



NEWS



DEVELOPERS BEWARE! THE HCRA CAN REVOKE YOUR LICENCE

BY RACHEL PUMA AND LEOR MARGULIES

As a result of a number of developers cancelling condo projects in the last few years due to escalating costs of financing and construction, the Home Construction Regulatory Authority (HCRA) is cracking down on builders who are attempting to improperly increase the price of their units. In early 2023, the HCRA updated one of its advisories with respect to Price Escalations and Contract Terminations. Much of the advisory is not new, but it highlights the HCRA's focus as the "watchdog" for consumers. This note will briefly discuss two items in the Advisory, being (1) Price Escalations, and (2) Adjustments; however, readers are encouraged to read the entire Advisory for further information and guidance from the HCRA. The advisory can be found [here](#).

The Advisory emphasizes that licensees must honour their agreements, which do not provide for arbitrary price escalations, and must not coerce purchasers into paying more money than agreed upon—particularly by threatening to cancel the sale agreement if the purchaser does not pay more money. The Advisory sets out that the HCRA may have some leniency for a licensee to request a price increase with existing purchasers, but the licensee must (a) provide significant information about how the price increase was determined, (b) advise the purchasers of all their options—including to continue with the original price, (c) give the purchasers a reasonable time to respond, and (d) recommend that the purchaser obtain independent legal advice. Even complying with those guidelines, however, may result in the HCRA determining that the licensee has not demonstrated necessary competencies to possess a licence. The authors strongly recommend obtaining legal advice before sending any kind of notice requesting a price increase to existing purchasers.

The Advisory also updates the HCRA's guidance on adjustments in sale agreements. There are two key points here: (1) adjustments must be **clearly communicated** through the agreements; and (2) a **summary** of how the adjustments were calculated must be provided on closings.

1. Clear communication.

Adjustment clauses in sale agreements must be drafted in a way that is clear to purchasers and, where possible, based on an objective and easily calculable method. Wording that is not sufficiently clear and specific may be determined to be an act of professional misconduct. We have all seen builder form adjustment clauses which are compacted into one difficult to read paragraph which leaves lawyers, purchasers, and the developers themselves scratching their head trying to understand what adjustments are chargeable. The HCRA has made it clear that this is not acceptable, and any existing builder form agreements should be updated with more clearly drafted adjustment clauses.

2. Summary of calculation.

When collecting adjustments on closing, licensees are required to communicate with purchasers clearly and in a timely manner. Purchasers should be provided, at minimum with a summary of how the adjustments were calculated and reasonable time to review the adjustments. In addition, for third party charges, such as municipal charges, the following information should be provided:

The basis for the charge;

- How the amount was arrived at;
- When the licensee was informed of the charge from the third party; and
- Confirmation that the licensee is not imposing a mark-up on the charge.

Failing to abide by the Advisory guidelines may result in the HCRA determining the licensee engaged in professional misconduct, and in short, the HCRA may revoke the licensee's licence for new homebuilding. The HCRA is looking to developers to not only abide by the legal terms of their agreements and the Addendum, but to also engage in what the HCRA considers to be moral and ethical consumer business practices. They may well take action if they feel that consumers are not being treated fairly even if the developer's actions are technically within their legal rights.



OPC UPDATES WORKPLACE PRIVACY GUIDELINES: WHAT EMPLOYERS NEED TO KNOW

BY BARBARA GREEN

The Office of the Privacy Commissioner of Canada (“OPC”) updated its guidance concerning privacy in the workplace and the application of the Personal Information Protection and Electronic Documents Act (“PIPEDA”). PIPEDA applies to federal works, undertakings or businesses. It applies to the collection, use and disclosure of personal information in the course of commercial activity and across borders.

CHANGES TO THE GUIDELINES:

- **Removed “balancing” language.**

The changes removed wording that discussed the need for “balance” between the employer’s need for information and the employee’s right to privacy. The new guidelines emphasize the specific legal requirements set out under PIPEDA. There are two primary exceptions to PIPEDA’s consent requirement applicable to the employment relationship:

1. Consent is not required where the collection, use or disclosure of employee personal information is necessary in order to establish, manage, or terminate the employment relationship (though the employee must still be notified in accordance with PIPEDA);
2. Knowledge or consent is not required if the personal information was produced by an individual in the course of their employment, business or profession and the collection, use or disclosure is consistent with the purposes for which the information was produced.

- **No blanket waiver of privacy rights.**

Employers are prohibited from making a loss of privacy a condition of employment. It is crucial for employers to obtain consent in a clear, informed and voluntary manner.

- **Employee monitoring.**

Employee monitoring should be specific, targeted, and appropriate in the circumstances. Employers should only undertake employee monitoring after an assessment of the privacy risks and any mitigating measures. Such an assessment should establish the necessity of the practice, and consider whether any less intrusive methods would achieve the same purposes.

The guidance also provides the following tips for employers:

1. Be aware of all legal obligations, including collective agreements and federal and provincial privacy laws.
2. Assess how the employee information being collected is used and whether this information is employee personal information.
3. Conduct Privacy Impact Assessments (PIAs) to identify and manage privacy risks.
4. Assess the purposes of processing employee information. An assessment should take into account:
 - a. the sensitivity of the personal information;
 - b. whether the organization’s purpose represents a legitimate need or bona fide business interest;

- c. whether the collection, use or disclosure would be effective in meeting the need;
 - d. whether there are less privacy-invasive means of achieving the same ends at comparable cost and with comparable benefits; and
 - e. whether the loss of privacy is proportional to the benefits gained.
5. Limit the information being collected to only what is necessary for a stated purpose.
 6. Be transparent about what information you collect, use and disclose by developing open and accessible policies. Employee privacy policies should identify:
 - a. what personal information is being collected from employees;
 - b. the purpose for which the personal information is being collected;
 - c. how the personal information will be collected;
 - d. how the information will be used, including potential consequences for employees; and
 - e. how long the personal information may be retained.
 7. Follow key privacy principles:
 - a. Accountability;
 - b. Accuracy;
 - c. Limiting collection, use, disclosure and retention;
 - d. Using appropriate safeguards to protect information;
 - e. Being transparent and open about policies and practices;
 - f. Individual access; and
 - g. Allowing affected individuals to challenge compliance.
 8. Be aware of inappropriate practices.



LITIGATION ECONOMICS 101: RISK-ADJUSTED RETURN ON LITIGATION

BY PHILIP HOLDSWORTH

From the outset of a law suit, a key advisory role we fulfill as litigation counsel requires us to equip our clients with the analytical tools necessary to evaluate their decision to commence, settle or continue litigating.

The significance of analyzing the economic risks inherent in litigation cannot be overstated. Each case presents a unique amalgamation of context, facts, and law, making it essential to delve into the specifics when assessing the potential outcomes for our clients. Vague descriptors such as “strong case” or “uphill battle” provide little clarity for commercial businesses facing decision-making uncertainty.

Civil litigation’s formal discovery process (the exchange of documents and evidence) serves to narrow down and spotlight the core issues and facts in contention. The complexity of this process, along with factors like the cooperation of opposing parties and counsel, greatly influences its challenges and costs.

As the issues and facts crystallize through discovery, we offer clients a systematic analysis to aid their decisions on trial continuation or settlement. This analytical framework, useful even outside formal litigation, helps organize uncertainties and factors pertinent to commercial disputes.

The issues in a case can generally be separated into issues of (1) liability, and (2) damages.

On the issue of liability, we assess whether the Court is likely to find the responding party liable for the alleged harm or loss caused. A claim can advance multiple “causes of action” (the legal basis for seeking a determination of liability from the Court), for the same harm or loss, concurrently, or in the alternative. For example, in commercial cases, the most commonly advanced cause of action is for damages arising from a breach of contract. Also, breaches of non-contractual obligations are often included as additional causes of action.

Each cause of action requires the claiming party to prove certain elements (specific facts) to establish liability. The availability and admissibility of evidence to support the causes of action are, in most cases, the most significant factors in estimating the probability of success, especially where key facts are in dispute. Our assessment of the probability of success on each identified issue is informed by prior case law deciding similar issues and decisions. There are many other factors, including the strength of potential witnesses’ testimony, which party’s position is more sympathetic, the judge’s personal background and experience, and changes in the law, that may need to be weighed, depending on the case.

On the issue of damages, a similar analysis is necessary. Even where the provable facts strongly support a finding of liability, the amount of damages the liable party will be obliged to pay can be disputed with experts necessary to identify or estimate the loss flowing from the defendant’s actions.

Once the potential outcomes of the liability issues raised by a claim are identified, we assess the likelihood of these outcomes.

Similarly, once the probability of the expected findings on damages are identified, we can adjust the expected value of the litigation based on the estimated probability of success on the corresponding issue of liability. Even with minimal uncertainty about the facts and law, assigning probabilities to expected outcomes on issues and damages is more an art, born from experience, than a scientific process.

Our goal is to provide a systematic approach to identifying a risk adjusted expected economic value of the litigation. In its simplest example, a 60% chance of proving liability in a \$1 million dispute where the damages are clear, would result in a risk adjusted litigation value of \$600,000. Where there are multiple contested liability and damages issues, this matrix of potential outcomes can become complex, quickly.

The final stage of this analysis frames this calculation in the context of the other hard and soft costs of litigating the dispute: legal costs and expected recovery, the time value of money, and the parties’ appetite for the risk/uncertainty of the outcome, client time and stress, to name just a few. These costs can have a substantial impact on the expected actual value of litigation.

Beyond courtroom advocacy, helping clients navigate economic risks and opportunities in disputes is integral to our role as litigation counsel. It enables clients to formulate reasoned settlement positions and assess options against the backdrop of continued litigation.



ROBINS APPLEBY'S REAL ESTATE LENDING GROUP COMPLETES LARGE LAND AND RESIDENTIAL CONSTRUCTION LOAN TRANSACTIONS

Our Real Estate Lending Group was quite busy at the end of 2023 on managing several large land and residential construction loan transactions. All of the transactions listed below were handled by Partners Leor Margulies and Ladislav Kovac, and Associate, Anthony Aiello, together with Senior Law Clerk, Cindy Applegath and Law Clerk, Natalie Mulhall.

- A Bank of Montreal \$120M facility to take out an existing lender, structured to finance land servicing, development, and the construction of approximately 750 units and 100,000 sq. ft. of retail space in Lindsay, Ontario;
- A Laurentian Bank \$30,350,000 condominium construction loan facility for a 13-storey building containing 122 units and 11,073 sq. ft. of retail space in Hamilton, Ontario; and
- A Canadian Mortgage Servicing Corporation mezzanine loan facility in the amount of \$41,700,000 to assist in funding requirements for servicing the construction of 255 residential lots in a low-rise project located in Richmond Hill, Ontario.



BREAKING GROUND: INDIGENOUS HEALING LODGE & AFFORDABLE HOUSING INITIATIVE SETS A NEW STANDARD IN ONTARIO

Real Estate Partner and Head of the Affordable and Social Housing Group, John Fox, together with Associates, Claudia Pedrero and Amelia Briggs-Morris, are assisting Thunder Woman Healing Lodge Society with its financing, development and construction of a healing lodge for indigenous women located in Scarborough. The six-storey lodge will offer 12 beds for women leaving incarceration, all of whom will participate in the healing lodge program and receive wrap-around supports for rehabilitation and reintegration. The building will also house 12 affordable transitional housing units for women that have completed the healing lodge program but require additional time and support to gain independence. This innovative hybrid model that incorporates the best practices of the Indigenous healing lodge tradition and a transitional rental housing program will be the first of its kind in Ontario.

ANNOUNCEMENTS



NEW PARTNER ANNOUNCEMENT

We are thrilled to announce and extend our warmest congratulations to Rachel Puma on her well-deserved admission as a Partner of Robins Appleby! Rachel's journey with us, from her time as a summer student to articling and returning as an associate in our Commercial Real Estate and Development group in 2019, has been nothing short of remarkable.

Her hard work, dedication, and undeniable charm have consistently shone through, earning her this esteemed position. Rachel's practical business-minded approach has made her invaluable to both the firm and our clients. Her ability to guide clients seamlessly through condominium and low-rise development projects, acquisitions and financings showcases her expertise and commitment to their success.

We are proud to have Rachel as a Partner, and we look forward to her continued success and contributions to the firm.

Congratulations, Rachel!

NEW JOINERS: WELCOME TO THE FIRM ROBERT SANTIA AND COLIN HUNT!



ROBERT SANTIA

Robert is an associate in our Tax group, where he primarily works with individuals, private businesses and their advisors to help achieve personal, business and financial objectives, including minimizing tax liabilities by developing and implementing practical and creative strategies that are tailored to meet the needs of the client.



COLIN HUNT

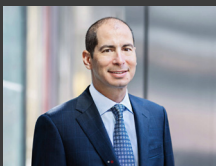
Colin is an associate in our Litigation and Dispute Resolution group where he maintains a general litigation practice, including commercial disputes, real estate disputes, fraud, bankruptcy and insolvency proceedings, and shareholder disputes.

BEST LAWYERS 2024

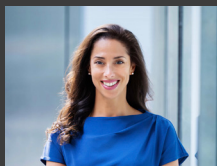
Several of our esteemed lawyers have been recognized as Best Lawyers and Ones to Watch for 2024! This prestigious honour is a testament to their exceptional dedication, expertise, and commitment to delivering top-notch legal services to our clients.

We extend our heartfelt congratulations to the following lawyers in their respective fields.

TAX LAW



David R. Schlesinger



Heela Donsky Walker

TRUSTS AND ESTATES



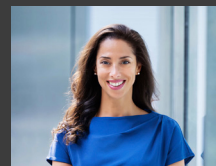
A. Lorne Greenspoon



David R. Schlesinger



Errol Tenenbaum



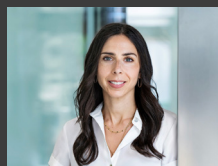
Heela Donsky Walker

REAL ESTATE



Leor Margulies

ONES TO WATCH IN TAX LAW



Amanda Laren Feigen



Robert Santia

At Robins Appleby, we take immense pride in the caliber of our legal team and the exceptional service we provide to our clients. This recognition is a reflection of our ongoing commitment to excellence and client satisfaction.



LAWYER SPOTLIGHT: HEELA DONSKY WALKER

Q) How long have you been with Robins Appleby LLP and what has your career path looked like here?

A) I have been with Robins coming up on seven years. I started as a Senior Associate; the transition was so smooth it felt as though I had been part of the team here for years. I became a Partner two short years later.

Q) Could you tell us more about your practice?

A) My practice centers around estate planning and estate administration issues, primarily where there are US connections such as assets in the US, or US citizenship or residency of the testator or one or more beneficiaries. Since many of my clients hold assets in other countries (US, UK, Israel, India, Europe) I have the opportunity to work collaboratively with lawyers in other jurisdictions, which I very much enjoy.

Q) What fun fact about yourself can you share that would surprise people?

A) I once had a teenage silverback gorilla approach me on a trek in the Rwandan mountains. I froze as instructed and he moved on fairly quickly after checking me out, but not before giving me a little love tap. I like to think of it as a polite reminder that it was his trail.

Q) As a Partner and a mother how do you balance everything? What has been the biggest challenge for you?

A) I have two young daughters who bring so much joy to my life every day. Although it's stressful trying to dash out of the office in time to do pick-ups so we can have dinner together as a family, it's worth it. The biggest challenge is managing energy and focus to get everything done. Sometimes it means working in the evening or on a weekend here or there. I know it's only for a short time as they grow up so fast!

Q) We hear you're a trained singer and were in a band before becoming a lawyer! What was that like and how did it all start?

A) I love to sing soul and R&B music. As a young woman, I pursued a professional career as a singer and had some success early on competing in singing competitions and working as a lead singer in a traveling show band. It proved to be a great gig in my 20's and helped fund the cost of law school. It also took me to many "exotic" locales to perform, including Hong Kong, the Virgin Islands, and most of all, Atlantic City.

Q) What made you want to become a lawyer?

A) Oddly enough my experience as a performer within the entertainment industry steered me to law school. You can't play the game, if you don't know the rules!

Q) If you could have dinner with anyone (dead or alive) who would it be and why?

A) A ladies night with Lauryn Hill and Amy Winehouse would be a dream. I still love singing Lauryn's version of *Killing Me Softly* and Amy Winehouse's *Valerie*. I confess, however, we'd probably skip dinner altogether and just do drinks and a jam session.

DEPARTMENT HIGHLIGHT



MERGERS AND ACQUISITIONS

Mergers and acquisitions (M&A) are complex transactions that need deep legal knowledge and understanding of the workings of business. Whether the deal is local or global, our lawyers have the expertise to lead the deal and close the transaction.

Our lawyers help clients mitigate risk while remaining practical and goal-oriented during a transaction.

Our M&A clients are diverse: owner-operators, private equity, privately held companies, entrepreneurs, major domestic and international corporations, emerging companies, financial institutions, governmental entities, public companies, controlling shareholders, management buy-out groups, and boards of directors.

When advising on M&A transactions, we draw upon the expertise and experience of our entire firm including: Tax Group, International and Cross-Border Transactions, Commercial Real Estate and Development, Secured Lending, Corporate Finance, Employment Law, and on occasion, the Corporate Commercial Litigation Group.

We understand that successful transactions have many moving parts. We understand how to work successfully with clients to preserve and leverage opportunities.

To ensure a successful closing of the transaction, we:

- Actively participate in the early planning stages;
- Provide insight, direction, and support in the due diligence process;
- Team with our Tax group and our clients' financial advisers to create tax-advantageous acquisition and divestiture structures and agreements;
- Leverage the expertise of our Commercial Real Estate and Development, Leasing and Employment lawyers;
- Provide assurance, reporting and timely feedback to investors and lenders; and
- Streamline and quarterback work among legal, financial, cross-border, and other key advisers.

Our lawyers help business owners, private equity, and strategic buyers with:

- Acquisition financing;
- Cross-border transactions;
- Distressed assets;
- Due diligence reviews;
- Employee benefits and executive compensation;
- Joint ventures and strategic alliances;
- Leveraged buy-outs;
- Management buy-outs; and
- Private equity-sponsored transactions

Call or email us to discuss your M&A transaction.

COMMUNITY INVOLVEMENT



SPREADING JOY: TOY AND FOOD DRIVE SUCCESS!

During the holiday season, we spearheaded a heartwarming initiative to spread joy and support within the community. Our team organized a collective effort to gather toys and food items for those in need, directing the generosity towards the Salvation Army/CTV Toy Mountain and local Food Banks. With unwavering commitment, our employees rallied to contribute to this worthy cause, and through their kindness and compassion, we not only brought smiles to children's faces with toys but also helped alleviate hunger by donating essential food supplies. Our team's philanthropic spirit illuminated the true meaning of giving during the festive season, embodying the essence of compassion and community support.



EMPOWERMENT IN ACTION: USED CLOTHING DRIVE!

In honour of International Women's Day, we took proactive steps to empower and uplift women in need through a meaningful initiative. The firm organized a Used Clothing Drive, where employees and partners donated gently used clothing items. With the aim of supporting those less fortunate, we were able to donate bags full of clothing to the Salvation Army. Through our collective efforts, we not only provided clothing essentials but also extended a hand of solidarity and support to women facing challenging circumstances.