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Bill 27 and The Unveiling of the Level Playing Field for Ontario Employees (Updated)

Background

Working for Workers Act 2021 (the "Act") introduced by the Ontario government on October 25th, 2021 has now passed and has received royal assent as of December 2, 2021. The Act will attempt to level the playing field for Ontario professionals through several changes. Most notably, it eliminates the use of non-compete agreements in employee contracts. This will be a step towards protecting employees entering into other work opportunities for the benefit and advancement of their careers and improving the support and standards for employees, along with a work policy for employees to disconnect, required by employees with 25 employees or more. This would mean employees would be expected to disengage from work-related communications during "off" hours, and employers could not seek recourse for such disconnection.

Minister Monte McNaughton, Minister of Labour Training and Skills Development, established the Ontario Workforce Recovery Advisory Committee, June 2021, undertaking the revival of Ontario's economy and how to better its future progress.

Proposal

If passed, this Act would amend Ontario's Employment Standards Act 2000 (ESA) amongst other statutes in Ontario. This could attract global talent and provide the province with a competitive advantage, especially within industries where Canadian companies lack a leading edge.

Work Disconnect

Employers with 25 or more employees will be required to formally notify employees through written Policy about "disconnecting" from their work-related obligations and post at the end of each workday. The Act addresses the meaning of disengaging from work-related communications such as emails, phone or video calls, sending or reviewing messages as per the employee's job description. Employees would be free from work performances following the end of each workday. The Policy drafted by employers must include the date it was prepared and any changes made, providing a copy to all employees within 30 days of preparation.

The employer is now required to prepare, produce or amend existing policies to comply with the Act and must comply by March 1, 2022.

Proscribe Non-Compete Agreements
Employers are banned from including non-compete agreements into employee contracts and other contracts which could potentially prohibit employees from engaging in other opportunities, be it work, occupation or business that is in direct competition with the employee's current business, following the end of that relationship, subject to some exceptions. If any employee were to sign such an agreement, this would be rendered void and violate the Act.

While the effort could assist the Canadian economy, there could be some setbacks for employers looking to protect their intellectual property and current and long-standing clients. In this regard, there is an exception to the Act. The legislation will still allow companies to forbid departing employees from using intellectual property, confidential information. It would still be allowed in the sale of a business or part of a business. As per the agreements of the sale, the purchaser and seller enter into a binding contract which forbids the seller from partaking in any activity, business, work, occupation, profession, project, or other related action that is in direct competition with the engagements of the purchaser acquiring the business after the sale, as well as after the seller becomes an employee of the purchaser. The goal is, to provide job mobility and limit competition barriers.

Further Changes Included are:

Lifted Barriers for Canadian Experience Requirements
Amendments to the Fair Access to Regulation Professions and Compulsory Trades Act, 2006, have removed existing barriers for access to jobs that match skills and qualifications. This would be applicable for Canadian experience requirements and internationally trained individuals. There will, however, still be requirements to ensure there is compliance with the regulation in respect to language proficiency in English or French.

Recruitment and Help Agency Licensing
The Act also adds protection for vulnerable employees with amendments to the Ontario Employment Standards Act 2000 to establish a licensing system for recruiters and temporary help agencies. There will be a list of requirements for such as licensing to operate in the province. The licenses would then be issued by the Director of Ontario Employment Standards yearly.

Availability and Accommodation of Restrooms for Delivery Workers
The Act will require business owners to provide company restrooms for delivery workers if they are delivering or picking up items. This would amend the Occupational Health and Safety Act. Any exceptions would include that providing access would not be reasonable for the health and safety of any person at the workplace; if providing access would not be reasonable or practical regarding all circumstances, with several regards to specific circumstances relating to the current employees of the workplace and location of the washroom in the workplace.

COVID-19 Recovery and WSIB
The Act further allows surpluses in the Workplace Safety and Insurance Board's (WSIB) Insurance Fund to be distributed to certain levels to business as an initiative to assist employers with the impacts of COVID-19. It provides that the WSIB's current reserve may be distributed to Schedule 1 employers as defined in WSIA if the amount of the insurance fund meets a sufficiency ratio.

Future Impact
The wording of the legislation with respect to non-compete clauses is important as many employers have and rely upon non-compete clauses in their current contracts. As we know from Waksdale v. Swegon North America Inc., 2020 ONCA 391, if an employment contract contains a clause that violates the Employment Standards Act, the entire contract is void, even if the employer has no intention of enforcing the offending clause. An employer's action or inaction will not be enough to save an otherwise invalid contract. The Act does not state that the prohibition of non-compete clauses will apply retroactively. Nevertheless, Employers should be vigilant of the changes in the Employment Standards Act to reduce the risk of unwelcome surprises upon the termination of an employee.

"This article is intended to inform. Its content does not constitute legal advice and should not be relied upon by readers as such. If you require legal assistance, please see a lawyer. Each case is unique, and a lawyer with good training and sound judgment can provide you with advice tailored to your specific situations and needs."

This blog was co-authored by Angela Victoria Papeo*

NEWS & SPONSORSHIPS

UPCOMING WEBINARS

Marty Rabinovitch from our Employment Law Department hosted an HR/Employment law webinar where he discussed covid-19 policies in the work place and provided case law updates.

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Frank Shostack from our Tax Law Department was featured in The Lawyer's Daily discussing estate freeze and the capital gains consumption.

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DSF was a sponsor at the Annual Barrie Film Festival, a not for profit organization that provides film fans unique experiences through year-round programming.

DSF was once again a proud sponsor of the Barrie Business Awards where we presented the Hospitality and Tourism Business Sector Award to the winner Chillz Dessert Lounge. The awards are a long-standing recognition program that celebrates the contribution of local businesses to the continued growth and success of the Barrie community.

DSF sponsored a Post-Secondary Tuition Support Video for Child Welfare PAC, a non-for-profit organization, who is hosting this event to encourage Canadian post-secondary institutions to undertake tuition-free positions for current and former foster kids.

DSF was a sponsor at Youth Without Shelter's Annual General Meeting which is typically an evening of celebration of the accomplishments of the resident youth, dedicated donors, and volunteers.

DSF sponsored the Barrie Santa Tour as a part of the Canadian-led Global Human Connection Movement, in connection with The GenWell Project, to reinforce the critical importance of togetherness hosted by the Barrie Chamber of Commerce.

WP Law donated to the resound choir which seeks out opportunities to make meaningful contributions by providing choral workshops and performance opportunities for singers, hiring early-career instrumentalists, soloists and conductors.

WP Law was a sponsor at the Durham Region Association of Realtors' Professional Development Day event which focuses on connecting realtors with businesses across the Durham region.

WP Law was a sponsor at Our Neighbourhood Realty Inc's Annual Christmas Party with proceeds going to the realty's Pantry Bag Initiative that helps to feed over 300 families in the neighbourhood during the holiday season.

WP Law won the diamond and platinum awards for 'Best Lawyer' and 'Best Law Firm' hosted by the reader's choice awards for 2021.

BLOGS

“NO MULLIGANS”- CHALLENGES FACED BY INSURERS REQUESTING MULTIPLE MEDICAL EXAMINATIONS IN PERSONAL INJURY CASES

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Where the physical or mental condition of a party to a proceeding is at issue, a medical examination may be granted by a court of competent jurisdiction. This examination is generally regarded as a defendant’s right in personal injury cases. However, there are a number of considerations which affect the availability of multiple examinations for any given case.

Where multiple examinations are requested, the primary consideration will be fairness, and it will be critical to establishing the necessary evidentiary basis supporting the defendant’s argument that fairness requires a second or further examination.

Notably, a recent decision of Justice Nicholson of the Ontario Superior Court[1] has highlighted the conflicting considerations applicable to this right and cautioned legal practitioners against seeking “a second kick at the can.”

General Rule: One Examination per Specialty per Defendant

Typically, in a personal injury matter, an examination will be permitted for each specialty applicable to the plaintiff’s injuries. For example, an orthopaedic examination is appropriate where there are orthopaedic injuries; a psychiatric examination is appropriate where there are psychiatric complaints. Examinations by other specialists are appropriate where there are complaints within the area of expertise of those experts.

The defendant’s right to a medical examination of the plaintiff in a personal injury matter arises under section 105 (2) of the *Courts of Justice Act:*[2]

> *“where the physical or mental condition of a party … is in question, the court … may order the party to undergo a physical or mental examination by one or more health practitioners.”*

“Health practitioner” is defined as a person licenced to practice medicine, dentistry, or psychology.

While the language of the statute is discretionary (i.e., “***may*** order”), a first medical examination has been generally established by the courts as a right. Beyond the first exam, section 105 (4) of the Act permits “further physical or mental examinations.”

The procedure is set out in Rule 33 of the Rules of Civil Procedure. Specifically, the order for the examination “shall name the health practitioner ***or practitioners*** by whom the examination is to be conducted.”[3]

Similarly, Rule 33.02 (2) empowers the court to order a “second examination or further examinations.”

Where there are two or more defendants, each defendant is entitled to a separate defence medical examination of the plaintiff by their own experts.[4]

“Overlapping” Examinations

A court will typically not permit multiple “overlapping” examinations to assess the same type of injury. For example, examinations by an orthopaedic specialist and by a physiatrist regarding the same orthopaedic injuries or an examination by a psychologist and a psychiatrist with respect to the same psychiatric complaints

would not generally be permitted.

However, grey areas arise where there are injuries or complaints that are partially within the expertise of one specialty and partially within the expertise of another. For example, where a plaintiff claims to have suffered a traumatic brain injury (TBI) as well as psychiatric complaints following an accident, an examination by a neuropsychologist with respect to the TBI complaints might be appropriate and an examination by a psychiatrist with respect to the psychiatric complaints might also be appropriate. The court will look at the degree of overlap between the complaints and may restrict the examination to either a neuropsychologist or a psychiatrist.

In one case where examinations had been conducted by a psychiatrist and a neurologist, the court refused to order further examinations with a neuropsychologist, an orthopaedic surgeon, and a second psychiatrist.[5] In another example, an examination by a psychiatrist was refused where an examination had been conducted by a psychologist, on the basis that there was an inadequate evidentiary basis for the psychiatric examination and the examination could delay the trial.[6]

In determining whether a further or "overlapping" examination will be ordered, the court considers whether the defendant will be prejudiced if no examination is permitted, and this will be weighed against any risk of prejudice to the plaintiff.[7] A key factor in determining prejudice is any possible delay in the trial. The decision will be based upon the evidentiary record, and the defendant has the onus to provide evidence supporting the need for a second or further examination and addressing the issues of fairness and prejudice.[8]

Examinations by Accident Benefits Insurers

A defendant in a tort action will be entitled to conduct defence medical examinations notwithstanding that the plaintiff may have been examined by the defendant's Statutory Accident Benefits Schedule (SABS) insurer where the initial examination did not address all the issues and there was no abuse of process.[9]

An examination under an insurance contract is separate and distinct from a medical examination under section 105. An examination under contract prior to litigation commencing does not pre-empt the defendant's right to an examination under section 105.[10]

The Test for Fairness (Bonello)

The applicable test for further examinations was addressed by Justice Brown in *Bonello v Taylor*.[11] Justice Brown stated that the overriding consideration was trial fairness.

In brief, the factors are:

- the assessment would be for a legitimate purpose (i.e., not to delay or cause prejudice);
- the party's medical condition has changed or there is new information;
- a report by the defendant is needed to "match" the expert evidence from a specialist's report from the plaintiff—although this is not automatic;
- the proposed examination would be necessary as a diagnostic aid, if conducted by a person who is not a health practitioner (e.g., a rehabilitation expert);
- there is sufficient persuasive evidence to demonstrate the need;
- evidence of unfairness is also taken into account; and
- whether the further examination would impose an undue burden on the plaintiff.

Read a full summary of the factors in Bonello.

When Is Further Examination Denied (Mitsis)

The recent decision of Justice Nicholson in *Mitsis v Holy Trinity* addressed many of these factors.[12] The plaintiff was pursuing a slip and fall claim and alleged that she suffered injuries including a fractured right shoulder and arm.

Following examinations for discovery, the defendant arranged to have the plaintiff examined by a physiatrist (at that point, the plaintiff had not served any experts' reports). Subsequently, the plaintiff served a report from an orthopaedic surgeon. In response, the defendant sought their own examination by an orthopaedic specialist. The defendant claimed that it would be prejudiced if a defence orthopaedic assessment were not permitted.

Justice Nicholson stated that there had been no material change in the plaintiff's condition and the defendant knew that the plaintiff's injuries were primarily orthopaedic in nature when it elected to commission a physiatry exam.

Justice Nicholson felt that there was no procedural unfairness to holding the defendant to its choice of experts, and denied the request for a defence orthopaedic examination. As an aside, Justice Nicholson commented that perhaps the defendant's physiatry report was not as favourable as the defendant might have hoped:

> ***"One cannot help but be suspicious that the Defendant had hoped for a report more favourable to its position in the litigation from Dr. Perera [the defence physiatrist] and is now seeking a 'mulligan.'"***

Conclusion

The importance of establishing the necessary evidentiary basis for a second or further medical examination of the plaintiff cannot be overstated. An affidavit from the prospective medical expert setting out why a further examination is necessary is generally preferable to an affidavit based on information and belief from defence counsel's clerk. The affidavit material must address the factors set out in Bonello. Establishing that fairness favours permitting the examination and that the plaintiff will suffer no undue prejudice will be key.

[1] Mitsis v Holy Trinity Greek Orthodox Community of London and Vicinity, 2021 ONSC 5719 [Mitsis].
[2] Courts of Justice Act, RSO 1990, c C.43, as amended.
[3] Rules of Civil Procedure, RRO 1990, Reg 194, as amended [emphasis added].
[4] Maniram v Jagmohan, [1988] OJ No 2877.
[5] Jones v Spencer, [2005] OJ No 1539.
[6] Clarfield v Crown Life Insurance, [2000] OJ No 960.
[7] Lawrence v Primmum Insurance Co, 77 CPC (6th) 388; see also Suwary (Litigation Guardian of) v Women's College Hospital, 2008 CarswellOnt 887.
[8] Abergel v Hyundai Auto Canada, [2002] OJ No 4387.
[9] Jeyanthiran v Ratnam, [2009] OJ No 469.
[10] Paul Revere Life Insurance Co v Sucharov, [1983] 2 SCR 541.
[11] Bonello v Taylor, 2010 ONSC 5723.
[12] Mitsis, supra note 1.

A LEGAL GUIDE TO CRYPTOCURRENCY IN CANADA

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What is cryptocurrency?

Cryptocurrency is decentralized digital money, based on blockchain technology. It is a form of currency that can be exchanged online for goods and services. However, it is not legal tender in Canada as it operates independently of any central bank, central authority or government.

The Currency Act defines legal tender as only:

Bank notes issued by the Bank of Canada under the *Bank of Canada Act*
Coins issued under the *Royal Canadian Mint Act*

How does the CRA Approach Cryptocurrency?

The CRA's position is that cryptocurrency should be treated as akin to a commodity for the purposes of the *Income Tax Act*. As a result, crypto transactions are subject to the same rules as barter transactions – transactions where one commodity is exchanged for another. Any income from transactions involving cryptocurrency can be treated as business income/losses or as a capital gain/loss, depending on the taxpayer's circumstances.

When is cryptocurrency taxed?

Canadians typically do not pay any taxes to hold a cryptocurrency but doing any of the following can lead to tax liability:

- Gifting cryptocurrency
- Selling cryptocurrency
- Exchanging or trading cryptocurrency, including converting between cryptocurrencies
- Converting from cryptocurrency to CAD or another fiat currency
- Buying goods or services with cryptocurrency

Do you need to declare your income from cryptocurrency transactions to CRA?

Yes. Income or gains from trading in digital currencies are subject to tax under the income tax rules. Gains and losses from buying and selling cryptocurrencies must be reported in a taxpayer's income when filing a tax return. Depending on the extent of the trading activities, the transactions may be characterizable as being on account of income or capital.

Generally, if an individual is in the business of trading cryptocurrency, or is engaged in an "adventure or concern in the nature of trade" any gains or losses ought to be reported as being on account of income. If an individual is not engaged in the business of trading cryptocurrency, gains or losses can be reported as being on account of capital.

Business Income:

The case law provides guidance to CRA auditors who typically use the following factors to categorize cryptocurrency as business income:

- Volume of trades – the more a taxpayer trades in a given year may indicate an "active" business
- A product or service is promoted
- The overall behaviour is managed in a commercially viable way

- Activities are done “in a business-like manner” (such as acquiring inventory or capital assets or making a business plan)

The net income will be fully included in income and taxed at the individual’s marginal income tax rate. CRA considers cryptocurrency mining, trading, exchanges, and ATMs to all be cryptocurrency businesses.

- **Adventure or Concern in the Nature of Trade**

The CRA may also consider transactions to be an adventure or concern in the nature of trade, which would also result in a full income inclusion for the taxpayer, even if only a single transaction is undertaken. The relevant factors to consider are:

- whether the taxpayer dealt with the property in the manner consistent with how a dealer in said property would ordinarily deal with it
- whether the nature of the property itself precludes the possibility that its sale was a realization of an investment or of a capital nature
- whether the taxpayer’s intention as deduced is consistent with a trading intention

Of the above factors, generally, the courts have held that the taxpayer’s intention is the most important and usually is determinative. The result is the same as business income, meaning that the taxpayer will be required to include 100% of the net gain into income.

- **Capital Gains:**

Generally, a transaction will be considered on account of capital based on some of the following factors:

- The property was purchased to generate recurring income such as rent or dividends
- Evidence of an intention to hold long term
- There is an absence of evidence of business intention or behaviour related to the asset
- When characterized as a capital gain, only 50% of the net gain will be included in the taxpayer’s income for the year and will be taxed at the individual’s marginal rate.

Reporting Ownership of Cryptocurrency to CRA

Because cryptocurrencies are treated in a similar manner to any other type of asset, Canadians who hold bitcoin or other cryptos with an aggregate cost base greater than $100,000 on exchanges or physical wallets outside of Canada will need to report their holdings on the T1135 – Foreign Income Verification Statement which must be filed each year with the income tax return if applicable. Failure to do so results in a strict liability penalty of up to $2,500 per year, and there is the potential for additional Gross-Negligence Penalties in excess of $10,000 per year to be assessed.

What if you fail to declare your (taxable) profits?

Failure to report income from cryptocurrency transactions, or failure to declare cryptocurrency held offshore is illegal in Canada and can result in prosecution for a criminal offence under the Income Tax Act, the imposition of extremely punitive Gross-Negligence Penalties and more. Depending on your circumstances, however, it may be possible to correct the deficiency with CRA by proactively filing a Voluntary Disclosure Application. Late-filing or amending can be considered but will result in penalties, so seeking specific legal advice in advance is preferred.

Fraud Against The Elderly Via Continuing Power Of Attorney For Property

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When people get older and their mental capacity dwindles, it can be a great relief to have someone else look after one's financial affairs. There often comes a time in our lives when it becomes difficult to keep track of bills and payments and to keep the necessary overview required to make financial decisions. A trusted relative or friend may be willing and able to help when such tasks become more and more cumbersome. A continuing power of attorney for property is an excellent tool that permits the 'grantor' to grant a power of attorney (POA in the following) to a person of their choice who will remain in charge of the grantor's property even in the event the grantor becomes mentally incapable. That is why it is called a continuing power of attorney.

Scope

With great power comes great responsibility and on the flip side great risk of abuse. The more encompassing the POA, the more vulnerable the elderly. S. 7(2) of the *Substitute Decision Act (SDA)* provides that a grantor may authorize the attorney to do anything in respect of property that the grantor, if capable, could do, except make a will. The grantor may also decide to limit the scope of authority to mitigate some of the risks that come with granting a POA. For example, the attorney may only be entitled to deal with certain assets, or the commencement of the power may be postponed to a specific time or event, i.e. when the grantor becomes mentally incapable. Such limitations would need to be clearly written into the POA.

The POA loses its effect of entitling the attorney to act on the grantor's behalf in property matters once the grantor dies.

Legal Requirements

According to s. 8 of the *SDA*, the grantor is capable of giving a continuing POA if the grantor

- knows what kind of property the grantor has and its approximate value;
- is aware of obligations owed to the grantor's dependants;
- knows that the attorney will be able to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;
- knows that the attorney must account for the attorney's dealings with the grantor's property;
- knows that the grantor may, if capable, revoke the continuing power of attorney;
- appreciates that unless the attorney manages the property prudently, its value may decline; and
- appreciates the possibility that the attorney could misuse the authority given.

Fraudulent Schemes

A relative, an alleged friend, or even a stranger may fraud the elderly victim by having them sign a POA by misrepresenting its content or scope to them. Such a POA does not meet the above-mentioned requirements and is void. Yet, third parties may rely on the signed POA nevertheless and conduct business with the fraudster. While such transactions are void and legally the sold asset is recoverable, there might be insurmountable practical hurdles to recovery. The asset may simply have disappeared by the time the fraud is discovered. If the asset is a piece of land, there are certain statutory protections against a title transfer by a fraudster. However, if a good faith purchaser who bought the land from the fraudster resells the land and title is registered for the benefit of the next purchaser, the title of the original owner is extinguished.

There even remains a risk of abuse after the grantor has died because third parties with whom the attorney conducts business purportedly on behalf of the deceased grantor may not know of the grantor's death. They may again reasonably rely on the POA presented to them by the attorney. This risk is at this stage of course a risk for the estate of the deceased grantor.

These extreme examples are criminal matters, as they are in clear violation of s. 331 of the Criminal Code 'Theft by person holding power of attorney'.

Another scheme can be conducted with a perfectly valid POA. The attorney may decide not to act solely in the interest of the grantor, as he or she is obliged to do under the *SDA*. For example, the attorney has the power to make gifts and loans to the grantor's friends. This is deemed to be in the interest of the grantor by the *SDA*. A limit imposed on such gifts is the unduly depletion of the grantor's property to a degree where it does not suffice to satisfy the support and care of the grantor. Obviously, where this line must be drawn is quite debatable and the attorney has significant leeway under the law. A further restriction to the attorney's power lies in the fact that, if challenged, the attorney must prove that he or she had reason to believe, based on the intentions of the grantor expressed before becoming incapable, that the grantor would have made the gift as well.

The reality is those elderly people who do not have the mental capacity to look after their own assets are also not in the position to challenge the abuse of a power of attorney. They are helpless and rely on better friends or kinder relatives to look after their interests.

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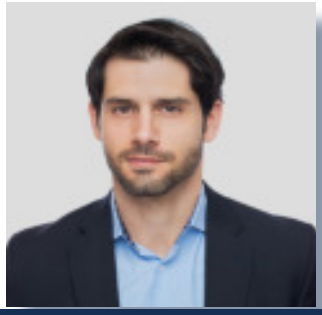
The Buyers Guide to New Construction Homes



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The purchase of a new construction home or condominium can differ from a property that is a resale. This is due to the fact that you are purchasing directly from the builder. The residential sector for the development industry is strong in Ontario. With the growing population and more residents moving outside the city, more new build development projects are expected to be completed to meet the province's housing needs. However, purchasing a new construction home will come with additional obligations specific to the purchase of the new build. Outlined below is what to expect when considering purchasing a new construction home.

New Build Agreement of Purchase and Sale

New build Agreements of Purchase and Sale do not use the standard OREA form that is used in resale agreements. The ones provided in new construction homes are more descriptive and tailored to the developer. Included with the Agreement of Purchase and Sale are TARION Addendums which are added to include the following:

- Statement of Critical Dates
- Conditions
- Rights and Obligations
- Occupancy
- Termination Clauses
- Early Termination Conditions
- List of closing adjustments the vendor proposes.

With these additions, it is important to have a lawyer review everything as some Agreements of Purchase and Sale can shift time frames for review. As well, there are a number of clauses and conditions that can be reviewed, removed, and negotiated for the purchaser's needs. Along with hidden restrictions for Purchasers before purchasing the home, there are some that could come into place upon taking possession of the home.

TARION

Ontario's new home Agreements of Purchase and Sale include a Warranty by the Tarion Warranty Corporation ("TARION"). This regulates and enforces the Ontario New Home Warranties Plan Act ("ONHWPA" or "Act"). Most new homes fall within the purview of TARION; with this, TARION Addendums. These will consist of a Statement of Critical Dates, which outlines the terms of the agreement and two schedules. Schedule A, the first schedule, will list types of permitted termination conditions. Schedule B, the second schedule, will identify all closing adjustments that the Vendor intends to charge the Purchaser.

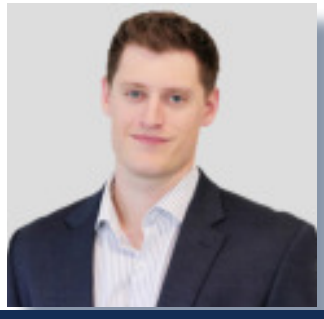
The Statement of Critical Dates is a crucial aspect of the new build agreement. Depending on the Firm Closing Date or a Tentative Closing Date, the Vendor could have the chance to extend the closing date numerous times. Similar to this is the Interim Occupancy Date which can be tentative or firm. This differs from the closing date as condominiums are generally available to occupy before the Vendor transfers ownership. If this happens, the Purchaser will pay Occupancy Rent until the closing date. If there are any delays in closing, there is compensation available through the TARION Warranty. This will come into effect after closing.

Schedule B Adjustments in a new build agreement differ from resale purchases where the adjustments include property taxes and other common expenses.

Purchasing a new home or condominium can come with lots of excitement. While there are new developments appearing every month, the importance of enlisting a real estate lawyer to thoroughly review your agreement of purchase and sale and other related documents is paramount.

If you have any further questions on New Build Construction Homes or would like to speak to someone about reviewing your New Build Agreement of Purchase and Sale, please contact Woitzik Polsinelli Lawyer Jonathan

DOMESTIC CONTRACTS (COHABITATION AGREEMENTS/MARRIAGE CONTRACTS) AND WHAT TO CONSIDER



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Congratulations! You have survived spending months of COVID-19 lockdowns with your significant other and still love each other! Perhaps you have now both decided that you are ready to move in together permanently. While the thought of a possible separation in the future is not at the forefront of your mind when you are in the process of happily building a life together, there are certain legal implications that are much easier and less stressful to address at the outset of your cohabitation, rather than in the unfortunate event of a separation.

When you and your intimate partner 1) cohabit for at least three years, 2) have a child together and are in a relationship of some permanence, or 3) are married, you gain certain automatic rights in Ontario primarily pursuant to the Family Law Act (FLA). A domestic contract (also known as a Cohabitation Agreement or Marriage Contract) permits these automatic rights to be varied in order to better suit the intentions of the partners. There are a number of questions that can be answered and agreed upon through a domestic contract that may not be so stress-free and straightforward to answer in the event of a separation.

What Impact Will Our Relationship Have on Our Property Rights?

One of the main questions asked and argued about when partners decide to part ways is, "Who gets what?"

Unmarried partners do not have automatic rights concerning property and therefore ownership is determined solely by who is named on an asset. For example, if your partner is the only individual named as the owner of the house that you are both living in, then you will not have any default rights to an interest in the value of the house, nor will you have a right to stay in the house in the unfortunate event that you separate. If you had been contributing to the house, it is possible to establish an interest in the property through an equitable claim in court. However, there are numerous legal thresholds to exceed in order to establish such an interest and the results of these types of claims are unpredictable. A domestic contract allows you and your partner to be clear as to who owns what, how assets will be distributed, and the permitted living arrangements in the event of a separation.

It is also important to note that, if you become married without a domestic contract in place, there are certain property rights that you and your partner immediately acquire. While the details of these rights are beyond the scope of this article, the general impact is that 1) the value of most assets acquired by either partner during the marriage essentially become a part of the marriage and 2) the value of the "matrimonial home" becomes a part of the marriage, regardless of who owns it or when it was obtained. What is critical to understand here is that this means there is an obligation to split the value of the home that you live in with your partner, regardless of who owns the property or for how long they have owned it (even if it was owned prior to the marriage). A domestic contract remains enforceable in the event that you get married (and can also be entered into in the event that you are already married) and allows you to vary these automatic property rights in order to reflect your intentions with regard to your assets.

Do Either of Us Expect Financial Support From the Other?

If cohabiting or married partners separate, the partner with the lesser income may be eligible for spousal support payments pursuant to the Family Law Act. Unfortunately, the framework for determining whether spousal support payments will be ordered by a court is unclear and is very case-specific. In order to avoid unexpected surprises and expensive litigation, a domestic contract can contemplate whether spousal support will be payable in the event of a separation and if so, how much will be payable and for how long. While it is possible for a court to determine that the spousal support provisions of a domestic contract are unconscionable and therefore unenforceable, the fact that the partners have come to an agreement with regard to the matter will be a major factor considered by a court.

If We Have Children, How Are We Going to Raise Them?

The Family Law Act also permits partners to agree upon the education and moral training of their children as well as each partner's support obligations for the children through a domestic contract. This allows partners to come to a greater understanding of each other's values, beliefs, and intentions with regard to the upbringing of children ahead of the final hour. Note that partners are not permitted to determine the decision-making responsibility or parenting time with respect to their children within a domestic contract (this is only permitted to be contemplated in writing in the event of a separation).

Preparing a Cohabitation Agreement

Overall, a domestic contract allows you to outline the obligations and rights of each partner during their time living together. It also allows for you to determine how matters can be settled between you and your partner in the unfortunate event that the relationship comes to an end.

If you are considering entering into a domestic contract, it is strongly recommended that you consult with a family lawyer in order to ensure that the agreement is enforceable and accurately reflects your intentions (see the article here on the enforceability of domestic contracts: Domestic Contracts – The Importance of Accurate Financial Disclosure and Legal Advice).

OUR FIRM IS GROWING

Nathaniel Hills *B.A., J.D*

Nathaniel Hills joined DSF as a senior lawyer in our tax department in 2021. He completed his J. D. at Osgoode Hall Law School where he excelled in the areas of tax law and legal writing and research. He has vast experience in all areas of tax dispute resolution with the Canada Revenue Agency and the Ontario Ministry of Finance, including Appeals to the Tax Court of Canada and the Federal Court of Canada, objections & audits, the Voluntary Disclosures Program and more.

Sanaz Golestani *B.A., J.D., LL.M*

Sanaz Golestani joined DSF in 2021 as a Senior Family Lawyer in our Whitby location. She graduated from York University with a B.A (Hons) and studied law at the University of Ottawa, where she obtained her J.D and she also completed her LL.M., specializing in family law in 2018 from Osgoode Hall Law School. Sanaz applies a practical and individualized approach that reflects the unique needs and goals of each of her clients by bringing a human element to the practice of family law.

Ryan Stubbs *B.A., J.D*

Ryan Stubbs joined DSF in 2021 as an associate lawyer in our commercial litigation and collections & mortgage recovery groups. He graduated from Carleton University with a B.A. (Hons) and earned his J.D. from Bond University. Through a detail-oriented approach to document review and analysis combined with strong oral and written advocacy, Ryan assists all of his clients in achieving positive outcomes in the face of difficult legal challenges.

Jake Vogl *B.Mos, J.D*

Jake Vogl joined DSF in 2021 as an associate lawyer in our corporate law department. He graduated from Western University with a B.Mos (Hons) and earned his J.D. from Queen's University. Jake works with start-up, growth stage, and mature privately held companies, and specializes in advising technology companies at any stage of their growth cycle. With a client-centred approach and the ability to anticipate issues before they arise, clients rely on him for timely, efficient, and effective legal advice.

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LETTER FROM OUR MANAGING PARTNER

This holiday season, DSF has had the privilege to be a part of several charitable and community events such as: The Barrie Santa Tour, Child Welfare PAC, ONRI's Pantry Bag Initiative, Barrie Business Awards, and Youth Without Shelter, to name a few. Community welfare has always been an integral part of our firm's core values and we are happy to help to empower businesses and individuals to make a positive impact.

DSF is pleased to welcome four new lawyers this month to our offices: Sanaz Golestani, Ryan Stubbs, Jake Vogl and Nathaniel Hills.

Sanaz joined DSF's Whitby family law department as a senior lawyer with experience in a variety of family law issues including equalization of net family property, child and spousal support and age-appropriate residential arrangements for children and decision-making responsibilities between separated parents.

Ryan is a part of our commercial litigation department with extensive experience in litigation, regulatory compliance and defence, and business law.

Jake joined our corporate law department where he works with start-up, growth stage, and mature privately held companies, and specializes in advising technology companies at any stage of their growth cycle.

Nathaniel Hills helps us to add more depth to our tax department. Nathaniel has spent his entire career accumulating experience in both proactive and retroactive tax planning, tax treaty optimization, offshore compliance, individual and corporate residence tax matters, trusts, director's and shareholder's liability issues, and inland transfer tax, income tax, GST/HST and employer heath tax issues.

We are also happy to announce that our sister firm Woitzik Polsinelli *LLP* ('WP Law') won the diamond and platinum awards for 'Best Lawyer' and 'Best Law Firm' hosted by the reader's choice awards for 2021 in the Durham region. Together we continue to welcome new opportunities that nourish our entrepreneurial relationships in Durham.

As always, our clients can be assured of our accessibility, expert services and guidance in the new year ahead. Until then, we wish everyone a very happy holiday season and a joyous new year 2022!

Larry Keown
Managing Partner
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Devry Smith Frank *LLP*
Lawyers & Mediators