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## Message From The Editor

*Ray Mikkola\**

Welcome to the Spring 2010 edition of The  
*Abstract Page*! Now, where to begin...

I recently received a letter from Kathleen Waters, President and CEO of LawPro, in which she highlights LawPro's national public awareness program in support of the Canadian real estate bar. LawPro views the future of the real estate bar as an access to justice issue, not just for real estate matters but also for wills and estates work, family law matters and other general legal advice. House deals and real estate matters generally constitute the "bread and butter" of main street practice. During the 2009 campaign, LawPro published eight different articles in 55 publications across Canada, containing detailed information on the importance of retaining a real estate lawyer. The articles also appear in the Real Simple Real Estate Guide on the Title Plus website ([www.titleplus.ca](http://www.titleplus.ca)), which records about 1,000 hits per week. Thanks Kathleen!

In this edition we present an interesting article by Jeff Lem on the current status of a comprehensive Toronto-wide zoning by-law, a mammoth project that has been discussed since shortly after amalgamation. Lisa Weinstein of Titleplus writes about the unauthorized practice of law. Lauren Gamble, a student at Pallett Valo, reports on the thorny issue of dealing with smokers in a condominium "environment". Our friends at Tarion invite all practitioners to comment on the Tarion addendum to purchase agreements, and in respect of closing adjustments. And Ray Leclair provides the most recent update to the national real estate law comparison chart, from across this great nation – still a work in progress (that is, the chart and the nation).

What else is new? Well, visit the Competition Bureau website for the latest on the Canadian Real Estate Association and access to the MLS issue. There's a lot there if you are interested.



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Here's a question for you: Is it possible to have an LTCQ condominium? I would have said "no". But I have now, in the last two weeks, come across two such condominiums, one in Waterloo and the other in Grey County. It seems with the repeal of the Certification of Titles Act, all CTA condominiums where the CTA is dated more than 10 years prior to the date of conversion are converted into LTCQ, complete with the title qualification respecting claims pertaining to boundaries, adverse possession and prescriptive easements. Where the CTA is less than 10 years old at the date of conversion, the condominium is still converted into LTCQ but those particular qualifications are not included (it's a kind of "less qualified but still not absolute LT" kind of LTCQ, or what I like to call "LQBSNLTLCQ"©). Apparently, several LTCQ condominiums have converted to "LT Absolute +". The issue with CTA condominiums is that the Certificate of Title, from its issuance, "degrades" as it is possible to obtain adverse possession and prescriptive easement after the issuance of the Certificate and following the expiry of the relevant time periods. So, it is possible (but very odd, in my view) to have a condominium in LTCQ in Ontario. I suppose purchaser's solicitors should ask for a declaration of possession, and boards should be vigilant, on behalf of the unit owners (who of course own very molecules of the common elements as tenants in common), about property line incursions.

All the best for the summer.

*\*Ray Mikkola, Partner, Pallett Valo LLP*

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## Message From the Chair

*Jeffrey Schwartz\**

I am always amazed at how time flies. I have been in practice now over 25 years. It seems like just a blink of an eye. I can vividly recall the days when we stood in lineups snaking through Toronto City Hall. We all heaved along thick files and on really busy days, brought along our staff, spouses, children or whomever we could grab.

Now, we are mere fax and e-mail exchanges. We call each other on the telephone to release and sign off Transfers, and on month ends, make frantic calls to find out where the courier delivery is.

One recent period of my professional life that has also zipped by is the term I have served as your Chair. My term, over three years, comes to a close in June and our Section will be well-served by our incoming chair, Don Thomson. I have known Don for over 20 years. Don was the passionate chair of the real estate course at the Bar Admission Course. I was privileged to be one of his seminar leaders for over 12 years - I have firsthand experience observing Don bring practical advice to thousands of young lawyers. His devotion to our profession and to our practice area is well known and he will no doubt carry on the good work of our executive.

Just so you know, I'm stepping aside but not moving on. One my most wonderful experiences are the monthly executive meetings. I marvel at the time given by all involved. Everyone contributes, usually without fanfare or recognition. Members of your executive plan CLE events, including lunch, half-day and full-day programs and of course, the annual OBA Institute. The amount of time involved is staggering. Have no doubt, everyone also has a professional life and has other obligations. Yet, the

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members of the executive still find time to provide you with several issues annually of the *Abstract Page*, and prepare and review the articles. Others plan evenings for us to gather and meet for more social interaction. Still others are involved in providing commentary and comment on pending legislation as well as being pro-active in promoting our stewardship in the real estate transaction.

I have now served on this executive for over a dozen years. When I first joined, I watched as members took charge in undertaking research on the then new concept of title insurance and how it affects our practice and our clients. I was witness to and amazed by how much time busy lawyers devoted to being absolutely resolute in their convictions and to promote the real estate lawyer and ensure that our function and importance was not eroded or made antiquated.

Over the years, and certainly during my term as Chair, there have been many opportunities for myself, together with members of our executive, to be given first exposure to new laws, rules and concepts, allowing us to consider and express opinions on the effect on the practice area. I am very proud of our continuing efforts on behalf of the real estate bar. I will not necessarily miss the work required to prepare for meetings and to marshal forces to respond to critical and time-sensitive issues. I do intend to continue to sit on this executive and contribute as best I can.

I must also be mindful and express my gratitude and thanks to the OBA staff who work behind the scenes to assist me and all members of the executive. We get one-on-one and timely service and attention from staff.

So it's really not goodbye for me. Really, all I will be doing is shifting down a seat or two and letting Don take charge. Fortunate indeed that sitting at our table are five or more former Chairs, all of whom continue to fully participate and work hard for the section. It's not for the lunch, for sure (good though it is). We are embarking on new matters confronting our section, many positive, some challenging. I know that Don will be up to the task; he has a new Vice-Chair in Rod Davidge and the continuing support of members who continue to work for the best interests of the real estate bar.

I want to thank each and every member of the executive for making me look good (when that's not the case, I'll stand alone and take the blame) and for their efforts, both past, present and future. Thank you to the staff at the OBA for helping with everything that has to get done monthly, and thank you, our members, for continuing to support our section by reading our wonderful newsletter, by attending our programs and continuing to contact our executive members to see how you can help. Our section always welcome lawyers who want to join us in this most honourable of pursuits.

Have a busy and safe summer.

*\*Jeffrey Schwartz, Schwartz & Schwartz*

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# Goodbye 438-86: A New Comprehensive Zoning By-Law for Toronto

*Jeffrey W. Lem\**

Juxtaposed against the millennia-old heritage of many tenets of real property law, the widespread adoption of comprehensive municipal zoning by-laws is a comparatively new phenomenon. The passage of the then new *Planning Act* in 1946 paved the way for modern comprehensive zoning by-laws in this province, with the Township of Etobicoke entering the record books as Ontario's first "planned community" after the passage of its first zoning by-law and official plan in 1949. North York and former City of Toronto soon followed suit in 1952, and York, East York and Scarborough followed thereafter by the end of the late 1950's.

City of Toronto By-law 438-86, Toronto's general comprehensive zoning by-law, in its own words, is designed "to regulate the use of land and the erection, use, bulk, height, spacing of and other matters relating to buildings and structures and to prohibit certain uses of lands and the erection and use of certain buildings and structures in various areas of the City of Toronto".

Although touted as the City of Toronto's "comprehensive" zoning by-law, By-law 438-86 is really somewhat piecemeal and, arguably, anything but comprehensive. By-law 438-86 is in fact only one of over 40 such "comprehensive" zoning by-laws that still affect various parts of the City of Toronto. Many of these "local" comprehensive zoning by-laws are really just carry-overs from the books of the municipalities that amalgamated to form the Municipality of Metropolitan Toronto in 1998 (i.e. Etobicoke, York, East York, North York, Toronto and Scarborough). According to the Overview Presentation of the new comprehensive zoning by-law released in November of 2009 by Toronto City Planning, the patchwork of applicable zoning by-laws was actually more than just lingering legacy by-laws from Toronto's predecessor municipalities. In fact, even when Toronto's predecessor municipalities were issuing their own comprehensive zoning by-laws, there were pockets of Metropolitan Toronto that, through historical happenstance, were still governed by local "neighbourhood" zoning by-laws (e.g. Leaside, Mimico and New Toronto), and many of these local neighbourhood zoning by-laws survived amalgamation and are still applicable to this day.

Toronto is now on the verge of introducing its first major comprehensive zoning overhaul as an amalgamated city. Although talk of a replacement for By-law 438-86 has been perennial, planning for the new zoning by-law began in earnest in early 2009, when the City of Toronto first officially announced its intention to harmonize these competing comprehensive zoning by-laws. After numerous internal staff reports and presentations and eight public "open house" presentations, the latest revised draft of this new zoning by-law, widely considered to be the penultimate draft version, was released on May 10, 2010. As of the writing of this article, the text of the new by-law and accompanying zoning maps are physically available for public review at the City of Toronto's clerk's offices in the Etobicoke, North York, Scarborough Civic Centres and at City Hall as well as online at the City of Toronto's website.

Paraphrasing the Overview Presentation, the new zoning by-law was drafted using a "staff based approach", with the view to preserving the true intent of all of the existing by-laws, while at the same time harmonizing the terms and language used therein and conforming all existing uses with those

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dictated by the latest Official Plan. The new zoning by-law also introduces thoroughly modern parking and loading standards throughout the City and will curb what had been cases of inconsistent application, interpretation and enforcement of some City regulations by converting frequently applied regulations into fixed provisions of the new draft zoning by-law based on the then current "best practices" relating to such regulations.

While the new by-law is punctuated throughout by an underlying theme of harmonization and standardization, there are some new substantive provisions. For instance, in addition to the new parking regime, the height of homes will now be measured to the true top of the roof (rather than the arguably unintuitive mid-point of the roof, as is currently permitted under By-law 438-86), but with a new higher standard of 10 metres for the maximum height of homes. Likewise, there will be new formulas for the calculation of front, rear and side yard setbacks, and there will be an outright city-wide ban on reverse-sloping driveways and below grade house garages.

Moreover, the logistics of by-law maintenance and accessibility will be altered by this new zoning by-law. Although periodic consolidations of By-law 438-86 have been available electronically for some time, the new zoning by-law will be stored electronically and available online from the get-go. This will increase ease of access, improve customer service, and allow up-to-date content (currently anticipated to be in "real time" as of the very latest Council meetings). Few practitioners familiar with By-law 438-86 will be sad to see it replaced.

The new zoning by-law will include a number of provisions that "grandfather" existing non-compliant properties. Even where a previous use is not explicitly "grandfathered", the doctrine of legal non-conforming use will still apply, and there is nothing in the draft new zoning by-law that seems intended to curtail legal non-conforming uses. Accordingly, in cases where a property continues a use that is currently lawful under By-law 438-86 (or one of the other existing zoning by-laws) and that will not be permitted under the new zoning by-law, the "old" use will continue to be legal, albeit non-conforming.

There is scheduled to be one final meeting of the Planning and Growth Management Committee on June 16, 2010 to discuss amendments to the new draft zoning by-law before it goes to Council. Torontonians are still entitled to make written submissions to the Clerk's Office in advance of the June 16 meeting.

The City of Toronto is betting that the replacement of By-law 438-86 with one truly comprehensive zoning by-law, using one universally common set of terms, will eventually lead to significantly clearer interpretation and more consistent results for all Torontonians. Good-bye By-law 438-86!

*\*Jeffery Lem, Davies Ward Phillips & Vineberg LLP*

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# The Unauthorized Practice of Law: A Report from Symposium V

*Lisa M. Weinstein\**

In October 2009, I attended Symposium V on The Unauthorized Practice of Law in Residential Real Estate Transactions, in Arlington, Virginia. This event illuminated the strategies that American real estate lawyers are adopting to deal with issues facing them today – issues similar to many of those facing Canadian lawyers who practise residential real estate.

The Symposium was sponsored by the Title, Conveyancing, and Bar-Related Title Insurance Committee, General Practice, Solo and Small Firm Division of the American Bar Association. The composition of the Committee reflects the unity of interest between residential real estate practitioners and Bar-related title insurance companies. Its origin dates back to 1961, after non-lawyer title insurers had been urged to work against Bar-related title insurers.<sup>1</sup> Ms. Kathleen Waters, President and CEO of LAWPRO, attended Symposium IV in 2007.

The attendees at Symposium V included practising real estate lawyers, representatives of Bar-related title insurers and a representative of the U.S. Federal Trade Commission.

The content of the Symposium indicated a wide divergence between states in the regulation (or lack thereof) of residential real estate transactions, but also showed some common themes. One of these is that organizations representing realtors, non-lawyer title insurers and other non-lawyer providers of real estate services actively engage in government lobbying and publicity to protect their interests.

Another common theme is that any initiative designed to increase the involvement of lawyers in real estate transactions will meet with opposition from the Federal Trade Commission, the U.S. Department of Justice and state regulators, unless these agencies are satisfied that the initiative will not tend to limit competition, or be more expensive for consumers. Qualitative factors, such as the consumer's need for independent, knowledgeable advice when entering into mortgage obligations, are relatively unrecognized. One of the Committee's objectives, on a go-forward basis, is to highlight this and related considerations as factors government agencies should take into account.

For instance, in December, 2008, the Hawaii State Bar Association proposed a rule that would have restricted the unauthorized practice of law, based on the provision of legal services and a client relationship of trust or reliance. Although the proposed rule recognized and permitted the functions of non-lawyer providers such as real estate agents, the Hawaii Association of Realtors® asserted that it would impinge on their members' rights and limit competition. In addition, the Federal Trade Commission recommended significant amendments to the rule. In the face of this opposition, the State Bar Association withdrew the proposal.

In North Carolina, a bill that would have required lawyers and other settlement agents to meet standards concerning financial responsibility and the handling of closing funds died at the committee stage. The bill had been opposed by TAVMA,<sup>2</sup> the NNA<sup>3</sup> and a non-Bar related title insurer with headquarters in Charlotte, N.C.

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However, developments in other states tend to favour lawyer involvement in real estate transactions, as well as consumer protection. South Carolina, for instance, is an “attorney state” where lawyers must play a meaningful part in all residential real estate transactions. The state Bar Association has drawn up guidelines for lawyers in residential real estate transactions, and has been requested to prepare guidelines for non-residential deals as well.

Virginia takes a somewhat different approach. In this state, the *Consumer Real Estate Settlement Protection Act*<sup>4</sup> provides that lawyers and non-lawyers can perform escrow, closing and settlement services if they are licensed under this Act. Licensees must have a minimum of \$250,000.00 in errors and omissions insurance, and post a surety bond of \$200,000.00. Other states, such as New York and Kentucky, are considering similar licensing regimes.

The Symposium concluded with a discussion about points to be made in support of lawyers’ involvement in real estate transactions. Among these were:

- The legal knowledge and training of the real estate lawyer;
- The well-defined duties owed by lawyers to their clients, which are enforceable by discipline;
- The availability of lawyers after real estate closings, and the ability to trace them through the records of their Bar Association, if necessary;
- Simplifying real estate transactions for consumers, by having a lawyer protect their interests and deal with problems or issues on their behalf; and
- Protecting consumers against predatory lending and other unconscionable practices.

In the next year or two, it will be the task of the American real estate Bar to bring these and other considerations to the forefront, without losing sight of consumer protection and competition concerns. Canadian real estate lawyers should keep all of these factors in mind in order to confront the challenges presented by non-lawyer service providers.

*\*Lisa M. Weinstein, Director, National Underwriting Policy, TitlePLUS*

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<sup>1</sup> William J. McAuliffe, Jr., “The Way We Were: 1958-1967”, Title News, March/April 2007, at 24.

<sup>2</sup> The Title/Appraisal Vendor Management Association is a trade association of the real estate settlement service industry. See [www.tavma.com](http://www.tavma.com).

<sup>3</sup> The National Notary Association is a trade organization representing American notaries. In the U.S., notaries can provide document signing services, but not legal advice. See [www.nationalnotary.org](http://www.nationalnotary.org).

<sup>4</sup> Code of Virginia, Title 6.1, Chapter 1.3.

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## Case Commentary - *Kabatoff v. Strata Corp. Plan NW 2767*, 2009 BCHRT 344 (October 13, 2009)

Lauren Gamble\*

In condominiums, where neighbours are not separated by lawns or hedges and instead share common areas, walls, hallways and vents, the dispute over the right to smoke or live smoke-free is becoming ever more significant.

A small number of cases have demonstrated Canadian courts' sympathy to non-smokers who are exposed to their neighbours' second-hand smoke while residing in privately owned units. Successful cases are generally based on nuisance claims or claims for breach of the condominium's Rules and By-laws which mandate quiet or peaceful enjoyment of property.

Non-smoking unit owners have, on occasion, been successful in claiming that a neighbour's drifting smoke has caused a nuisance to the complainant's private property. In the 1984 B.C. County court decision of *Raith v. Coles* (1984), 14 C.E.L.R. 82 (B.C. Co. Ct.), the applicants were granted an injunction to restrain the respondents from emitting cigar smoke from their premises. The judge stated:

"This is not a simple dislike of the smell – there is concern based on medical grounds. While the individual must be expected to put up with some inconvenience in today's world there comes a point where the perpetrator of a problem must curtail his actions when they become demonstrably harmful to others... There are many things a person may not do in his house or castle – in the case of these Respondents, one of these things now is that he may not allow there to be emitted or discharged a noxious substance, in this case, cigar smoke and odour, from his premises..."

A number of decisions have also been rendered by various landlord and tenant boards across Canada to prevent the permeation of second-hand smoke into apartments on similar grounds. For example, in *Feaver v. Davidson* (2003), O.R.H.T.D. No. 103, File No. TSL-52189 (ORHT), the landlord applied to the Ontario Rental Housing Tribunal for an order to terminate the tenancy and evict a smoking tenant from the basement apartment on the basis that the smoke emitted from the apartment was substantially interfering with the landlord's reasonable enjoyment of the residential unit above due to health concerns. There was no written lease or oral agreement prohibiting smoking. However, the Board concluded that the tenant's smoking substantially interfered with the landlord's reasonable enjoyment of the property by causing the landlord to be concerned about the effect of the tenant's second-hand smoke on her health and requiring her to take measures to stop the permeation of the smoke. The Board exercised its discretion to reject the order requested by the landlord based on the tenant's good faith throughout, but inserted a condition into the endorsement entitling the landlord to obtain an eviction order without further notice to the tenant if the tenant continued to smoke in light of the Board's determination that smoking could be prohibited.

In another tribunal decision, the Manitoba Residential Tenancies Branch upheld a non-smoking policy passed by a landlord on the basis that the policy would ensure tenants' peaceful enjoyment to their units and would "improve the safety, comfort and welfare of tenants, their guests, and workers at the

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complex..." (*Beverly E. Reeves v. Globe General Agencies*, 2007 (Manitoba Residential Tenancies Branch, Order # W2007-000506).

Now, a recent British Columbia case has taken a different approach by tackling the problem of drifting second-hand smoke under provincial human rights legislation.

In October, 2009, B.C. Human Rights Tribunal member, Marlene Tyshynski, refused to dismiss a complaint brought by a non-smoking couple under British Columbia's *Human Rights Code*, R.S.B.C. 1996, c. 210 in *Kabatoff v. Strata Corp. Plan NW 2767*, 2009 BCHRT 344 (October 13, 2009). The couple, Mr. and Mrs. Kabatoff, both suffered from pre-existing respiratory problems which were exacerbated when new owners moved into the unit below. The new owners smoked cigarettes indoors and the smoke filtered through to the unit owned by the Kabatoffs. The Kabatoffs claimed that the smoke had negative effects on their health and that their respiratory illnesses were a physical disability which the condominium corporation was required to accommodate under the *Code*.

After unsuccessfully attempting to have their complaints addressed by the condominium corporation privately, the couple brought their complaint before the Tribunal on the basis that the condominium corporation had failed to accommodate their disability by providing them with a smoke-free environment in accordance with British Columbia's *Human Rights Code*. For its part, the condominium corporation took the position that it did not have a no-smoking by-law and therefore had no authority to respond to the unit owners' complaint.

Although she did not deal with the complaint on its merits, Tribunal member Marlene Tyshynski did set out the case the Kabatoffs would have to meet in order to be successful in their claim against the corporation. She noted that if the Kabatoffs are able to establish that they have disabilities that are exacerbated by second-hand smoke, the complaint that the corporation failed to accommodate their disabilities could amount to discrimination under the *Code*. It is this recognition of the possibility that non-smoking unit owners may achieve success on human rights grounds that has caught the attention of condominium corporations, unit owners, and the lawyers who act for them.

Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19 has parallel provisions to British Columbia's *Human Rights Code* which provide that every person has a right to equal treatment with respect to the occupancy of accommodation and not to be discriminated against on the basis of, among other things, disability where the differential requirement is not reasonable and *bona fide* in the circumstances.<sup>1</sup>

Success in cases brought by non-smokers in Ontario in the past has centered on classifying drifting or permeating second-hand smoke as a nuisance and a breach of the unit owner's right to quiet enjoyment of the property. In the proper case, would a complainant with a pre-existing health problem such as asthma or an allergy to smoke succeed in a human rights complaint in this province? Would condominium unit owners without a pre-existing health concern but who maintain an aversion to smoke or object to the health effects related to second-hand smoke exposure be able to bring a complaint successfully under the *Code*? Or will these owners be forced to continue to rely only on nuisance and condominium rules alone to deal with the matter?

While the *Kabatoff* complaint has not yet been finally determined, the Tribunal member seemed to indicate that a pathway to achieve smoke-free accommodation in a condominium may be available

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under human rights legislation. If nothing else, the excitement over this decision indicates that there is a market for smoke-free condominium housing that ought not to be ignored.

*\*Lauren Gamble, Student at Law, Pallett Valo LLP*

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<sup>1</sup>*Ontario Human Rights Code, sections 2(1) and 11(1)(a).*

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## Your Input Requested on the Tarion Addendum and Closing Adjustments

Tarion Warranty Corporation (“Tarion”) is exploring two policy development issues in 2010 and would be grateful for any input which could be provided by residential real estate lawyers who act for one or both of homeowners and builders.

The first relates to the new Tarion “Addendum” which by statute is required to be attached to any new home agreement of purchase and sale, generally speaking, signed on or after July 1, 2008. The Addendum, effectively a supplement to the purchase agreement, addresses, for example, questions of disclosure of critical dates and how extensions and delays are handled. Tarion has received some suggestions for changes to this form based on experiences to date with the new Addendum. Tarion would welcome additional comments on experiences to date with respect to the Addendum and suggestions for improvements from members of the new home residential Real Estate Bar.

The second matter relates to how closing adjustments are addressed in new home purchase agreements. For example, there have been reports of attempts to pass on costs as closing adjustments in relation to amounts not actually expended by a builder. Questions have also arisen on the level of disclosure of closing adjustments in new home purchase agreements. Again, Tarion would be interested in hearing comments about this issue and any suggestions for improvements from members of the new home residential Real Estate Bar.

Persons wishing to make written submissions are invited to do so on or before July 1, 2010. Each submission should include the person’s name and postal address and/or email address. Unattributed submissions will not be accepted during this process.

All inquiries and submissions should be sent to Tarion through one of the following options:

**E-mail:** [submissions@tarion.com](mailto:submissions@tarion.com)

**Mail:** Vice President and General Counsel  
Tarion Warranty Corporation  
5160 Yonge Street, 12th Floor  
Toronto, ON M2N 6L9

**Fax:** 647-722-1165



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# National Real Estate Law Comparison Chart

*Ray Leclair*

[Click here](#) to view the PDF of the revised and updated National Real Estate Law Comparison Chart.

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## Upcoming Programs and Events

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### Annual Real Estate Gala

**Date:** Thursday, June 10, 2010

**Time:** 6:00 PM

**Location:** Vaughan Estates, The Estates of Sunnybrook, 2075 Bayview Ave., Toronto

Join friends and colleagues from the Real Estate Bar to socialize and celebrate the best of the profession!

Join us as we honour Kate Murray with the Award for Excellence in Real Estate.

[Click here](#) for more details.

Call **416-869-1047** or **1-800-668-8900** to register.

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### Ask The Experts

**Date:** Thursday, June 17, 2010

**Time:** 12:00 PM

**Location:** OBA Conference Centre, 20 Toronto Street, 2nd Floor, Toronto

Do you have any real estate questions you are **DYING** to know the answers to?

If the response is “**YES**”, then this is your **BIG** opportunity to find out what our great panelists and **LEADING** practitioners would do!

Please join our team of Real Estate experts for an informative (and no doubt, entertaining) lunch session addressing questions posed by the audience.

Attendees are invited to submit questions in advance of the program. In order to provide meaningful responses we request that questions be submitted by noon on to June 11, 2010. Please submit your questions to [sections@oba.org](mailto:sections@oba.org).

[Click here](#) for more details and to register.

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