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Bill 206 - OMERS ACT, 2006

After significant debate and a number of amendments to the bill at Standing Committee, Bill 206 passed a third reading and received Royal Assent on February 23, 2006. The Act passed despite an unsuccessful misinformation campaign by CUPE which raised unwarranted concerns among stakeholders, plan members and retirees.

In introducing the legislation, the McGuinty government undertook to review the governance model for the OMERS Pension Plan by 2012. Among the key features of the OMERS Act are:

- The Act replaces the Province of Ontario as sponsor with the new OMERS Sponsors Corporation, whose Board of Directors will have an equal number of member and employer representatives;
- A decision of the Sponsors Corporation regarding changes to plan design, contribution rates or funding reserves requires a two-thirds majority of the Board;
- Introduces a new requirement that contribution rates cannot be reduced nor changes made unless the plan is in a 105% funded position in order to protect the plan against financial instability;
- Supplemental Plans must be established for those in “public safety” occupations – firefighters, police officers and

- paramedics. Supplemental Plans are separately funded, stand-alone plans that will enhance benefits not presently available under the OMERS basic pension plan, such as early retirement and a three-year best salary average;
- Paramedics are not automatically eligible for a normal retirement age of 60 (NRA 60) since the Act does not change the terms of the current plan. Under the current plan, NRA 60 is only available to police officers and firefighters and therefore, paramedics would be required to collectively bargain for this benefit;
- Once the Supplemental Plan is established, only one supplemental benefit can be bargained initially and an additional benefit only at three-year intervals after that.

While municipalities will certainly share the cost of collectively bargained (or imposed by arbitration) supplemental benefits, the doomsday costs floated by some organizations are simply not accurate. Some estimates are based on supplemental benefits being provided equally to all employees immediately. This scenario is not possible under the Act since the extension of supplemental benefits must be collectively bargained, and any improvements can only be put in place one at a time every three years.

CASE LAW UPDATE

Hembruff v. Ontario Municipal Employees Retirement Board, [2005] O.J. No. 1355
(Court of Appeal)

The Ontario Court of Appeal overturned the lower court's decision which held that the Ontario Municipal Employees Retirement System ("OMERS") Board had an obligation to inform plan members information of contemplated plan changes. The action was commenced by members of the Toronto Police Service Board who had resigned in 1998 and elected to transfer the commuted value of their pensions out of the OMERS Plan at that time. Subsequent to their termination of employment, the OMERS Plan was amended to provide certain benefit enhancements that became effective on January 1, 1999. The members alleged that the OMERS Board was liable for negligent misrepresentation and breach of fiduciary duty for failing to inform the members of the potential plan changes that were under consideration.

The lower court determined that the OMERS Board had a duty to inform members earlier than the finalization of the recommendation of the Board at a November 20, 1998 meeting even though the government did not effect the regulation until May of 1999 which provided for the benefit enhancements as of January 1, 1999. Accordingly, the court held that the duty to communicate included future occurrences and proposed changes that were "almost certain", or "highly likely" should be communicated to plan members. The court also determined that OMERS failed to treat the members fairly and equitably by selecting an arbitrary effective date for the plan amendment. The Court of Appeal's judgment was written by Justice Eileen Gillese, former chair of the Pension

Commission of Ontario and a well respected trust and pension law expert. The Court of Appeal reversed the lower court's decision and confirmed that the *Pension Benefits Act* (Ontario) specifically requires advance disclosure of the terms of adverse amendments however there is no such requirement to disclose possible changes that the plan administrator may be contemplating.

The Court determined that since information regarding potential plan amendments are speculative in nature and not the type of information that plan members could reasonably rely on, such information does not qualify as "highly relevant" information to which disclosure obligations apply. Justice Gillese observed what many plan administrators had previously thought was a relatively obvious position – a overly broad disclosure obligation, as suggested by the lower court, would create an unmanageable burden and thus place plan administrators in an "invidious position" if potential changes were announced and then discarded, because some members may have detrimentally relied on the earlier announcements.

Noting that the effective date "necessarily creates a dividing line, with some members benefiting and others not", the court also determined that the effective date of January 1, 1999 for the benefit enhancement was not arbitrary or irrational since it was the beginning of plan's fiscal year. The decision brings welcome relief and clarification for plan administrators regarding their disclosure obligations to members.

Sidewalks and Occupiers' Liability

Peterson v. Windsor (City), [2006] O.J. No. 837

The breach of a municipal by-law requiring residents to clear snow and ice from adjacent municipally-owned sidewalks does not operate to shift the legal responsibility, and civil liability, from the municipality to the resident.

In *Peterson v. Windsor (City)* the court, in affirming the Ontario Court of Appeal decision in *Bongiardina v. York (Regional Municipality)*, [2000] O.J. No. 2751, determined that a municipal by-law requiring residents to clear snow and ice from municipally owned sidewalks abutting their residences could not be relied upon by the municipality to shift civil liability to residents. In particular, where the municipality is sued by someone who has slipped and injured themselves due to snow and ice on a municipally owned sidewalk, liability does not shift to the abutting property owner under the by-law because the clearing of snow and ice from municipally owned sidewalks is the legal responsibility of the municipality under the *Municipal Act, 2001*. Such by-laws only impose penal sanctions and a breach does not impose a common law civil liability upon the owner of adjacent private property for injury to a third-party. However, liability may be shifted where:

1. the property owner exercises the requisite care and control over the municipally owned sidewalk to be deemed an "occupier" for the purposes of the *Occupiers Liability Act*, such as where a store uses a sidewalk regularly to display its wares (see *Bogoroch v. Toronto (City)*, [1991] O.J. No. 1032); or
2. conditions or activities on the private property "flow" off that property and cause injury to persons on nearby municipally owned property.

The court in *Peterson* did not consider whether the hiring of a third-party to clear snow indicates the requisite exercise of care and control of the sidewalk because, although argued, it appears that this was not properly plead by the municipality.

Emergency Orders under the *Building Code Act*

Pickle Lake (Township) v. Shetterly Enterprises Ltd., [2006] O.J. No. 776

The standard of review with respect to a factual determination under the *Building Code Act, 1992*, including whether non-compliance with a property standards by-law poses an immediate danger to the health or safety of any person, appears to be whether or not the factual determination was "reasonable" in the circumstances.

In *Pickle Lake (Township) v. Shetterly Enterprises Ltd.* the municipality brought an application for a court order confirming an emergency order issued under the *Building Code Act, 1992*. The municipality's building inspector had issued the emergency order requiring the owner to demolish a building where the roof of the building had partially caved in due to heavy snow. The day after the deadline for the owner to perform the required work the municipality entered onto the property and commenced the work. The property owner argued that even though the order purported to be an "emergency" order, it was in fact an "unsafe building" order. The court held that the standard of review for a decision under the *Building Code Act, 1992* that is an interpretation of law is

“correctness”. The standard of review for a decision under the *Building Code Act* that is dependent on factual determinations within the specific expertise of the building inspector is “reasonableness”. In this case, in confirming the emergency order, the court found that the determination of what constitutes “an immediate danger to the health and safety of any person” is a factual determination, and the decision of the building inspector was not unreasonable in the circumstances.

Also, interestingly, the building inspector referred to the wrong section of the *Building Code Act, 1992* on the emergency order. The court found that notwithstanding the error, it was “clear” what section of the *Building Code Act, 1992* to which the building inspector intended to refer.

Development Agreements

Kiradaar Investments Corporation v. Penetanguishene (Town), [2006] O.J. No. 877

Where a municipality asserts non-compliance with a development agreement it bears the onus of proving, on a balance-of-probabilities, the non-compliance. The evidence must show that the determination of non-compliance was reasonable and not made in bad-faith.

In *Kiradaar Investments Corporation v. Penetanguishene (Town)*, Kiradaar entered into a development agreement with the municipality and the local hydro utility in respect of a condominium development consisting of an apartment building and townhomes. Issues developed with respect to the slope of certain driveways and the location of hydro-electric transformers. As a result of these issues, the municipality refused to issue a clearance letter for those

aspects of the draft plan conditions and development agreement, and drew on the letter of credit to fix the problems.

The development agreement included the following provisions:

1. acceptance of a Municipal/Internal Service shall be in the reasonable discretion of the Municipal Engineer;
2. if at any time and from time to time during the construction of the project, and at any stage thereof, the Municipal Engineer in his sole discretion, is of the opinion that a modification of design of any services required to be installed under the provisions of this Agreement is occasioned by site conditions or is necessary to maintain the standard of any of the municipal services related thereto, the developer shall construct, install or perform such modifications of services as may be required; and
3. if, in the opinion of the municipality, the developer is not complying with the terms of this paragraph, then the municipality, its servants, agents or subcontractors shall have the right to enter upon the said lands and carry out any work, at the expense of the developer necessary to maintain, repair or if necessary replace the said internal services; all at the expense of the developer.

By the time the case went to trial, the court had to consider only the following two issues:

1. Was the municipality prohibited from taking steps to fix the grade of the driveways as constructed by Kiradaar at the expense of Kiradaar?

2. Was the municipality entitled to cash the letter-of-credit to pay the costs of fixing the grade?

Since the municipality was asserting the position that the slope of the private driveways were not compliant, it had the burden of proof, on a civil standard, of proving same notwithstanding that it was the Developer who commenced the claim. The court held that the municipality had proved to the civil standard that the driveway slopes did not comply with the Storm Water Management Plan prepared by the applicant's engineer and accepted by the municipality. Also, the court held that drainage was a question of operational fitness, which required the exercise of reasonable discretion by the Town Engineer, so long as that discretion was not exercised in bad-faith. There was absolutely no evidence of bad faith and the engineer's rationale was supported by the evidence, and therefore the municipality was entitled to cash the letter-of-credit to pay the costs of fixing the grade.

Libel Claim – Liability of Directors

Frijia v. Steblin, (Ont. S.C.J. Mar. 3, 2006)

A multiparty action was commenced by Vito Frijia, a prominent London land developer and builder, against certain directors of the London Land Developers Association (LDI) and Peter Steblin of the City of London for libel arising out of the writing and publication of three letters.

Five of the directors moved for an order to dismiss the action on the ground that there was no genuine issue for trial. Janes was the president, manager, and spokesman for LDI. The plaintiff, Frijia and his companies ("the Southside Group") were not members of LDI. Steblin was the General Manager of

Environmental and Engineering Services and City Engineer for the City of London. In August 2004, Steblin wrote a letter on city letterhead to Frijia which allegedly was defamatory of Frijia and his companies. The letter was "published" to the defendants Janes and LDI, along with several other parties including all members of the London City Council. When Janes received a copy of this Steblin letter, he immediately faxed copies of it to the LDI directors with a covering letter that stated "*Southside's performance has caused all sorts of difficulties. From LDI's standpoint Southside's actions only play into Steblin's hands and his apparent objective of taking control of all forms of development. Please let me know your reactions and suggestions as to any further action we should take.*"

Janes claimed that he received only one voicemail response from the directors (timing was in dispute) and sent a follow-up letter of his own to Steblin prior to receiving this response. The five directors emphatically denied participation in drafting the letters and claimed that absent some evidence of their approval of or participation in these writings, their summary judgment motion had to succeed. The plaintiff, however, argued that the corporate veil argument should not succeed and that the directors had effectively abdicated their function totally to Janes and that their lack of diligence or proper supervision caused the letters to be published. The court allowed the motion and the action was dismissed against the directors. The court held that the evidence simply did not support an arguable position to the effect that the directors ever took a position after Janes's letter went out approving what had happened in the chain of correspondence between Steblin and Janes. As to the evidence of the one director with respect to the voicemail, there was no real genuine issue of material fact as Janes

denied that the director participated in the position advanced in the letter and the director's own evidence was basically to the same effect.

Ward Boundaries – Jurisdiction of OMB

Wagar v. London (City), (Ont. S.C.D.C. Feb. 28, 2006)

The Corporation of the City of London (the "City") sought leave to appeal an order of the OMB, providing for ward boundaries of the City to be redivided "based on the evidence the Board heard including representation by population, communities of interest and the other criteria as set out in the decision". The order altered the old model of seven wards and redivided them to create 14 wards. In this case, an appeal to the Divisional Court was available only with leave and only on a question of law alone. The main arguments for the City centred upon whether City Council had exclusive jurisdiction pursuant to s. 217(1) of the *Municipal Act, 2001* to change its composition; whether s. 223 of the Act authorizes the Board to only deal with the boundaries of wards and not change the number of wards nor the number of councillors; and that the Board had no power to determine the number of councillors to be elected from each ward. The court rejected all of the City's arguments and leave to appeal to the Divisional Court was denied. In particular, although the City had the power under s. 217 of the *Municipal Act, 2001* "to change the composition of its council" and pursuant to s. 222 "despite any Act" to "divide or redivide the municipality into wards or dissolve the existing wards" subject to certain rules and requirements that are set forth in the sections, it was the court's opinion that this was not an absolute power. The Board cited s. 223(5) of the *Municipal Act, 2001* as authority for the Board to order

the redividing of the wards where the municipality fails to pass a by-law in accordance with a petition submitted by electors. Even if a City Council acts under s. 222(1) and initiates a division or redivision of the wards, that decision is also subject to review under s. 222(4) by the Board. The Board did not order that any particular number of councillors should be elected for each ward and that decision remains within the power of City Council to make pursuant to s. 217.

Council Closed Meetings

RSJ Holdings v. London (City) (Ontario Court of Appeal, November 28, 2005)

The Court of Appeal granted the appeal of the RSJ Holdings Inc. from a decision of the Superior Court of Justice dismissing his application to quash London's interim control by-law affecting the subject property. After purchasing the property, the appellant sought permission to demolish the existing structure located on it. There was no response forthcoming from the respondent and so the appellant eventually sought a permit to construct a proposed larger building on the site. Again, no response was forthcoming from the respondent. Subsequently, the municipality passed the bylaw in question limiting development in the area for a period of one year. The bylaw was recommended at a closed session of council, but then immediately adopted in an open session. Closed meetings were only permitted under certain exceptions listed in s. 239(2) of the *Municipal Act*. The motion judge concluded that, in the circumstances, there was a real potential for litigation and therefore the closed meetings fell within the exception created by s. 239(2)(e) of the Act and the application was dismissed. In allowing the appeal, the Court of Appeal held that the motion judge erred in

concluding that the closed meetings were permissible because the interim control bylaw fell within the potential litigation exception in s. 239(2)(e) of the Act. It was clear that the subject matter being considered by the committees was the interim control bylaw and not litigation or potential legislation. The court was of the view that where the subject matter under consideration was an interim control bylaw, it could not be said that the subject matter under consideration was potential litigation simply because there was a statutory right of appeal by a person affected by the interim control bylaw. The fact that there might be, or even inevitably would be, litigation arising from the interim control bylaw does not make the subject matter under consideration potential litigation. There was nothing in s. 38(3) of the *Planning Act* to suggest that consideration of an interim control bylaw could be done in a closed meeting. Application for Leave to the Supreme Court of Canada was filed on March 13, 2006.

Public Lands – Adverse Possession

Lake of Bays (Township) v. 456758 Ontario Ltd., (Ont. C.A. March 27, 2006)

The Ontario Court of Appeal dismissed the appeal by the numbered company of the decision of the Superior Court of Justice. The application judge concluded that there was overwhelming evidence that the lands in dispute had been used by the public for a public purpose since the mid-1940's and accordingly found that there had been dedication and acceptance of the lands for public uses. The municipality conceded that the dedication of the lands as a public park would extend only to the use of the lands and would not include ownership. The Ontario Court of Appeal held that the issue of dedication and acceptance of land for a

public purpose was factual in nature and that there was no palpable or overriding error to justify reversing the lower court's finding. The court was satisfied that all of the requisites for possessory title had been established since the municipality has had actual possession of the property; that the fence was erected with the intention of excluding the company from possession and that the company has been effectively excluded from possession since that time (test for adverse possession as set out in *Masidon Investments Ltd. v. Ham*).

Public Lands – Dedication of Roadway

Becking v. Tiny (Township), (Ont S.C.J. March 15, 2006)

The matter in dispute was a 20-foot strip of land which the municipality claimed was a public highway. The Township of Tiny featured at least 100 registered waterfront and back lot plans of subdivision with extensive cottage and residential development. Most of the subdivision plans were prepared prior to the introduction in 1946 of the first comprehensive Ontario *Planning Act*. The applicants were a number of owners of the lots on the plan of subdivision. Counsel for the applicants argued that there was no evidence of municipal acceptance of the dedication and the "strip" was not labelled anywhere as a public highway on the Plan. The applicants sought an order declaring both that the by-law was void and of no effect, and declaring its registration in the Land Registry Office to be of no effect. In dismissing the application, the court held that from the notations and certificates on the Plan it was clear that both a roadway (Trew Avenue) and a 20-foot strip were dedicated in 1936 by their owner to the township as public highways, and that the municipality in 1937 endorsed on the Plan its acceptance and

consent to the dedication. The court concluded that the by-law passed by the municipality was implemented to require the Registrar of Titles to open an abstract sheet for the 20-foot strip and to have the land properly registered as a public highway in the name of the municipality as required under the *Municipal Act (1994)*. In addition, the court was not persuaded by claims that the municipality exercised bad faith in the passage of the by-law and was of the view that the bylaw was merely a "housekeeping" bylaw in compliance with its obligations under the *Municipal Act* and an act of land identification, not of land-taking.

Judicial Review Granted on Greenbelt Lands

Canada (Attorney General) v. Berrywoods Farms Inc., (Ont. Div. Ct., March 1, 2006)

The federal government in 1972 expropriated land for an airport in Pickering. The Ontario Minister of Municipal Affairs subsequently filed by regulation a zoning order under the *Planning Act* creating a buffer zone for the Pickering Airport outside the "airport lands". By Order in Council in 2001, the "airport lands" were declared an "airport site" under the *Aeronautics Act* and "required for use as an airport". Title to the "Berrywoods' lands," which were located close to "airport lands" was in the name of Bitondo's Market Limited. The land was partially used for agriculture and was partially vacant. It was also subject to an agreement of purchase and sale to Berrywoods who proposed to develop a residential subdivision on the lands. The Berrywoods' lands were located directly under the extended centre line of the southeast/west runway of the proposed airport and as a result Berrywoods' housing project would be directly under the flight path of aircraft. The Ontario Government

introduced the *Greenbelt Protection Act, 2004 (GPA 2004)* in 2003. The *GPA 2004* temporarily froze urban development of rural and agricultural land in order to contain urban sprawl. The legislation prohibited persons from applying to municipalities for development of lands outside "urban settlement areas" or "urban areas" and prohibited municipalities from granting approvals of land outside of such areas. The critical factor to qualify as an "urban settlement area" under the *GPA 2004* was that the land must be "designated" in an official plan. In 2005, the Ontario government completed the greenbelt study and passed the *Greenbelt Act, 2005* which was made retroactive to 2004. Berrywoods acknowledged that if the *Greenbelt Act 2005* applied, then no urban development could take place on approximately a third of Berrywoods' lands that were designated as "protective countryside" under the Greenbelt Plan (except for minor ancillary uses associated with existing housing and farming). In July 2004, Berrywoods appealed their development application to the OMB when Durham and Pickering failed to make a decision on the Berrywoods' applications within the 90-day period formerly stipulated under the *Planning Act*. The applicants, Transport Canada and the Greater Toronto Airports Authority, filed an application for judicial review seeking a declaration, among other things, that the various applications for planning approvals submitted by Berrywoods and filed with Pickering and Durham were nullities and of no effect by reason of the *GPA 2004*; and that all decisions taken by Pickering and Durham related to the processing of the Berrywoods' applications were of no effect; and that there was no statutory right of appeal to the OMB in the circumstances. In granting the application for judicial review, the court first determined that it had jurisdiction to grant the relief sought by the

applicants since Pickering, Durham and the OMB purported to exercise "statutory powers of decision" under various statutes in relation to the Berrywoods applications and thus, became subject to a declaration by the Divisional Court under s. 2(1) 2 of the *Judicial Review Procedure Act* "in relation to the exercise, refusal to exercise or proposed purported exercise of a statutory power". In the circumstances, each issue was one of jurisdiction and therefore reviewable on the standard of correctness. The court stated that in order to escape the freeze set out in *GPA 2004*, Berrywoods applications had to demonstrate that the lands in its applications came within the definition of "urban settlement area" in the *GPA 2004*. The court held that the subject lands were not designated "urban settlement area" lands in any official plan as of December 16, 2003 (date when the *GPA 2004* came into effect)

and therefore the applications were considered nullities and of no effect. As a result, there was nothing to appeal to the OMB. The court further found that pursuant to s. 4 of the *GPA 2004*, the municipalities were prohibited from processing the applications leading to adoption or approval and that, in taking the steps actually taken by the municipalities, they were acting *ultra vires*. The Berrywoods' applications may have been initiated and filed in anticipation that the *GPA 2004* and Bill 26 (*Strong Communities Planning Amendment Act*) would not be made retroactive to December 16, 2003.

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