastewater, transit, and libraries, thus offsetting capital costs. Development charges do not pay for operating costs or for the costs associated with rehabilitation of infrastructure. Municipalities can levy development charges that apply either to the entire municipality or only to a specific part of area. They can also exempt certain type of development from paying a development charge or charge less than the maximum charge payable. Development charges may not be levied to pay for increased capital costs required for the provision of cultural or entertainment facilities; tourism facilities; headquarters for the general administration of municipalities and local boards; a hospital; landfill sites and services; waste incineration facilities or services; or for the acquisition of parkland. Following the Ministry of Municipal Affairs and Housing's review of the Development Charges System, Bill 73 (*Smart Growth for Our Communities Act, 2015*) amended the *Development Charges Act* to improve its predictability, transparency and cost effectiveness. However, some in the development industry are unhappy with the changes which now allow municipalities to collect more funding for infrastructure and waste recycling and handling facilities from developers who are concern that this will only result in increased costs for future homebuyers.

The Province has since passed Bill 7 (*Promoting Affordable Housing Act, 2016*), which amends the *Development Charges Act* by exempting secondary suites (such as above-garage apartments or basement units) from development charges thus making them less costly to build. While this exemption increases opportunities for affordable rental housing, it also creates opportunities for property owners to earn additional income from rental units.

Things to watch out for:

- A municipality may withhold a building permit for a development until the development charge has been paid.

Planning Act, R.S.O. 1990, c. P.13, as amended

The *Planning Act* sets out the ground rules for land use planning in Ontario and describes how land uses may be controlled and who may control them. The Act gives municipal governments the power to regulate land uses through zoning by-laws and official plans, to impose site plan control on developments and to grant minor variances. The Act also regulates subdivision of land. After its review of the municipal

measures that levy costs on development, including section 37 and parkland dedication provisions of the *Planning Act*, the Province passed Bill 73 (*Smart Growth for Our Communities Act, 2015*). Bill 73 amended the *Planning Act* in several ways including prohibiting the appeal of certain matters to the Ontario Municipal Board, extending the period of time municipalities have to make a decision on official plan amendments, and prohibiting certain development applications (i.e. an amendment to an official plan or zoning by-law within the first two years of its enactment). In 2016, the Province passed Bill 7 (*Promoting Affordable Housing Act, 2016*), which amended the *Planning Act* to give municipalities the option to implement inclusionary zoning, which would require affordable housing units as part of residential developments.

In April 2018, Inclusionary Zoning Regulations came into effect. These regulations only allow the imposition of "affordable housing units" on developments of more than 10 residential units. The regulations give municipalities considerable flexibility in implementing inclusionary zoning ("IZ"). Among other things, municipalities have the ability to set out the approach to the following: (i) the minimum size of a development to which IZ applies; (ii) location and areas where IZ units are to be directed; (iii) how affordable rent or price is determined; (iv) the length of time a unit must remain "affordable".

Things to watch out for:

- Section 50 of the *Planning Act* prohibits transfers of interests in land – including leases for 21 years or more – if the person transferring retains an interest in abutting lands;

- The *Planning Act* allows municipalities to pass by-laws restricting the demolition of residential units.

Bill 139, *Building Better Communities and Conserving Watersheds Act*

Bill 139, which became law in December 2017, has made significant, complex changes to the land use planning regime. Perhaps most significantly, it has repealed and replaced the Ontario Municipal Board with a new tribunal called the "Local Planning Appeal Tribunal" and amended the *Planning Act* to significantly limit the ability to appeal municipal council land use planning decisions. These changes place much greater authority in the hands of elected municipal councils to determine the fate of proposed development, and it is expected that proponents will encounter greater political interference in land use planning decisions.

Summary of Key Changes:

- New Standard of Review: official plans, official plan amendments, zoning by-law and zoning by-law amendments can now only be appealed for inconsistency with provincial plans, non-conformity with provincial policy statements, and/or non-conformity with applicable official plans. It is no longer sufficient to argue principle of good land use planning.

- New Appeals Process: there is now a two-step appeals process that applies to all appeals of official plans and zoning by-laws (decisions, refusals and non-decisions), and to appeals of non-decisions with respect to plans of subdivision.

- At a first appeal, the Tribunal must make a decision on the basis of the record that was before Council, no new evidence can be called, and there will no longer be the opportunity to cross-examine witnesses. If the appeal is successful, the matter is returned to the municipality, and they are given 90 days to make a new decision.

- There may be an opportunity for a second appeal if the municipality fails to make a new decision within 90 days, but the tribunal will only be able to overturn a matter if the tribunal determines that the municipal decision is inconsistent with, or does not conform to provincial policies and municipal plans.

City of Toronto "Harmonized" Comprehensive Zoning By-law (No. 569-2013)

In August 2010, the City of Toronto passed a harmonized comprehensive zoning by-law ("HZBL") in an attempt to harmonize the 43 different zoning by-laws inherited from its pre-amalgamation municipalities into one single comprehensive zoning by-law. This by-law was a source of considerable controversy for many reasons, and was appealed to the Ontario Municipal Board (OMB) by hundreds of property owners. However, before the appeals were heard, City Council repealed the by-law at its meeting on May 18, 2011, and City Planning Staff engaged in a long consultation process. A revised draft City-wide zoning by-law was released for public consultation in June 2012, and nearly a year later, in May 2013, the City passed By-law 569-2013, enacting the new harmonized Zoning By-law.

By-law 569-2013 was again appealed to the OMB by various property owners, but instead of repealing, the City is working to resolve the appeals at the OMB. Until all appeals are resolved, By-law 569-2013 cannot be brought into full force and effect. Despite this, the City's Chief Building Official and the Committee of Adjustment apply By-law 569-2013 to all applications filed after its enactment (May 2013).

Things to watch out for:

- The new by-law may have an impact on the uses that can be made of a property;

- Until the OMB approves the new city-wide zoning by-law, all applications filed after May 8, 2013 will be reviewed for compliance with both the new and former zoning by-laws;

- If a minor variance is required, owners will need to apply to the Committee of Adjustment for a variance to both the new and former zoning by-law; and

- i.e. in the case of a minor variance to allow an increase in commercial floor area, the increase is evaluated against the permissions of Zoning By-law 569-2013 and the former applicable zoning by-law (such as the former City of Toronto Zoning By-law No. 438-86)

- There are several areas where By-law 569-2013 does not apply and the previous zoning by-laws remain will remain in effect to regulate those properties even after OMB approval of By-law 569-2013. These areas appear as holes in the mapping for By-law 569-2013.

Building and Fire Code Requirements

Building Code Act, 1992, S.O. 1992, c. 23, as amended

Ontario Building Code, Ontario Regulation 332/12

The *Building Code Act, 1992* regulates, among other things, the issuance of permits for construction and demolition of buildings. The Ontario Building Code is a regulation under the *Building Code Act, 1992*. It applies to new construction, renovation and change of use of buildings, and also sets out the technical requirements for buildings.

Among other things, the Building Code regulates fire safety, structural requirements, energy efficiency, resource conservation, mechanical systems including plumbing, accessibility, and sewage systems. The Building Code also includes certain building safety requirements for electrical systems, elevators and escalators. Amendments to the Building Code to enhance accessibility came into force in January 2015 (see the *Accessibility for Ontarians with Disabilities Act, 2005*, below).

Things to watch out for:

- Many leases provide that a certificate of occupancy is required before the tenant can enter premises, but it can often take up to six months for the building department to issue the certificate;
- Certain changes of use of a building or part of a building require a building permit;
- The *Building Code Act, 1992*, authorizes municipalities to pass by-laws regulating property standards. Among other things, property standards by-laws can prohibit outside storage of materials, require lawns and shrubbery to be maintained, and require buildings to be kept in good repair.

Occupiers' Liability Act, R.S.O. 1990, c. O.2, as amended

The *Occupiers' Liability Act* creates a universal duty which occupiers (defined broadly under the Act) must meet for nearly every entrant to the occupiers' premises (also defined broadly under the Act).

The main thrust of this statute is found in section 3 which establishes the general duty owed by an occupier to persons entering their premises. Generally, the occupier must take reasonable care to see that persons entering on the premises, and the property brought on the premises by those persons, are reasonably safe while on the premises. The Act provides certain exceptions to this general duty, including situations in which the risk is willingly assumed, when a person is engaging in criminal activity, or when a person is trespassing.

Things to watch out for:

- You don't have to know the person, or consent to his or her entry onto the property to owe him or her a duty;
- Landlords can owe duties to people entering onto leased premises.

Accessibility for Ontarians with Disabilities Act, 2005, S.O. 2005, c. 11.

The *Accessibility for Ontarians with Disabilities Act, 2005*, recognizes that people with disabilities should have the same kind of opportunities as everyone else. The Act applies to every person and organization that provides goods, services or facilities, employs persons in Ontario, offers accommodation, owns or occupies a building, a structure or premises, or plays a part in a business or other activity that the regulations may identify. The Act's regulations establish the accessibility standards in respect of customer service, transportation, information and communications, buildings, and employment, as well as the time schedule for meeting such standards.

In 2015, the Building Code (O. Reg. 332/12) was amended to substantially enhance accessibility in newly constructed buildings and existing buildings that are to be extensively renovated. Existing buildings, where no work is planned, were not affected by those new requirements. Houses, including semi-detached houses, townhouses and duplexes, are not affected by most accessibility requirements, with the exception of smoke alarm requirements.

Requirements under the *Accessibility for Ontarians with Disabilities Act* cover a range of areas, including:

- Requirements for visual fire alarms to be installed in all public corridors of multi-unit residential buildings and in all multi-unit residential suites;
- Requirements for all smoke alarms in all buildings, including houses, to include a visual component;
- Requirements for an elevator or other barrier-free access to be provided between storeys in most buildings, with some exemptions for small residential and business occupancy buildings;
- Requirements for power door operators to be provided at entrances to a wider range of buildings, and at entrances to barrier-free washrooms and common rooms in multi-unit residential buildings;
- Requirements for barrier-free washrooms and universal washrooms;
- Requirements for barrier-free access to public pools and spas; and
- Requirements for accessible and adaptable seating spaces in public assembly buildings such as theatres, lecture halls and places of worship.

The Customer Service Standards apply to a person or organization that provides goods or services to the public, or to other businesses, and has one or more employees in Ontario. These standards set out requirements for identifying and removing barriers to access to goods or services. Annual accessibility reports are required to be filed by persons and organizations which employ 20 or more employees. Changes to the Customer Service Standard came into force on July 1, 2016. All accessibility standards are now part of one regulation – the Integrated Accessibility Standards Regulation (O. Reg. 191/11). This integrated regulation redefines a "large organization" to be an organization of 50 or more employees, an increase from the previous definition of 20 or more employees. Accordingly, the annual accessibility reports are now only required for organizations which employ 50 or more employees.

Things to watch out for:

- Inspectors can, without a warrant, enter any lands, or any building, structure or premises, where the inspector has reason to believe there may be documents or things relevant to compliance with the Act;
- Administrative penalties may be levied for non-compliance;
- Organizations and individuals (including directors and officers of organizations) may be charged with an offence for non-compliance of certain sections of the Act.

Ontario Heritage Act, R.S.O. 1990, c. O.18, as amended

The purpose of the *Ontario Heritage Act* is to give municipalities and the provincial government powers to preserve the heritage of Ontario. The primary focus of the Act is the protection of heritage buildings and archaeological sites. The legislation also mandates the Ontario Heritage Trust, a Crown agency, and the Conservation Review Board, a tribunal that hears objections to municipal and provincial decisions under the Act.

The Act gives the province and municipalities the power not only to delay, but to stop, the demolition of heritage sites. The Act further allows municipalities and the provincial government to designate individual properties and districts in Ontario as being of cultural heritage value or interest. Once a property has been designated under the Act, a property owner must apply to the local municipality for a permit to undertake alterations to any of the identified heritage elements of the property or to demolish any buildings or structures on the property. The Act sets out standards and guidelines for the preservation of provincial heritage properties and enhances the protection of heritage conservation districts, marine heritage sites and archaeological resources.

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31
Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56

The *Freedom of Information and Protection of Privacy Act* (FIPPA) and the *Municipal Freedom of Information and Protection of Privacy Ac*t (MFIPPA) are provincial statutes that provide individuals with a right of access to records and personal information held by the institutions covered by the Acts. FIPPA

covers all ministries of the Ontario Government and any agency, board, commission, corporation or other body designated as an "institution" in the regulations. MFIPPA covers all municipal corporations, including a metropolitan, district or regional municipality, local boards and commissions. The purposes of FIPPA/ MFIPPA is to provide a right of access to information in accordance with the following principles: information should be available to the public, necessary exemptions from the right of access should be limited and specific, decisions on the disclosure of information should be reviewed independently of the institution controlling the information, and institutions must protect the privacy of individuals with respect to personal information they hold. Further, the Acts set out the rules regarding a party's right to intervene with respect to requests for information pertaining to them by third parties, and complaints and appeals to the Information and Privacy Commissioner.

Occupational Health and Safety Act, R.S.O. 1990, c. O.1, as amended

The *Occupational Health and Safety Act* protects workers against health and safety hazards on the job. The Act sets out duties for all workplace parties and rights for workers. It establishes procedures for dealing with workplace hazards, and it provides for enforcement of the law where compliance has not been achieved voluntarily.

The Act provides that workers have the following four basic rights: (1) The right to participate; (2) The right to know; (3) The right to refuse work; and (4) The right to stop work. The Act further imposes duties on those who have any degree of control over the workplace, the materials and equipment in the workplace and the direction of the work force. Further, the Act provides an enforcement mechanism in that if the internal responsibility system fails to address adequately the health and safety issues in a workplace, or if the Act and regulations are not being followed, the Ministry of Labour has the authority to enforce the law.

Directors of a corporation can be liable for failure to comply with the Act.

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A, as amended

The *Workplace Safety and Insurance Act, 1997* governs the system which was designed to help protect workers from injury or illness in the workplace, and to help workers if they do suffer an injury. The Act governs the workplace insurance plan which is mandatory for most Ontario employers pursuant to this Act.

The Act focuses on governing health and safety in workplaces, and preventing and reducing the number of workplace injuries and occupational diseases. It governs helping injured workers and workers with an occupational disease, re-entry into the labour market of workers and spouses of deceased workers, and compensation and other benefits to workers and to survivors of deceased workers.

The Act sets out the rights and responsibilities of workers and employers. It further sets out the benefits to which workers (and a worker's family in certain situations) are entitled to as a result of a work-related injury. The Act provides an appeal mechanism for decisions made by the Workplace Safety and Insurance Board as well as enforcement and administration provisions.

Commercial Leasing Law

Commercial Tenancies Act, R.S.O. 1990, c. L.7, as amended (Ontario)

The *Commercial Tenancies Act* outlines the relationship, rights and obligations between commercial landlords and tenants. It further governs other issues which include the non-payment of rent, breaches of non-rent covenants, notices to end a tenancy, rent increases and interest on rent deposits.

Things to watch out for:

- Non-rent notice provisions in the lease may be supplanted by legislation;
- Legislation may be supplanted by certain lease provisions;
- General provisions that supersede the specific provisions of the lease.
- Statutory timelines.
- Rights of subtenants.

Personal Property Security Act, R.S.O. 1990, c. P.10, as amended (Ontario)

The *Personal Property Security Act* establishes a comprehensive set of rules to govern the rights of creditors and debtors when personal property is used as collateral to secure the payment of a debt. The Act defines personal property generally as any collateral other than real property and includes, among other things, vehicles, furniture, and equipment.

The Act sets out the rules with respect to the validity of security agreements and the rights of the parties, perfection (i.e. additional steps required to make your security interest effective as against third parties) and priority of security interests, the personal property security registration system, and the rights and remedies of a secured party in the event of a debtor's default.

Things to watch out for:

- There are occasions when a landlord can claim a PPSA security interest and those when it cannot; for example, one needs to choose between being a "secured creditor" or a "landlord" if one wishes to claim the special priority on "accelerated rent" under the BIA (see below).

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended (Federal)

The *Bankruptcy and Insolvency Act* is a federal statute which governs the law of bankruptcy in Canada. The Act aims to preserve a debtor's assets for the benefit of creditors as well as to rehabilitate debtors by forgiving their unpaid debts.

The Act governs bankruptcy orders and assignments as well as consumer proposals. The Act further sets out rules with respect to the property of the bankrupt; the administration of estates; the duties of a bankrupt; jurisdiction of the courts with respect to bankruptcy; offences under the Act; the orderly payment of debts; secured creditors and receivers; and the bankruptcy of securities firms and international insolvencies. The Act further sets out the duties and powers of the Office of the Superintendent of Bankruptcy, which is the federal agency responsible for ensuring that bankruptcies are administered in a fair and orderly manner.

Things to watch out for:

- Generally speaking, the Act supersedes the provisions of your lease.
- Powers of a trustee in bankruptcy (including disclaimer or assignment of the lease, ignoring the use clause, etc.)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (Federal)

The *Companies' Creditors Arrangement Act* is a federal statute which governs financially troubled large corporations owing more than $5 million to creditors. The Act provides such insolvent corporations with protection from the actions of creditors and allows the company to continue operations while a plan of arrangement is considered. The purpose of the statute is to present an opportunity for the company to avoid bankruptcy and restructure their affairs so as to allow creditors to receive some form of payment for amounts owing to them by the company. However, this Act is being used more frequently by corporations who are looking to wind up their operations (for example, the recent insolvency of Target Canada Co.).

Things to watch out for:

- Generally speaking, the Act supersedes the provisions of your lease and there may be a "stay" (or suspension) of a Tenant's obligations and the Landlord's right to enforce such obligations under the Lease.
- Under this Act, the courts have very broad powers and discretion to ignore terms of the lease, including use and transfer provisions.

Interest Act, R.S.C. 1985, c. I-15, as amended (Federal)

The *Interest Act* is a federal statute which governs the rate of interest that may be charged under any contract or agreement. The Act sets out default interest rates where no rate is provided and further governs the interest rate that can be charged on amounts secured by a mortgage on real property. The Act also affects the interest that can be charged on lease payments in default

Things to watch out for:

- The Act requires that an equivalency be used in certain circumstances in order to collect interest on arrears and there may be "illegal rates" of interest.

Real Property Limitations Act, R.S.O. 1990, c. L.15, as amended (Ontario)

Of the 43 sections of the *Real Property Limitations Act* ("***RPLA***"), the provisions that deal with actions for rent arrears, levying distress, and the recovery of land are the most relevant to commercial leasing. Under the *RPLA*, a landlord has 6 years from the date that a tenant has defaulted on the payment of rent to recover the arrears by levying distress or by initiating an action (s.17, *RPLA*). The *RPLA* defines rent as "all annuities and periodical sums of money charged upon or payable out of land." In the case of written leases, landlords may only levy distress or initiate actions to recover possession of their land within 10 years of rent being paid by their tenants to persons who wrongfully claim to be entitled to the land or rent (s. 4, s. 5(5) *RPLA*). A 10-year limitation period applies to recovering land from or levying distress against a tenant under an oral lease agreement providing for year-to-year (or other period) tenancy, which period is calculated from the later of: the end of the first year (or other period) of the tenancy or the last time when any rent payable in respect of the tenancy was received (s.4, s. 5(6), *RPLA*). With respect to a tenancy at will, the two remedies are only available to a landlord within 10 years of the determination of the tenancy or 11 years after the commencement of the tenancy, whichever is earlier (s.4, s.5(7), *RPLA*).

The other provisions of the *RPLA* are unlikely to figure prominently into the practice of commercial leasing, although you should be mindful of their content to avoid being caught off guard when an extraordinary situation arises.

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, as amended (Ontario)

The *Limitations Act, 2002* sets out a basic limitation period within which a claim must be made: 2 years from the date on which the basis for a claim is discovered, or ought to have been discovered, by the person entitled to bring the claim. In the commercial leasing context, limitation periods not prescribed by the *RPLA* are prescribed by either the *Limitations Act, 2002* (the "New Act") or the *Limitations Act*, R.S.O. 1990, c.L.15 (the "Old Act") (s.2, New Act). Since the *RPLA* does not provide limitation periods for the enforcement of non-rent covenants contained in lease agreements, legal proceedings initiated to enforce non-rent covenants are subject to limitation periods prescribed by either the Old Act or the New Act, depending on the timing of the action and when the underlying claim was discovered (s.24, New Act). Section 22 of the New Act renders ineffective clauses in agreements made after January 1, 2004 that purport to vary or exclude the limitations periods prescribed by the New Act. Therefore, courts are unlikely to enforce agreements made after January 1, 2004 that shorten or lengthen the limitation periods prescribed by the New Act. An agreement by parties to seek the assistance of an independent third party to resolve a claim (e.g., alternative dispute resolution) is a statutorily-sanctioned method of suspending the limitation periods of the New Act (s.11, New Act). The limitation periods are suspended from the date the agreement is made until: the date the claim is resolved; the date the attempted resolution process is terminated; or the date a party terminates or withdraws from the agreement.

Things to watch out for:

- The *Limitations Act* may create a two-year limitation on charging back or claiming back amounts due for non-rental defaults.

Statute of Frauds, R.S.O. 1990, c. S.19, as amended (Ontario)

The *Statute of Frauds* sets out the requirement that certain kinds of contracts be made in writing and signed. The Act applies to: the creation of certain estates or interests of freehold; leases of more than three years; certain contracts, including those for the sale of land; and all declarations or creations of trusts of land.

Things to watch out for:

- Leases with a term in excess of three years need to be in writing.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, as amended (Ontario)

The *Personal Information Protection and Electronic Documents Act* is a federal statute governing data privacy. The Act was enacted to support and promote electronic commerce by protecting personal information that is collected, used or disclosed in certain circumstances by providing for the use of electronic means to communicate or record information or transactions. The Act governs how private-sector organizations collect, use and disclose personal information in the course of commercial business.

Part 1 of the Act establishes a right to the protection of personal information collected, used or disclosed in the course of commercial activities, in connection with the operation of a federal work, undertaking or business, or interprovincially or internationally. It further establishes principles to govern the collection, use and disclosure of personal information and provides for the Privacy Commissioner to hear complaints under the Act.

Part 2 of the Act sets out the legislative scheme by which requirements of federal statutes and regulations that contemplate the use of paper or that do not expressly permit the use of electronic technology may be administered or complied with in the electronic environment. It grants power to the appropriate authorities to make regulations about how those requirements may be satisfied using electronic means.

Things to watch out for:

- This federal legislation affects all “confidential information” and its “use, retention and disclosure”.
- Recent updates to the legislation require mandatory notification of a privacy breach and that specific records be kept of any such breach.

Arbitration Act, 1991, S.O. 1991, c. 17, as amended (Ontario)

The *Arbitration Act, 1991*, governs the manner in which disputes can be resolved outside the court system. It speaks to the enforceability of agreements to submit disputes to arbitration and the procedures attached to the arbitration process itself. The Act sets very clear limits on the right of the courts to intervene in matters governed by the Act.

Generally, the basic principle of this Act is that people who have agreed to do so may resolve their disputes by following the decision of a third party chosen by them and, having done so, are required to honour that outcome. The Act sets out various rules with respect to arbitration and also sets some limits on arbitration.

More specifically, the Act governs the composition of an arbitral tribunal, the jurisdiction of an arbitral tribunal, the conduct of arbitration, awards under arbitration, the termination of arbitration, and remedies available under arbitration.

Things to watch out for:

- The Act sets out various rules and timelines for proceeding with arbitration and may invoke cost penalties against a party.
- Parties can choose to contract out of the Act and instead agree to their own rules for arbitration.

Construction Act, RSO 1990, c.C-30

The *Construction Act*, formerly referred to as the *Construction Lien Act*, is provincial legislation containing a number of rights and remedies available to parties who supply materials or services, or both, to construction projects. Whether the project is a home renovation, a commercial tenancy improvement, a new condominium, a residential subdivision, roads and highways or a multi-million dollar public-private partnership project, the *Construction Act* applies.

Significant changes, to be implemented in two phases, were recently made to the *Construction Act,* with the first set of changes to coming into effect in July 2018.

On July 1, 2018, the *Construction Lien Act* changed its name to the *Construction Act*. In addition to this name change, there are a number of other changes that were made to modernize the Act and reflect changes in the construction industry.

Things to watch out for:

- lien periods are extended from 45 days to 60 days
- lien action periods are extended from 90 days to 150 days
- special trust accounting and banking obligations are imposed on parties receiving trust funds
- phased and annual release of holdback for specific projects are permitted
- the release of the 10% holdback is now mandatory
- surety bonds are mandatory for specific projects

- where payments are made by landlords for tenant improvements, a landlord's interest in the land is subject to the liens of unpaid trades to the extent of 10% of the payments made
- parties can refer lien actions to Small Claims Court
- the financial threshold to achieving substantial completion have increased
- capital repairs are lienable, while maintenance work is not
- a termination of a contract will be published

On October 1, 2019, additional changes will be made to the *Construction Act.*

There are two significant changes to watch out for:

Prompt Payment of Invoices: Owners will have to pay contractors within 28 days following receipt of a proper invoice. Contractors in turn will have 7 days to pay their subcontractors following receipt of payment. If anyone within the construction pyramid seeks to suspend their payment obligations (in full or in part), that person must give a notice of non-payment alerting the other party that payment is not going to made and explain why the payment is disputed.

Adjudication of Disputes: While the project is under construction, any party to a contract or subcontract is entitled to refer a dispute to an adjudicator for an interim resolution of the disputed issue. The adjudicator's decision will be rendered within 30 days of receiving documents from the party triggering the adjudication and that decision is binding on the parties until the project is complete. Any payment ordered to be made by the adjudicator must be made within 10 days, failing which the unpaid party can suspend work. As soon as the project is complete, the right to refer a dispute to adjudication also comes to an end.

Statutory Holidays

There are a number of pieces of legislation which create statutory holidays, including the (federal) *Holidays Act*, the *Canada Labour Code*, the (Ontario) *Employment Standards Act, 2000*, the (federal) *Interpretation Act*, the (Ontario) *Legislation Act*, the *Retail Business Holidays Act* (which the *Stronger City of Toronto for a Stronger Ontario Act, 2006* stipulates does not apply to the City of Toronto – Toronto regulates by way of Chapter 510 of the Municipal Code – Holiday Shopping).

Property managers need to consider this legislation in order to assess, generally speaking:

- Their tenants' expectations with respect to their days of operation;
- The definitions and notification provisions in their leases;
- Access and service requirements during holiday periods and the allocation of costs associated therewith.

Canadian GAAP vs. IFRS

Historically, Canadian Generally Accepted Accounting Principles ("GAAP") have been applicable, in the context of commercial leasing, principally to the manner of calculating and allocating common area costs. Since 2011, International Financial Reporting Standards ("IFRS"), have had a direct impact on how results and balance sheets are prepared. Under IFRS, a single set of globally harmonized accounting principles is used for certain types of enterprises – namely "Publicly Accountable Enterprises". If applicable, property owners have to categorize their properties and in this regard, investment property is specifically defined and accounted for. All landowners and their accountants/auditors will have to engage in a discussion of whether or not a particular property falls within this classification. Once characterized, IFRS offers the owner various ways as to how to record the property: using either the "cost method" or the "fair value method". The transition to IFRS also affects characterization of tenant inducements, debt covenants, management fees and performance fees, how results are reported and the duties of directors during the changeover process. Audit committees have more discretion to exercise which impact a company's financial results, and generally speaking, key financial covenants and performance targets will have to be reviewed and revisited.

Disclaimer

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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