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President's Report

John Krawchenko

Library services, examination of alternative business structures and access to justice are three issues that have dominated the agendas at the recent County and District Law Presidents' Association (CDLPA) Plenary and at our own Hamilton Law Association (HLA) meetings.

In This Issue

Library Services

Many would be surprised to know that a system wide review of law library services had not been undertaken for over 15 years, notwithstanding the significant changes in technology and in the legal publishing world. In response to these changes and associated challenges, a Library Information and Support Services Working Group (LISS) was struck to assist the Library Co. and its shareholders to provide advice regarding efficiencies and other possible enhancements to our law libraries.

The LISS prepared its preliminary report on 15 October 2014. This report concluded that our courthouse libraries play a significant and important role in providing legal information and maintaining professional competence. It also found that there was room for improvement and a need for reform.

The working group stated that:

"*In the face of cuts and other challenges to funding, as well as in the interest of rigorous analysis of the usefulness of services and delivery mechanisms it is important to consider redeploying existing funding, including eliminating approaches that do not produce necessary results. Revitalizing library spaces to provide better public access, pro bono programs to assist self-represented litigants and seminars to provide both general education to the public about the law and their rights and obligations as well as tools to search the law could all contribute to access to justice.*"

The LISS report was reviewed and debated by the HLA and at the recent CDLPA Plenary. The initial feedback to the LISS working group suggested refinement was needed to their position on public access in light of the concerns of the bar regarding safety and security within the library. In addition, the need for a private work space for lawyers (in the context of the library being more of a practice resource centre) was also stressed. The suggestions in the report relating to pro bono programs was considered by many to be beyond the scope of the mandate of this working group.

The fact that a dedicated group of capable people is looking at library services with an eye to improvement, is a good thing. The fact that this same group is actively engaging in a dialogue and debate on the issues, is an even better thing. But the best thing

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HLA Journal

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of all is knowing that library funding will remain stable for next year and that our own Executive Director of the HLA, Rebecca Bentham has been appointed to the Board of LibraryCo. Congratulations to Rebecca.

Alternative Business Structures (ABS)

The HLA recently hosted an ABS information session moderated by James Scarfone. The perspectives of the Law Society were presented by benchers Malcolm Mercer and Susan McGrath, while the views in opposition to ABS were presented by Allen Wynperle and bencher Joseph Sullivan.

The positions on this subject are now coming into better focus and we have attempted to make all relevant information available to our members in order to allow them to come to their own conclusions. As Michael Winward, Treasurer of CDLPA stated at the recent Plenary, we must now consider whether ABS is "a field of dreams or a swamp of despair". In other words is ABS a necessary and important innovation or is it a concept that requires greater study, empirical data and analysis before being considered as an option?

A preliminary deadline for submissions to the Law Society on ABS has been set for 31 December 2014. Our association will be taking a position. Robert Lapper, CEO of the Law Society of Upper Canada has advised that the LSUC is "going very slow on this" and that there will be careful consideration of what to do, if anything. Ontario is not the only jurisdiction looking at the issue, but is joined by the three Prairie Provinces as well as Nova Scotia and British Columbia.

Access to Justice

With 38,100 Lawyers and 4,700 Paralegals in Ontario, trepidations about "access to justice" seem paradoxical. It does however come up regularly as an issue of concern to the profession and our regulators.

The term access to justice means many things to many people. To some, access to justice is a question of the state funding of legal aid, to others it relates to physical barriers, yet to others it is a cry for enhanced court services and the harnessing of technology to make the legal system cheaper and easier to use.

Whatever it means, many initiatives exist to address this concern. One of the newest is TAG which is a community of organizations and individuals working collaboratively to find new solutions to access to justice challenges in Ontario. The Law Foundation of Ontario, the Attorney General of Ontario as well as the LSUC are supportive of this initiative. For more information please visit their website at theactiongroup.ca.

Conclusions and Challenge

I invite our members to take apositions on these topics, to become engaged in the debate and to make their feeling known by attending and participating in our various forums or by writing to me directly care of the HLA.

In closing, I extend my best wishes to all in the upcoming holiday season and look forward to meeting with many of you at our member appreciation luncheon on 5 December 2014. ■

Acknowledgment of Retired Members

Are you retiring from the practice of law?

If you are a lawyer who is a member of the Law Society of Upper Canada, practicing law within the City of Hamilton, 10 years in practice, and have at least 10 years' cumulative Membership in the Hamilton Law Association we would like to acknowledge you at the Annual Dinner on Thursday, April 16, 2015.

Please contact Riane Leonard by phone at 905.522.1563 or by email at rleonard@hamiltonlaw.on.ca for your free ticket to the Annual Dinner.

Report from the Executive Director's Office

Rebecca Bentham

HLA Distinguished Solicitor Award

I would like to congratulate Paul Dixon for receiving the 2014 HLA Distinguished Solicitor Award. Paul was presented this award by our President John O. Krawchenko at our Emerging Issues in Real Estate Seminar on November 6th. The HLA Distinguished Solicitor Award was created to honour a solicitor member of the Hamilton Law Association who has distinguished himself or herself throughout his or her career by exemplary service to our Association, to our profession, and/or our community. This award was first presented to the late Lawrence Bremner in 2009.

Paul received a standing ovation from his fellow colleagues in attendance after he thanked members of the Real Estate and Corporate Commercial Bar, the Trustees and Staff of the Hamilton Law Association, his family and friends and those who nominated him for the award.

Paul was the President of The Hamilton Law Association from 2002-2003, and was a member of the HLA's Real Estate Subcommittee for over 15 years and a member of the Corporate Commercial Subcommittee since its inception in 2008. He was an active participant in the HLA for many years as a *HLA Journal* contributor and seminar speaker on topics like Financing Solar and Wind Projects. We thank him for his many years of service and many contributions to the Hamilton Law Association. We wish him all the best in his retirement.

Fall Events

Fall is an especially busy time at the Hamilton Law Association due to our many social events and CPD programing. The HLA administered approximately 10 events in less than two months! Our events consisted of various roundtable sessions, practice dinners, half-day seminars and our annual Advocacy Conference. Some topics of discussion at these events included succession planning, cybercrime, government income programs, practice management tips for sole practitioners and small firms, and emerging issues in Real Estate and Employment Law.

Each year The Hamilton Law Association garners growing interest from sponsors who attend these events in order to showcase their available products and services to a highly targeted legal audience. The members of the Hamilton Law Association, as well as legal professionals from all over Ontario, attend our many events in greater numbers every year. Our growing event attendance is a testament to the quality of varied and stimulating programming that our volunteers pride themselves on providing year after year.

CPD Reporting

We thank our members and the lawyers of Ontario for completing their Continuing Professional Development hours with the HLA enabling us to offer more and more quality programs every year. Lawyers must report their CPD Hours using the online LSUC Portal by December 31 2014. Lawyers can report eligible CPD programs and activities at any time on or before December 31 2014 and are encouraged to report regularly. CPD Hours should be entered into the Portal once an activity or program has been completed.

You may not know this but any Professionalism Hours completed in excess of the 3 required Hours that have been entered into the LSUC Portal will be automatically applied to the lawyer's Substantive Hours. However, it is important to note that Substantive Hours completed in excess of the required 9 Substantive Hours and entered into the Portal will not be applied to the lawyer's Professionalism Hours.

For information and tips about reporting your CPD Hours in the LSUC portal, do not hesitate to contact our Event Coordinators Riane Leonard or Dana Brown at 905-522-1563.

Thank You in 2014

Member appreciation at the Hamilton Law Association is a very important contributor to the success of the Association, its events and the collegiality of the Hamilton legal community as a whole. If it were not for our members, volunteers and countless participants in various HLA events, the Association would not be as successful and vibrant as it is today. I would like to extend my many thanks and gratitude to all of the individuals, groups and supporters of the HLA who have dedicated their time and expertise in 2014. We look forward to your ongoing support in 2015. ■

Librarian's Report

Mary Jane Kearns-Padgett

By the time this article is read, much will have transpired in the life of the Hamilton Law Association since the last edition of the Journal. A number of our chief events take place in November and early December, including the Employment Law and Real Estate Seminars, the Annual Advocacy Conference, and the Members' Appreciation Lunch. As well in late fall, the Library is buzzing with activity with between 2500 and 3000 visitors a month. It is wonderful to see members using our facilities regularly, and utilizing our collection and free online resources such as Quicklaw and O'Brien's Encyclopedia of Forms.

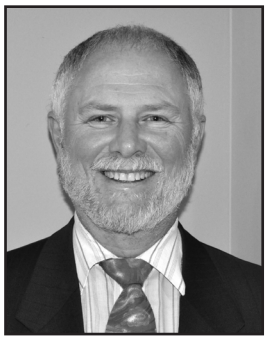
The future of courthouse libraries such as ours was a focal point of the annual fall Conference for Ontario Law Associations (COLAL) held in Toronto in mid-October. In light of significant changes to the administrative structure of LibraryCo and the recently published report from the Legal Information and Support Services Working Group (LISS), the agenda for the conference took on a somewhat different format this year. Chris Wyskiel and I were fortunate enough to attend the conference.

The Conference began with a Keynote speech by Kim Silk, Data Librarian at the Martin Prosperity Institute, University of Toronto. Kim was a very dynamic speaker and she discussed new methods of managing digital collections, and applying social media principles to knowledge management. Kim emphasized the importance of understanding the community we serve in order to ensure what we do is valuable and meets our target audience's needs. Many of her ideas are rooted in R. David Lankes' book *Expect More: Demanding Better Libraries for Today's Complex world*, a book that is a free download on the web for anyone who is interested.

The inevitability of change was something that was in the forefront at the COLAL Conference. Most of the sessions focused on discussions of what those of us who work in the county courthouse libraries would like to see improved or modified in our libraries and how we might facilitate such change – if we had the money and power to do so. On Thursday we had a related and significant update session with the Shareholders and LibraryCo Board. This session brought into focus some of the issues that must be tackled in order to move forward. The nine people representing the Stakeholders and Board responded to a prepared set of questions given to them by the Ontario County Library Association (OCLA) and a generally upbeat positive tone dominated despite the fact that OCLA was told repeatedly that things were "at sixes and sevens" although there was no plan to change at the moment. An issue that remains unresolved at the writing of this article was how LibraryCo will be able to retain the Toolkit with its free access to Quicklaw for all members. It was indicated that the hope is we will continue to have Quicklaw as part of the Toolkit as part of our front counter service, while eliminating Desktop services to lawyers in county associations serving smaller and more remote communities. CPD programs, paralegal access to libraries public access to law libraries were all topics that were also considered in light of recommendations of the LISS report.

The final session on Friday morning provided the three types of libraries – Regional, Area and Local - an opportunity to confer and discuss issues and goals related to the different types of libraries. These dialogues were summarized and presented to everyone at the Conference and in general reflected the desire on the part of all libraries to develop a stronger communication network between libraries, to coordinate acquisition and collections in a way that would best benefit all and to implement a plan that would allow courthouse libraries to achieve their goals.

The Conference sessions were interspersed with very enjoyable breakfasts, lunches, a dinner, and coffee breaks which gave OCLA staff periods to interact more informally and to enjoy the comradery of others attending the event. While much remains to be decided, there was certainly a general consensus at the end of the Conference that the 2014 COLAL conference left most with a positive feeling about the change that is to come. ■



Criminal Law News

Geoffrey Read

Good Practice, Good Form

One of the laments of contemporary practice is the want of opportunity for many inexperienced lawyers to learn from those who are more experienced. This becomes a vicious circle of ignorance that erodes sound traditions of the Bar as increasingly fewer lawyers pass on the accumulated collective wisdom of the profession until it is eventually lost altogether.

One of the most egregious examples of this is the custom of bowing in the courtroom. Today, we see the spectacle of court staff, police, even members of the public bowing whenever they enter or leave a courtroom in which a judicial officer – a judge or a justice of the peace – is sitting. We must seem to be a servile lot indeed to an observer from that great democracy to our south. Chief Justice Gale spent an hour or so gently teaching a bunch of soon-to-be lawyers in the writer's Bar Admission Course some of the more elementary do's and don'ts of how to conduct oneself as a barrister and solicitor. One of them concerned the practice of courtroom bowing. It is a reciprocal gesture of mutual respect between the Bench and the Bar when the Judge enters or leaves. It is not some kind of kowtowing to be performed by everyone whenever entering or leaving a courtroom in session. Think of it as a sort of judicial handshake. The parties to it are only the presiding judge on the one hand and the lawyers at the Bar - not in the public gallery – and it should occur only when the judge enters and leaves the courtroom.

Lest you think this is just the lament of an aging lawyer from the last century, check the Internet for *The Bow* by Mr. Justice John deP. Wright of the Superior Court of Justice, published by the Ontario Justice Education Network (www.ojen.ca). This succinct two-page monograph concludes with these words: "Personally, I think in this day and age we should get the word out that only lawyers should bow in court. Specifically, we should tell the police that if they are respectful and quiet they can come and go without doubling over. We should tell counsel that they should bow only upon the entry and exit of the judge. If they enter a courtroom while court is in session I think it is sufficient, and less distracting, if they simply pause respectfully inside the door, then go to their place."

While on the subject of form and so forth, let's try using the right words to express ourselves – after all, Law was once considered one of the so-called learned professions. A judge (or justice of the peace) is just that; not a "jurist", which the Pocket Oxford dictionary defines as "one versed in the law; writer on, student of, graduate in, the law". Likewise, how is it that anyone other than counsel are entitled to use the term of art "my friend" when referring to their opposite number in the courtroom? And, don't even start on the question of vocabulary generally, where cases are "traversed" when they are really being transferred, made "pre-emptory" when they are peremptory, and complainants become "complainants" *(sic)*. We are necessarily wordsmiths, so let's get it right.

Defence Counsel and Victims

It was recently reported that some criminal lawyers had volunteered their services to persons claiming to be victims of the embattled Jian Ghomeshi, which prompted a debate within the Criminal Bar as to the proper role of defence counsel. One lawyer posted these remarks by Edward Greenspan in an Empire Club speech:

> And the role of the defence counsel, the obligation the

> community places on him, is a societal role-to defend the constitutional guarantees of presumption of innocence and the requirement that in our democracy no one can lose freedom unless and until the state can prove guilt beyond a reasonable doubt. Our community can retain justice and freedom only as long as it gives standing to one person to take, within the limits of the law, the defendant's side in court and to remind society when the scales of justice are tilting in the wrong direction. For instance, we live in the Dawning of the Age of the Victim. You may think the defence counsel will naturally oppose the interests of the victim. Not true. What we must do is remind you all the time of the potential danger that fashionable and trendy ideas might have on the law. Will it upset the delicate balance the justice system desperately tries to maintain. John Robinette, the dean of Canadian lawyers, says, "It's so easy for the victim to exaggerate ... I'm not happy about this new rule for the victim. It worries me."

I would add this. Whatever the reason for the rising popularity of the victim, the new suggested role for the victim is at odds with the tenets of democratic justice. The function of criminal law in theory and in fact is not the resolution of disputes between individuals. In the law of torts it is the individual suffering the depict who is conceived to be wronged. In criminal law, though the act may be and often is a recognizable tort, the important difference is the notion that it is the state or the collective community that has been injured. The substantive criminal law is not concerned with violations of the rights of individuals, but with violations of the collective interest in the security of the state, the safety of its citizens, or the shared morality of the community. A civil trial may be a fight between neighbours, each asserting rights. In a criminal trial, the state, on behalf of the community, accuses an individual of violating some collective value in the society.

A democratic society is not, however, solely concerned with dealing with crime as an attack on the law-abiding majority. We also value freedom and dignity of the individual and this has implications for how we treat the accused throughout the criminal process. It is the need to recognize these values which creates what may appear to be an imbalance, or as Ronald Dworkin thinks of it, an asymmetry. "The geometry of a criminal prosecution, which does not set opposing rights in a case against one another, differs from the standard civil case in which the rights thesis holds symmetrically." It is this peculiar configuration of the sides in criminal cases, the prosecution representing the collective values of our society set against the defence representing not only the individual defendant but the individualist values of our society, which makes it critical that we never blur the distinction between civil and criminal law.

Both sets of values are of great importance and are seemingly irreconcilable in the criminal trial. The ever-increasing popularity of the victim and the new role for the victim obscures the role of the state, attempts to legitimate personal revenge as a justification for public punishment, and tends to overshadow the primary focus of the criminal trial-the legalized attempt by the state to deprive the individual of his liberty. There are other forums for redress of the violence done to victims. The legitimacy of the violence we do to an individual accused of a crime can only be determined in a criminal trial.

Timely thoughts, considering prospective legislation to radically expand the role of victims in the criminal justice process.

Documentary Evidence in the Internet Age

Now, let's conclude with a little something substantive: the admissibility of evidence derived from Facebook and other social media and sites on the Internet. Suppose the Crown wants to tender screenshots taken by the police from the "friends" page of a public Facebook account in the name of the accused together with a picture that resembles the accused, accessed by the police from their own Facebook account, in order to prove that the accused knew the persons

depicted in the screenshots and named. Should an expert be called regarding Facebook verification and privacy policies, and, if so, by the Crown to establish the authenticity and identity of the images, or by the defence to impeach the screenshots? There seems to be abundant evidence that one might have many Facebook "friends" with whom one has never associated or even met. For example, the lead plaintiff in the American case of *Lane v. Facebook, Inc*., 696 F.3d 811, 826 (9th Cir. 2012) *cert. denied sub nom. *Marek v. Lane*, 134 S. Crt. 8, 187 L. Ed. 2d 392 (2013) had over 700 Facebook "friends". An American lawyer, citing eleven cases on the issue that he said he found with a mere ten minutes of research, recently stated that the majority position in the United States is that such documents require some additional proof of authenticity, although the minority position is it is *prima facie* evidence.

Here, in Canada, consider the analysis in *R. v. Soh*, [2014] N.B.J. No. 41 where L.A. LaVigne J. admitted, without expert evidence, Facebook evidence of an online conversation the complainant said she had with the accused after the alleged sexual assault. However, contrast that with *R. v. Andalib-Goortani*, 2014 ONSC 4690 (CanLII) where Trotter J. excluded a Facebook photo from which the meta-data had been removed because it could not be authenticated (see paragraphs nos. 33 and 34). This writer understands that there is an app called x1.com, which may or may not be trustworthy, that can be used to discover social media material from everything that is open (as opposed to locked accounts). Police, prosecutors and defence counsel alike are increasingly resorting to these kinds of searches to discover useful information.

Indeed, it seems that bogus Facebook accounts are easily created and that fake profiles have been fabricated including apparently genuine details and pictures. Recently, it was reported in the October 21, 2014 of Vice News (https://news.vice.com/article/facebook-tells-the-dea-that-fake-accounts-and-covert-ops-are-not-welcome) that last week Facebook told law enforcement agencies that the social media site will not be an option for officers looking to carry out covert operations.

The company reprimanded the Drug Enforcement Administration for creating a fake profile using a real person's information and personal photos to assist in an "undercover" sting investigation, saying that they found the activity "deeply troubling." Facebook's chief security officer, Joe Sullivan, sent a letter to the agency on October 17 informing them that "the DEA's deceptive actions violate the terms and policies that govern the use of the Facebook service and undermine the trust in the Facebook community." Sullivan asked the DEA to "cease all activities on Facebook that involve the impersonation of others." Canadian law enforcement agencies are said to have employed similar tactics to identify people involved in a Vancouver riot: see https://riot2011.vpd.ca/.

This will undoubtedly be a subject of practical interest that will continue to develop. ■

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Immigration Law News

Robert Young

Express Entry: Just a unicorn ride over a rainbow

On January 1, 2015 Citizenship and Immigration Canada promises to change how non-Canadians apply for permanent residence. This change will affect all "Economic Class" (that is, non-refugee and non-family sponsorship) applications; potentially a pool of over 180,000 people a year. The new program will be called "Express Entry".

I'll say it right now, I seriously doubt that the final program will look anything like what is promised or that it will be put in place at the promised time. The government websites hold very little hard information about the new program, but do contain a lot of empty cheerleading. As is this government's practice, they haven't bothered to circulate draft versions of the new legislation (probably because they haven't started writing it). They'll just drop it on the public after it goes into effect. Reading what is available, I struggle to understand what is planned.

According to Immigration's websites, Express Entry will be a hybrid. We currently have several economic class categories, the chief of which are: Federal Skilled Worker, Canadian Experience Class, and, Provincial Nominee Program. "Express Entry" will be superimposed on these programs, acting as a threshold test or gatekeeper function. Only if an applicant is accepted under "Express Entry" may he\she then apply under one of the existing programs.

Here's how it may work. A foreigner will fill out an on-line application. His/her name will go into a pool of candidates. If an employer has gone through a "Labor Market Impact Assessment" (a program which the government has essentially killed through an overly-generous injection of red tape) in the foreigner's favour, they qualify. They also qualify if the employer has applied to a province under the "Provincial Nominee Program", the application is somehow (no details are available) "matched" with an employer through the National Job Bank or possibly because they have skills that line up with what may be yet another list of preferred occupations. It's not clear if there will indeed be an occupation list – it's possible that only candidates with some sort of job offer will qualify. If that is the case, the pool of candidates is going to be quite small.

We have an occupation list under the current Federal Skilled Worker program. The 50 occupations listed are allegedly those Canada currently needs the most. It includes bizarre categories like psychologist, financial manager, human resources manager, property administrator, and insurance brokerage manager. Some categories do, however, make sense such as specialist physicians, medical radiation technologists, and medical sonographers. How many people have applied in the last six months under those last three categories (up to 1000 each category are permitted)? Less than 10 in each category. This fact tells me that our system is already so tied up with red tape that highly qualified people can't be bothered to apply.

I feel like Sigourney Weaver's character in Aliens. The terraformed planet you're on is covered by an impenetrable fog and something you can't see is picking off your people one by one. I want to see what's out there, but I'm terrified at the thought of what I will see. ■

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Input This - The Impact of HST on Income for Support Purposes

Ryan C. Bensen

In theory, the income for the purposes of determining spousal and child support is a relatively straight-forward and simple concept to understand and calculate.

In any marital breakdown, there are a variety of negative consequences which affect both the applicant and respondent. It's not only an emotionally draining process, but it can have dire financial consequences as well. The purpose of spousal and child support, of course, is to counteract these financial implications to the best and most reasonable degree possible.

This remains simple in the case of the bread-winner 'employee'. Income is generally traceable through T4's and Income Tax Returns, and future career trajectories can be reasonably determined.

But what about the self-employed business owner? What are the implications of having the ability to write off personal expenditures through the business? How does tax play a role in matrimonial affairs?

In *Orser v. Grant, 2000,* Justice Benetto considered the consequences of business ownership with regards to the Guidelines, stating:

"The Child Support Guidelines base support on the payor's gross taxable income. One of the objectives of the guidelines is to ensure "consistent treatment" of those who are in "similar circumstances" (s. 1(d)). Thus, there are provisions to impute income where a parent is exempt from paying tax (Section 19(1)(b)), lives in a lower taxed jurisdiction (Section 19(1)(c)), or derives income from sources that are taxed at a lower rate (Section 19(1)(h))."

This rationale was applied to determine an income tax gross-up on personal expenses paid by a corporation, to reflect what a regular "employee" would have needed to earn to pay for these expenses on an after-tax, personal basis.

Put differently, this decision provided a basis to normalize the earnings of a self-employed business owner, by grossing up personal expenditures paid for by the corporation or business by the individual in question's marginal tax rate, in order to reflect regular "employment" income.

However, this decision and the *Sarafinchin v. Sarafinchin (2000)* decision, presided over by Justice Sachs only addressed the personal income tax component of these expenditures.

What about Input Tax Credits?

There is a separate and determinable amount that has not yet been considered as an 'add-back' subject to this gross-up, which is the Input Tax Credit. Input Tax Credits are applied against any HST received through the business. As businesses pay HST on expenses, they can claim this amount to offset any HST collected on sales in the period.

By regularly claiming Input Tax Credits on personal expenditures, business owners will reduce their Sales Tax liability. This translates to additional pre-tax dollars available for the Corporation or business owner.

This is a relatively straight forward benefit to calculate. For every dollar expensed by the business, there is a 13 percent benefit to the business owner in claiming this as an Input Tax Credit. If there was $10,000 in personal expenses incurred by the business, this represents a $1,300 benefit to the business-owner, on a ***pre-tax basis.***

The ability to deduct personal expenses through a corporation is certainly a perquisite of owning and operating a business. Similarly, being able to take advantage of Input Tax Credits in this regard is also a perquisite, as it rep-

resents a cash-in-hand benefit to the business owner.

In accordance with current case law, the $1,300 would be subject to the income tax gross-up based on marginal tax rates impacting the yearly Income for Support Purposes by over $2,400, if said owner fell into the highest tax bracket. This addition can significantly impact the decision on support made by the court, as there is an additional 24 percent benefit on personal expenditures that has not been considered to date.

Conclusion

In considering Income for Support Purposes for self-employed business owners, the court has established a precedent of imputing income by including personal expenditures paid for by the corporation, which are subject to an income tax gross-up. These personal expenditures are considered a benefit of owning a business.

Based on the precedent set under *Orser v. Grant* and *Sarafinchin v. Sarafinchin,* this benefit also extends to Input Tax Credits, which are entirely unavailable to the traditional employee that the Guidelines are built around.

Current jurisprudence supports adding back, and subsequently grossing-up any personal expenditures incurred by a business on behalf of its owner. This serves to equalize the Guidelines between employees, and business owners, who by virtue of ownership are better able to make use of tax deductions.

By including the Input Tax Credit incurred on these personal expenses, and applying the applicable personal income tax gross-up, the Income for Support Purposes calculated will be more reflective of the business owner's true income.

Ryan Bensen graduated from the DeGroote School of Business with a Master of Business Administration in Accounting and Finance, and subsequently obtained his CPA, CA with a Big Four Accounting Firm in Toronto. In addition, he has obtained his Certification in both Fraud Examination and Financial Forensics.

For the past several years, Ryan has focused his expertise on Tort, Matrimonial, and Corporate/Commercial Disputes.

Ryan is a Partner of Bensen Industries Ltd., a boutique Litigation and Tax Accounting Firm with clients throughout the Golden Horseshoe and Southern Ontario.

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The Hamilton Club continues as it began – an elegant and inviting place for Hamilton's business professionals and their families.

The Hamilton Club has been the premier private club in the city since 1873. The history of Hamilton is indeed the history of The Hamilton Club.

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An Eye on the Courts

Peter Lawson

Density Group Ltd. v. HK Hotels LLC: Revisiting the Said v. Butt Defence

Traditionally the tort of inducing breach of contract has been a popular strategy for circumventing the corporate veil when a plaintiff wishes to claim against an officer or director personally. Indeed the strategy has been so popular that the courts have recognized a unique defence in these circumstances—the so-called *Said v. Butt* defence. Unfortunately the scope and content of the defence remain a puzzle. The comments made by Justice Perell in his decision in *Laurier Glass Ltd. v. Simplicity Computer Solutions Inc*. are telling in this regard:

> **A review of the case law ... reveals that where claims are brought against a corporation and also its officers or employees, the law is subtle and difficult to apply. The case law sets out general principles about the potential of directors, officers, and employees being personally liable, but unfortunately, the case law does not go far in explaining the reality of liability....[1]**

Given this difficulty, the Ontario Court of Appeal's decision in *Density Group Ltd. v. HK Hotels LLC*[2] is welcome. It provides a text-book example of the successful application of the *Said v. Butt* defence. The decision is doubly helpful because the Court provides further guidance on the new test for summary judgment as set out in the Supreme Court of Canada's decision in *Hryniak v. Mauldin*[3].

The case itself dealt with a joint venture gone wrong. The two parties had entered into an agreement to develop a hotel project. Each party owned a 50 per cent interest in the project, and the costs and expenses of the approvals phase were to be shared equally. However, the principal of HK Hotels--a Mr. Kallan-- discovered that Density Group was paying itself management fees, and was doing so without authority or approval. In consequence, HK terminated the relationship. Density Group then sued—and it sued not only HK, but also Mr. Kallan personally. As against Kallan, Density Group alleged breach of trust and breach of fiduciary duty, as well as a series of torts, including inducing breach of contract. For his part, Mr. Kallan moved for summary judgment dismissing the claim as against him personally. The Motion Judge first held that it was appropriate to hive off the personal suit and to decide it by way of summary judgment. She then considered the factual allegations against Mr. Kallan. Here she concluded that the management fees were indeed unauthorized and that when Kallan caused HK to terminate the joint venture, he did not act out of revenge but in a good faith effort to protect the corporation's "best interests". On the basis of these

findings, the Motion Judge rejected the various claims against Kallan, and granted him summary judgment.

In reaching this conclusion the Motion Judge held that the *Said v. Butt* defence was applicable. By way of background it will be recalled that this defence was first set out in the 1920s in the case of *Said v. Butt*. It starts from the proposition that because a company must act through an *alter ego*, the acts of a director or officer are necessarily, in law, the acts of the company. It follows that one cannot impose personal liability on a director or officer simply because he or she authorized the act in question. Before personal liability will be imposed, it must be demonstrated that the officer or director had an interest separate from that of the company, and therefore acted outside the scope of his or role as an officer or director.

In considering this defence in *Density Group Ltd.*, the Motion Judge began by noting that a plaintiff cannot simultaneously claim against the corporation on grounds of breach of contract *and* against a director or officer on grounds of inducing that breach: "[a] claim for inducing breach of contract cannot proceed as against a corporate officer or director where a claim for breach of contract lies against the corporation."

The Motion Judge then set out the two core elements of the defence:

> **In order for an officer or director to rely on the *Said v. Butt* principle, the director must be acting *bona fide* in the best interests of the corporation and cannot have individually engaged in tortious or unlawful conduct that would lead to the director having a separate legal identity from the corporation. [emphasis added][4]**

On appeal the case was heard by a panel consisting of Justices Feldman, MacFarland and Epstein. In her decision for Ontario Court of Appeal, Justice Feldman begins with a brief discussion of the new test for summary judgment. The Appellant had argued that because the issues of the liability of personal Defendant, and of the corporate Defendant, are so closely intertwined, it could not be in the "interest of justice" to allow them to be heard separately. Justice MacFarland disagrees. She notes that in *Hryniak* itself, the SCC had recognized that "the resolution of an important claim against a key party could significantly advance access to justice." She also indicates that in the particular case of a personal defendant, a measure of speed can hardly be contrary to the "interest of justice": "I am sure that to him, having his personal liability determined at this stage is preferable to waiting perhaps years for a trial to resolve an action that was commenced more than five years ago."

With respect to the allegation of inducing breach of contract, Justice MacFarland notes that the crucial question is whether Mr. Kallan had satisfied the test for the application of the *Said v. Butt* defence. In this connection she notes that the facts as found by the Motion Judge suggested two conclusions: 1) Kallan had always acted "honestly"; and 2) he had always acted "to protect HKH's interests". In light of these findings Justice MacFarland concludes that the two requirements of test had indeed been met. As such, the Motion Judge was right to grant summary judgment.

Although the decision provides a helpful example of the application of the *Said v. Butt* defence, questions remain, particularly with respect to the actual meaning of the two core elements of the defence. In particular, it is still not entirely clear what it means to act "dishonestly" or "unlawfully". In addition, it is still not entirely clear what it means to act only in "the best interests of the corporation". Until these categories are clarified the defence will remain a bit of a puzzle. ■

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1 2011 CarswellOnt 1580 (S.C.J.), at para. 34.

2[2014] O.J. No. 3865 (C.A.).

3 2014 SCC 7.

4 [2012] O.J. No. 3378 (S.C.J.), at para. 186.

So You Want To Be An Executer (Estate Trustee)?

Catherine A. Olsiak

Lessons for the Drafting Solicitor and the Solicitor during the Estate Administration

What many lawyers may not fully appreciate about practising in estate planning is the unique nature of the solicitor-client relationship. What may begin as a young lawyer preparing a will and powers of attorney for a single adult often develops into a life-long relationship which experiences the phases of personal and professional growth of clients coupled with the challenges of aging, including unexpected loss and hardship. In such a relationship, the legal advice provided over the years also changes, not simply because of the evolution of the law, but because the advice given is more comprehensive and evolved. As a result, planning embraces a "holistic" model as it is based on an understanding of the client's family situation, career path, life choices, and core values.

In these unique relationships the estate solicitor may become the trusted family advisor, and is often the point person who brings in other professionals to lend their expertise for anything from a commercial transaction to a family medical crisis. Notwithstanding the time spent, solicitors may not be able to invoice all of their time in these circumstances. Reasons may vary but often it is because of the difficulty in characterizing the service provided. Accordingly, at first blush, a reader of a will or other estate planning document may not understand that behind these documents lie countless hours of conversation about those "soft" issues which are of importance to the client. Consequently, this cultivated relationship and the estate solicitor's unique knowledge and understanding of the client's goals, values, family dynamics and overall estate plan, may result in being asked to be the client's executor.

During a time when solicitors continue to face the challenge of obtaining fees commensurate with their expertise when preparing an estate plan, an executor appointment can assist in bridging the fee gap/disparity. When the estate solicitor, acting as an executor, properly administers the estate, an executor appointment is the opportunity for such solicitor to receive fees commensurate with time expended, skills, and commitment.

However, hand in hand with this opportunity is the challenge of getting paid at the end of the day. Even in situations where the lawyer as the estate solicitor has provided good advice, and, as executor has administered a deceased client's estate expertly and expeditiously, payment terms which were agreed upon with the then living client during the estate planning meeting may still be challenged. Beneficiaries may be hurt that a third party is involved. Initial perceptions may breed a mutual sense of mistrust and erode the executor / beneficiary relationship which will invariably thwart efforts to get paid *even if the Will explicitly permits payment*. The deceased client cannot be examined to evidence his or her intention. What can an estate solicitor do?

This article summarizes i) the statutory authority for a solicitor to act as both solicitor and executor, ii) select aspects of cases dealing with solicitor's compensation and legal fees[1], and iii) lessons for practice for the estate solicitor. [2]

The Trustee Act [3]

The Trustee Act permits a solicitor to receive an allowance for professional services above the compensation that the solicitor would be awarded in his or her role as an executor.

Sections 61 (4) and (5) of the Trustee Act read as follows,

> *(4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services.*
>
> *(5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust.*

A beneficiary may certainly challenge the quantum of a solicitor's claim for executor's compensation, and, notwithstanding this provision, any fees charged for solicitor's work.

Executor Compensation and solicitor fees - Cases

The Estate of Curtis T. Conrade (Deceased) Ontario Superior Court of Justice 2005 CarswellOnt 7058 21 ETR (3d) 140

Abel Calvin Conrade, Carol Ann Mailing and Richard Wayne Rosenman were originally appointed Estate Trustees. Mr. Rosenman was also an estate solicitor. Abel Calvin Conrade was removed by order of the court and then later filed a notice of objection to the accounts of the remaining estate trustees. One of the grounds for the objections was that Clause 21 of the Will, which permitted payment of Mr. Rosenman in his capacity as a solicitor, was ambiguous.

Clause 21 read as follows, *"I declare that any trustee of this my Will who is a barrister at law or a solicitor shall be entitled to charge and to be paid all professional fees or other charges for any business or act done by him or his firm in relation to my estate or to the trust declared by this my will as compensation for acting as one of my trustees…"*[4]

Mr. Justice Kruzick agreed that Mr. Rosenman's inclusion of this paragraph in the Will was permitted by legislation, notably s. 61 (4) of the Trustee Act. The judge went further to say that given the wording of Clause 21 he agreed that when a lawyer is a trustee of any estate, and he/she or a member of his firm does work as a trustee, the lawyer will be entitled to bill at his regular rate.

Mr. Justice Kruzick characterized the nature of the estate as "*not only a large estate but given the evidence, an estate where the deceased was not the most organized person, and the estate was of some complexity given the nature of the holdings*"[5]. Mr. Justice Kruzick awarded compensation in accordance with the usual percentage guidelines, however, although he stated that that he could not but conclude that the deceased's intention was for the lawyer to wear two hats, he could not conclude that it was the testator's intention that the wording in the Will itself contemplated double dipping.

The end result was that the compensation was reduced by both the fees and **disbursements** [6].

In the writer's view, the latter portion of Clause 21 appears to meld compensation and fees, with one offsetting the other in determining the calculation. It appears that the intention may have been that compensation would be charged at an hourly rate instead of the usual percentage guideline. With the exception of Clause 21 in the will, the case does not reference any additional documentation evidencing the late Mr. Conrade's intention. What is not clear however, and of interest to the writer, is the rationale for not permitting payment of disbursements, which would have been a direct out-of-pocket expense for the firm.

Arrand v. MacKenzie, 2010 Carswell Ont 9553, 2010 ONSC 6815, 195 A.C.W.S. (3d) 989, 69 ETR (3d) 154

One of the estate trustees was Gordon Chalmers Adams ["Adams"], who was a solicitor. The issues with respect to Adams were: 1) What is a reasonable amount of compensation to be paid to him? and 2) Is he entitled to be paid his professional hourly rate for all services rendered in the administration of the estate?

Mr. Adams had drafted the will and had included a clause permitting a solicitor, accountant or other professional to charge and be paid all usual professional fees or other charges. Mr. Justice Roy J. Albert had difficulty with the accounts submitted by Adams as they were confusing with respect to various hourly rates, and Adams was making revisions of these rates during trial. Mr. Justice Albert felt that the hours submitted for driving were excessive.

Mr. Justice Albert was also critical of the fact that Mr. Adams would not discuss his compensation with the beneficiaries which seemed to foster a number of the problems between Mr. Adams and the beneficiaries.

Mr. Justice Albert also turned to the Will itself which contained the following clause:

> *"where at any time any of my trustee or my literary executor is a solicitor, an accountant, other than engaged in any profession or business, he or she shall be entitled to charge and be paid all usual professional fees or other charges or business transacted, time expended and asked down by him or her or his or her firm in connection with the administration of my estate and he [sic] trusts all this my Will, including act when she trustee [sic] not being any profession or business could have been done personally."* [7]

With respect to the clause itself, Mr. Justice Albert stated the following,

> *"Adams relies on this clause as his authority from the testator to charge his legal hourly rate for all services rendered at [sic] the trustee. Obviously this paragraph is a standard clause found in many wills. We have no evidence that the testator understood the full implications of that paragraph"* [8]

The end result was that Adams' hourly rate was reduced, and his hours for work were reduced by twenty-five percent (25%).

It seems clear in reading this case that

the conduct of Adams during the trial, coupled with his method of record keeping was less than satisfactory. However, even if Mr. Adams administered the estate properly, it is questionable as to whether Mr. Justice Albert would have ruled differently given the fact that the clause was the only written evidence of the testator's intention.

Krentz Esate v. Krentz, 2011 CarswellOnt 1651, 2011 ONSC 1653, 66 E.T.R. (3d) 132, 199 A.C.W.S. (3d) 1025

In this case the late Mr. Krentz died leaving a will appointing an accountant, bookkeeper, and his lawyer, Robert Sidney Fuller, as his executors.

Mr. Fuller had prepared the Will. The Will contained the following two provisions:

> *I authorize my Trustees from time to time to pay to themselves from the capital and income of my estate such reasonable amount or amounts for compensation at such reasonable intervals during any accounting period of my estate, subject to the subsequent approval of such amount or amounts so made by a Judge or authorized officer of the Court on any passing of accounts or audit of the assets of my estate.* [9]
>
> *Any trustee who is an accountant or solicitor or engaged in any profession or business may make and be paid, in addition to disbursements, all usual professional and other charges for work done by them or their firm or any member or employee thereof in relation to the probate of this will or any Codicil hereto or the trusts thereof in the same manner in all respects as if they were not a Trustee hereof including matters which might or could have been attended to in person by a trustee not being an accountant or a solicitor or other professional persona but which such Trustee might reasonably require to be done by an accountant or solicitor other professional person.* [10]

With respect to these two roles, Justice Turnbull stated as follows: "*I have no doubt that most lay people do not understand that there is a distinction between "compensation" and "professional fees" and their effects on their estate, absent specific examples being given to them so they can understand the amount involved and the effect on the residue of their estate.*"[11]

Mr. Justice Turnbull went further to state that although the Trustee Act permits double dipping, that where there is an objection the onus rests on the Trustees to satisfy the court that that was the intention of the testator.

In his analysis, Mr. Justice Turnbull referred to lawyers charging contingency fees. He stated that there are strict requirements to validate such contingency agreements and that recent regulations had been enacted under the Solicitors' Act [12] including examples to calculate such fees.

In this case, Justice Turnbull stated that Mr. Fuller did not present evidence of what he explained relative to double dipping. Mr. Fuller did not have his client sign or initial any sample calculation of the effects as required in a contingency retainer agreement.

Mr. Justice Turnbull stated that he was not implying any wrongdoing, but that when a claim for compensation and fees is being made there is an obligation to satisfy the beneficiaries that the full effect of these clauses were explained to the testator.

Mr. Justice Turnbull held that he was not satisfied that the wording of the Will made the testator's intention clear that the trustees be paid both their professional fees and full compensation.

Thoughts

Respectfully, the writer is concerned about the use of the term "double dipping" in the judgments and the negative inference which does not necessarily characterize all estates where the solicitor charges both executor's compensation and his or her fees. There is a distinction between the solicitor/executor administering an estate and the solicitor acting as lawyer for the estate. The former is a fiduciary obligation and carries a heightened personal liability and risk associated with this obligation. The latter supports the estate administration with the requisite legal work and advice. These are two different and separate functions. Perhaps however the notion of double dipping is not just a reflection of cases where there is poor file management and improper accounting, but, as stated in the introduction, it is a preconceived impression of the Bar due to the solicitor's general lack of attention to evidencing all of the non-billable hours, all of the agreements, all of the discussions and goal setting, and all of the education provided to our clients.

Lessons for Practice - The Planning Meeting and Drafting

One of the reasons for selecting the cases as presented is noting the similar judgments as they relate to ascertaining testator intention notwithstanding the different fact scenarios – notably conduct of the solicitor and content of the clauses. The case law seems clear that regardless of the nature and

content of the clauses in a Will, these clauses cannot be solely relied upon to evidence testator intention when there is an objection to compensation and fees. Based on the decisions described above, the following are suggestions from the writer to ensure the estate solicitor can satisfy his or her onus when there is an objection to compensation and fees:

- Learn from the Trust Companies – Prepare a letter of intention, or a memorandum incorporated into the will, indicating that the client (testator) is aware that the firm will be charging fees for solicitor's work. Ensure that the testator/ client has signed or initialled any schedule or memo evidencing his or her understanding;

- Incorporate calculations with examples in your correspondence and/or memorandum. With respect to legal fees, you may want to include current hourly rates including those of the estate clerks, with a fee approximation. Include a sample equation - *$_____ (Executor's Compensation) + $ _____ (Legal Fees exclusive of disbursements) = $_____*.

- Will drafting – It seems clear that incorporating a provision into a basket of administrative clauses toward the end of the will is unlikely to be a compelling argument to evidence the client's knowledge and understanding. Include the relevant compensation clauses at the beginning of the will so that they are readily identifiable and have the client initial them. "Personalize" this paragraph to reflect the actual circumstances, such as referring directly to the solicitors (eg. Mr. John Lawyer) named as executors.

- Reference the client's specific instructions regarding fees and compensation in both your interim correspondence and final reporting letter.

Lessons for Practice – The Lawyer (Law Firm) as Executor and Estate Solicitor

When beginning the estate administration, it is best to practise defensively, not only for the purpose of being prepared to respond to any potential objections but to facilitate better file management overall. The following are recommendations:

- If your firm has an estates practice group, ensure that a different lawyer is assigned to the solicitor's work. It is easier to assign and differentiate roles at the beginning of the estate administration;

- Prepare estate accounts in court accepted format from the beginning of the administration;

- Open separate executor files and solicitor files so as to differentiate dockets and their descriptions;

- Communicate with the beneficiaries and respond to questions. This does not mean that you are to provide legal advice to beneficiaries. This means that you are to provide periodic status reports as to the progress of the administration as in the normal course. In providing such progress reports, ensure that you clearly communicate that neither you nor your firm are the lawyer for the beneficiaries, as the dual role may cause confusion.

Conclusion

These cases are a wake-up call for solicitors to not only improve our file and practice management, but to become greater educators and advocates of our skills as both executors and as estate solicitors to clients and to the Bar in general. As we continue to educate and improve our practice management, it is the writer's hope that collecting proper fees will be an attainable goal. ■

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1 The case summaries are not reflective of the entire case, and speak to only those relevant facts and related issues discussed in this article.
2 This article is not a comprehensive analysis of executor's compensation and for purposes of space does not speak to the five factor analysis as set out in Toronto General Trusts Corp. v. Central Ontario Railway (1905) 6 O.W.R. 350 (Ont. H.C.)
3 R.S.O. 1990 c.T.23
4 Re Conrade Estate 2005 21 E.T.R. (3d) 140 , CarswellOnt 7058 at para 28
5 Re Conrade Estate 2005 21 E.T.R. (3d) 140 Carswell Ont 7058 at para 23
6 Emphasized for effect by writer
7 Arrand v. MacKenzie, 2010 ONSC 6815, 195 A.C.W.S. (3d) 898, 69 E.T.R. (3d) 154, 2010 CarswellOnt 9553, at para 10
8 Ibid
9 Krentz Esate v. Krentz, 2011 ONSC 1653, 66 E.T.R. (3d) 132, 199 A.C.W.S. (3d) 1025, 2011 CarswellOnt 1651 at para. 42
10 Ibid
11 Supra note 9 at para. 43
12 R.S.O. 1990, c. S.15

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Insolvency Law

Frank Pignoli & Colleen Yamashita

Trust Funds Under the CLA Must Meet Common Law Definition of Trust to Survive Bankruptcy: Royal Bank of Canada v. Atlas Block Co. Limited

The interplay between insolvency law and construction law can often be complex. Until recently, however, savvy commercial litigators could capitalize on the provisions of both the *Construction Lien Act* ("CLA") and the *Bankruptcy and Insolvency Act* (BIA") in order to achieve special status for their creditor clients within the context of a bankruptcy. More specifically, practitioners could rely upon the breach of trust provisions of the CLA to establish that a debtor's failure to segregate or otherwise account for trust funds constituted conduct so egregious on the part of the bankrupt that the creditor's claim should survive the debtor's bankruptcy. This often translated into a scenario where an unsophisticated trade contractor that was unable to pay his/her suppliers would be found personally liable for the debts owing to the supplier notwithstanding going bankrupt. As bankrupts rarely challenge legal actions initiated against them due to their inability to pay legal fees, judgments surviving bankruptcy were often obtained by way of default. In these cases, practitioners representing CLA creditors merely had to ensure that the CLA breach of trust provisions were properly plead in the Statement of Claim in order to obtain a Default Judgment which survived bankruptcy.

As a result of the recent decision of *Royal Bank of Canada v. Atlas Block Co. Limited* (2014 ONSC 2062) ("Atlas Block"), commercial litigators will have to rethink this strategy.

In the Atlas Block case, at issue was whether Holcim Canada Inc. ("Holcim"), the supplier of materials that were incorporated into a bankrupt company's manufactured products had a trust claim under the CLA. KPMG, the receiver and trustee in bankruptcy of the insolvent company, Atlas Block Co. Limited, was appointed by Royal Bank of Canada ("RBC") and moved for directions on this issue.

In rejecting the creditor's claim, the Honourable Mr. Justice Penny of the Ontario Superior Court of Justice (Commercial List) confirmed that trust claims pursuant to section 8 of the CLA **do not** survive bankruptcy.

In considering the creditor's claim Justice Penny noted that to establish a trust under section 8 of the CLA, the material supplier had to establish that:

1. Atlas was a contractor or subcontractor;
2. The supplier supplied material to projects for which Atlas was a contractor or subcontractor;
3. Atlas received or was owed money on account of its contract or subcontract price for materials supplied to the improvement; and
4. Atlas owed the supplier in respect of those materials.

Nevertheless, His Honour held that even if the supplier satisfied the above test and established that it had a valid trust claim under section 8 of the CLA, the claim would still be a claim provable in the bankruptcy (i.e. the claim would be compromised along with the other unsecured creditors within the bankruptcy).

The Court's reasoning appears to turn on the fact that, unlike the statutory obligations imposed on load brokers, the deemed trust provisions of the CLA only "deemed" a trust into existence, but did not impose a positive

duty to create a trust.

The supplier argued that its claim fell under section 67(1)(a) of the BIA, which excludes from the bankrupt's estate property divisible among the creditors "property held by the bankrupt in trust for any person." However, Justice Penny, relying on authority from the Supreme Court of Canada, held that section 67(1)(a) does not extend to assets subject to a provincial statutory deemed trust where such a deemed trust does not otherwise have all the attributes of a valid trust at common law. In other words, if a CLA claimant cannot establish a common law breach of trust, its claim does not fall under the exception contained in section 67(1)(a) of the BIA.

In contrast to the section 8 CLA trust test, a trust at common law depends on three certainties:

1. certainty of intention;
2. certainty of subject-matter; and
3. certainty of object.

Justice Penny held that the "certainty of subject-matter" requirement of a common law trust was not met because KPMG did not segregate the payments it collected from construction projects for products sold which contained the claimant's materials. Therefore, based on His Honor's reasoning, it seems that any commingling of funds by a debtor or receiver destroys the required certainty of a valid trust, even where tracing is possible.

As a result of this decision, the material supplier in Atlas Block was left without a common law trust, and consequently, without a statutory deemed trust sufficient to improve its priority position within the bankruptcy.

This decision was somewhat shocking to the insolvency community in that the general practice among Ontario trustees in bankruptcy has been to accept proofs of claim for CLA trust claims. Moreover, the commentary contained in the Houlden & Morawetz annotated *Bankruptcy and Insolvency Act*, which is often referred to as the insolvency practitioner's "bible" suggests in its commentary respect paragraph 67(1)(a) that CLA trust claims do in fact survive bankruptcy.

It should also be noted that the cases cited in Atlas Block were recently considered by the Alberta Court of Queen's Bench in the case of *Iano Contractors Ltd.* (2014 ABQB 347). In that decision, the Court which reached an identical conclusion on the interplay between the deemed trust provisions of that province's *Builder's Lien Amendment Act*, and the federal BIA legislation.

These decisions signal the need for commercial litigators to take a critical look at any ongoing or future CLA trust claims to see if the hallmarks of the common law trust are present and plead appropriately.

Duty of a Receiver to Segregate Funds:

The Atlas Block case is also significant in that Court considered whether a court appointed receiver has a positive obligation to segregate accounts receivable collections during a receivership administration in furtherance of a CLA trust. Receivers will be relieved to learn that the Court determined that "the receiver's obligations cannot exceed what the debtor was obliged to do." The receiver was therefore under no obligation to establish and maintain a separate account for funds received as payment for products sold containing the deemed trust claimant's product. ■

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Lunch with Lou

The Honourable Mr. Justice Alan Whitten

Interviewed by Louis Frapporti

In this issue of the HLA Journal, I have the privilege of bringing to you a casual interview with the Honourable Mr. Justice Alan Whitten. It was enormously good fun and I'm confident you'll find the interview as interesting and entertaining to read as I did to experience. I would like to thank His Honour for the generosity of his time and his sense of humour.

Good afternoon Justice Whitten.

Good afternoon.

Where to begin. You are on the eve of supernumerary status?

Yes, that's true.

And are you relieved or saddened to be near the end?

I'm relieved. I feel challenged somewhat to make it a graceful and classy exist. Look, Valentino said that you have to be able to leave when the room is full. You can't always overstay your welcome. You don't want to end up becoming a parody of yourself. And so I am quite committed to doing great work as long as I possibly can. I now have this opportunity to pace myself a bit better. I now have this opportunity to pursue other interests, for example, the Arctic and the Yukon and French, and spend more time with my wife, Laurie, family. The life/work balance isn't as terrible as it was throughout the course of the practice of law, I'll say, up to now.

Justice Alan Whitten en route between Hall Beach airport and Court in Nunavut.

Do you really think that there was any significant risk of your becoming a parody of yourself?

I am probably harder on myself than anybody else is. But I do hold up myself to fairly high standards of which even I don't know what they are. [Ed note: There was some laughter at this point although it must be stated that His Honour ("HH") laughed first.]

Given that you're near the end, perhaps we should discuss how it is that you got here.

I was born in a council flat in Dagenham, England. A council flat is like city housing.

How long were you there?

I was there for about 9 years at which point my family emigrated to Canada.

Do you have any recollection of that time?

I do. I remember that the washroom was outside. And we had coal as a source of heat. I remember wearing shorts and I remember there were a lot of trains. I was a big fan of trains, public transit. I remember the boat over. I remember my brother and my mother and something of the styles. I remember actually being with my mother, it was right after the war, and she had to use food stamps. And television was abysmal, I mean, it was a new thing back in the 50s in England, there was a lot of tennis matches as I recall and there was a children's hour. It was bleak. We were poor.

How poor?

We were so poor—we lived in a house so small that if you wanted to change your mind, you had to step outside. [Ed's note: HH's wife Laurie has forbidden this joke for obvious reasons. We reprint it over her objections.] We didn't own a car. My father rode a bicycle to work, he was a policeman in England. And it had an impact, some of which you can't

enunciate.

Have you found during the course of your judicial career that those early experiences have factored into your approach to the cases that you've heard?

It's possible. I think what it did is - it instilled an element of openness. We were going to a different country, we had no idea what it was going to present. It was an adventure. And so maybe what that kind of thing does is it imprints a sense of openness to adventure in life. So when you're sitting in court, you are open to and interested in the great variety of peoples' stories. The characters. Their dilemmas. And the law provides some solutions or a construct by which you can approach the stories and seek a solution.

What was life like in Canada in the early days?

I started off in Scarborough, like a lot of immigrants, David and Mary Thomson Collegiate. I was one of the first students at the school. Then I ended up in Don Mills, which is one of the first planned communities in North America built by E.P. Taylor. By the time we hit Don Mills, my parents had achieved a fair degree of affluence so we were up and comers, sort of *nouveau riche-ish.*

What did you father do?

My father started off as a policeman, as I mentioned to you, in England and they had a program where they would bring English bobbies over and put them into the Military Police here in Canada and he did that for awhile. Then he started a business on the side providing security guards and ushers. One of his first contracts was the Sony Theatre. And, in fact, I worked there as a teenager. He had about 300 people working for him at one point and it was a business he ran like the army. And that was back when security people could actually carry guns. There were all kinds of mishaps and these guys were shooting these things off in industrial areas or shooting themselves in the foot.

Anyway, he made a lot of money quickly. And it all kind of blew apart because it was like *Mad Men*. He was associating with a lot of other guys who made a lot of money and so traditional values kind of went out the window. I could tell you all kinds of stories. In fact, he had to sleep with a gun under his pillow... [Ed's note: these stories are not suitable for publication and have been redacted.]

Have you continued that tradition [of sleeping with a gun under your pillow] today?

No I have not.

Did your mother work at home?

She was completely bilingual so when they first got here, she worked as a bilingual medical secretary and then when they became affluent she didn't have to work but when everything blew up she became a real estate agent with Royal LePage and I guess she too was very successful. She made more money than I ever did as a lawyer!

Relative to your parents, you had a very conservative career trajectory?

I actually wanted to become an archeologist because I read several books on the subject but there wasn't much demand for archeologists….

I don't think much has changed.

…..and it was only later after I graduated from University of Toronto and worked that I turned my attention to law. I had known some lawyers in the fraternity, one of my big brothers is the Chief Justice of the Yukon Superior Court and I had vivid memories of him torturing me during the initiation weekend. So I knew guys who were in law but it wasn't necessarily something within my scope of possibility.

I take it your parents weren't pushing you into law.

No. My parents were preoccupied with their own existence.

What was it about the law then that attracted you and prompted you to go to law school.

A variety of things. The TV for one. One of the first programs we watched as immigrants was Perry Mason. We were all mesmerized by that. And then I met barrister students selling ties and then I went into the courts and absorbed the atmosphere and saw the 'learned' people sitting on Woolsack and all that stuff. And then I applied and I got in at Queens and it was wonderful.

And what did you see yourself doing after law school?

Well I had this love of criminal law oddly because of… will, I blame it all on Perry Mason. Anyway, I was attracted by criminal law and there were a couple of cases at that time that were really fascinating. One of which was a case on automatism. In any event, I had written a letter to Joe Pomerant expressing my enthusiasm for it - he was a counsel in that case - and we got together and it came out in the course of conversation that I had been to Israel and so forth. [Ed's note: I probably should have followed up on the 'and so forth' but unfortunately neglected to.] And I think Joe assumed I was a Zionist and hired me. I wasn't,

I was an Anglican. And later Eddie Greenspan walks in and he says 'Well, you must be bright because you're here'. So I did all their factums, and I went down to the jail and interviewed multiple murderers for them.

Did you have a chance to appear in court very often at that point in your career?

Yes, I did do a lot of stuff for them and by then Mike Moldaver and Alan Gold had joined the office. One of my first experiences in court involved getting an adjournment of a matter which had been already adjourned a year. I just walked in there like a lamb to the slaughter and actually managed to get another year adjournment of this criminal case. I also got to watch great counsel. One of the first people I watched in court in action was Mike Moldaver.

What do you recall of that experience.

Well, he was very good. He seemed to be a natural advocate. He had amazing skills and a very thorough knowledge of the law. And the one thing that… notwithstanding Joe Pomerant's time in jail… he did emphasize… the culture of that place was (we were the 35th floor of the Toronto Dominion Centre), we were pros. And pros… we demand so much of a pro. A pro does things well and there was a lot of pride and I'm not talking about the silly stuff but …

The expectations were high…

The expectations were high and you worked hard and you played hard. I would be in the office around 7:30 and we'd have supper around 7-8 and, on many occasions I would go back to work and then I would leave at midnight and catch the Go train back to my home in Whitby, Ontario. And I mean it was not very good, it was not conducive to family life. But there were fabulous cases.

Were they active mentors?

Yeah they were. And Eddie has always been very good to me throughout my career. Many years later I applied for a Masters program at Osgoode and he was quite supportive and I got in. He was happy when I was appointed here. We bump into each other periodically in restaurants and sometimes I have one or many of my sons are with me and it's good. They never held my hand or anything like that but they taught me some basics, you know, like 'break stuff down.' Know what the issues are. Break it down into the core issues and then work from there". So, I wasn't cleaning their cars or anything like that. And then I would go with them to court. I went to court the most with Eddie and I saw him in action a lot and he was only about two or three years older than I was and it was just, he was obviously a rising star just as Pomerant had been but Eddie was coming up. And it was the whole circle, there was Brian, his brother, and there was just a whack of people who were very inspirational. It was a very neat culture.

I take it that your early mentors didn't suffer fools gladly. Were they shy about expressing their dissatisfaction?

No. I do recall one time when they called me from the restaurant, and that was back in that day and age when you had to work through all the books and the indexes and so forth, and I said 'Well, I think I found a case which is in the Court of Appeal right now but it has gone directly against you. And they said, 'Well, you idiot that's our case, we're appealing it to the Supreme Court!'

Most of us who have practiced for a while, feel that the culture isn't

what it used to be. Do you agree with that?

Yes, I do. [It sometimes seems] that we have lost track of the fact that we're professionals which in itself is a huge privilege and that you have stature, an identity and responsibility, above and beyond the case itself. You're not a flag waver. You are there to present the case for your client in the best possible fashion. You are not that client's brother or mother. You don't have to become emotionally involved with the person. Regrettably, that's not always the case. Counsel are also often really paranoid about being shafted by the other side, requiring that the Judge becomes the hockey ref. You've got to pull them apart and dive in there or throw a bucket of water on them or call a break just so that tempers settle down.

Would you agree with me that a lawyers' lack of civility, that hyper competitiveness, detracts from their effectiveness?

Yes. I think it's the understated that achieves a lot. You know, if your position is strong, you can plead it, you don't have to attack the other person. And if you've got balanced counsel, both of you have experience one way or the other (losing, winning or whatever the case may be), you *know* that your friend has got to do his or her job. But there's often a lot of money riding on all these issues and it's competitive to begin with and some people don't seem to be able to manage the competitiveness gracefully.

It's been my experience that the losses are harder to take than the victories. You move on from a win very quickly but the losses stick with you. Was that a feeling or sentiment that you experienced?

Well you do a lot of post-mortems thinking, oh gee, how did I miss that particular point.

Did you dwell or wallow in those losses yourself or did you move on quickly?

I allowed myself a certain degree of wallowing, I think, and then invariably it would cause me to move on because I had another case and I had to dust myself off and get going and learn from the prior experience.

Did it help to come to the conclusion that it was all the fault of the trial judge who clearly wasn't up to the job?

[laughter] No, that was seldom the case although there were a couple of people who, I had the sense did not like me.

How did you deal with that?

I would try to humour the person, but in some instances… There was one instance, in particular, I had to fight the desire to throttle him because he was such a jerk. For me he did the unpardonable thing and, he [took it out] on my client because I was representing him, as opposed to just dealing with the issues. God forbid, I think that's the biggest sin that you ever could do as a jurist is that you take how you're feeling about the particular lawyer out on the party or the client.

What advice would you give, particularly to younger lawyers, who find themselves in similar situations where they have the feeling that there's some degree of personal animosity or tension that is having an impact on a case?

Well, I think probably the first step is to ask yourself - what is it about your own behaviour that is contributing to the way this person may be reacting to you. And having been brutally honest with yourself in that regard, you address that. And you keep it simple. You put everything on the record. And hopefully with the passage of time it will blow over like some situations do. I don't think complaining helps. Whining is never in fashion. You know, looking hurt and puppy-like when you haven't won your particular point or motion or whatever the case, is a pain in the %$& for the judge.

When you were practicing what quality did you most appreciate in the judges that you saw?

Those who were patient with me and were good listeners and allowed me to develop what I saw as the case. People with a good sense of humour and people who were, by and large,

polite and gracious and were open. I like open spirits. I mean, you can take not being successful by somebody who is open and who has considered your point of view.

What qualities did you find you disliked the most in a jurist?

I dislike rudeness. I dislike people coming in late. I dislike the bullying. Sometimes they were in a bad mood and they seemed to me that they were being imposed upon that we were there. And I'd think to myself look this is a very good job. You've got job security and you've got nice robes and you've got status in the community and so forth so why are you so unhappy for crying out loud? If you're that unhappy about it there seems to be quite a few others who would willingly take over this position.

How did you come to be a judge?

I think after about 12, 14 years… I bounced around a lot. I went to Owen Sound to practice for personal reasons. I really wasn't a small town kind of guy and I had done like a lot of people had done in the 60s and 70s… bought a small farm and it looked something like Waldon Pond. Everyone was wearing their hair long and having kids and I got to a point where I'm thinking 'What am I doing here?'

I became politically active. I ran for a political party at one point hoping to be elected and the plan was that I would go to Ottawa and I would not have a constituency office and I would never come back. [Laughter]

How did that work out for you?

Well, I did get a nomination and I made a lot of plans and I learned how to work a room and to be reasonably presentable. I learned more about people and politics. And I lost! The next plan, Plan B, was to go to the Crown's office. So I became a member of the Crown's office in Hamilton and that enabled me to move down from the North.

What is your recollection of your first coming to Hamilton?

There were some interesting families here.

Yes, and that, of course, remains the case.

Yes, that's true. So I thought it would be interesting from a criminal law point of view.

What was it like to put that robe on for the first time and sit behind a bench? How did that feel?

It was wonderful. When I was a lawyer, appearing before a jury was a special moment when you had to address them at the end and you kind of went into your own space or your own zone. So, when I put the judicial robes on for the first time, I went into my own zone. It was a space that I felt very positive about … I'm on stage, it's show time.

Were there any nerves on your part when you first sat behind the bench or did you just fall comfortably into the role?

No, I felt a bit nervous. I still do from time to time. There's always some fear that you're going to be exposed for being the fraud that you are. It's just like people having dreams about being naked in public places. That somebody is going to think, 'My god, the emperor's not wearing clothes'. There is that fear.

Do you find that the magnitude of the case has a bearing on how nervous you are?

Sometimes, yes. You'll notice on a first

day of a big case like whether it's … a murder case for example, everybody's nervous. I used to say that to students in the bar ad course, 'Nervousness is natural. The lawyers are nervous, the judge is nervous'… it's like the start up of a musical…the first night. There has to be a kind of creative tension that has to be entered into.

Do you find that the emotional space or perspective that you carry into court is different if you are dealing with a serious criminal proceeding rather than a serious civil one?

I don't think so. But you have to put your… the criminal cases are more… there's more drama in there. There's more of the human struggle.

I take it then that there is no getting around the fact that engaging the interest of the trier of fact is important.

For sure. But what I noticed with some of the older counsel is that they've got a template. They've got an approach whether it be examination in chief or cross examination and it's like us reading charges, it's lifeless. It's very difficult to read life into something when you are reading something to somebody. Some folks develop patterns which have worked well for them over the years, but I would challenge them to throw out the template every now and then and they would probably be more effective if they went off script.

Do you think that that would be widely shared among members of the bench?

For sure. Some counsel just seem to be oblivious to the fact that you're not there just to move your lips and so forth, you're there to engage the trier of fact. Do you want to be exciting?

Are you asking me or…

Oh, no, that's not your problem… [Ed's note: I was not sufficiently self aware to pursue this comment further.]

Do you follow the appeals of your decisions?

I do. Sometimes I save it and I think 'Okay, well next time I'll incorporate what they've said which I missed on this particular case'. I'm less sensitive about it now than I was in…

Your earlier years?

Yes. The first case I did was an intellectual property thing involving Tandy corporation who I ruled against and I was quite proud of that judgement and I bumped into Mike Moldaver a couple of months later and he says 'Oh it was very well written that judgment, it was poetic, but you totally screwed it up. You were wrong.' So I was the darling of the intellectual property bar for about 6 months and then I became a bum overnight. I mean you've got to laugh at yourself.

Do you read the decisions of your fellow jurists here locally? Do you keep track of what they're doing and what they're writing?

I can honestly say, no. And it's not because I'm disinterested, it's just that I have other things in play. There's a considerable amount of collegiality here in the sense that you can go down the hall and say 'Look, I've got this particular problem and what do you think?' and some people give you a precedent or a judgment where they've touched upon it or just talk to you generally about it. So it's helpful in that regard but I don't fastidiously read all their judgements nor do I expect them to read mine unless of course it's in the ORs.

So tell me what local lawyer do you most enjoy?

There are about 6 or 7 people that I really enjoy…. there are some leading lights and they're interesting and one can learn from them.

On a more serious note, if you had the power, what would you most like to change about the state of the practice of law today?

Efficiency in terms of our paperwork especially in this technological age. And to keep the costs down. The costs are really alarming and it may be that generational gap that I experienced when I practiced and also the fact that I practiced Criminal law. The bills today seem phenomenal. We're in an age where access to justice is very much an issue. So if I could do anything is to make the provision of

legal services more efficient and if I could go to bed at night thinking that there was no repetition of effort in some of the bigger firms… just more efficiencies… that would be good because then maybe more people can afford counsel.

Would you agree with me that much of this results from a lack of trial experience? In other words, they're unable to focus on just the important facts and issues for fear of leaving something out.

Well, sure, because they expend effort which isn't productive. I think some people just can't seem to focus or see the forest for the trees and so … they ride off in all directions. If people got focused as soon as possible …it would help.

What is in the cards for you after you've hung up the robe?

I'd love to take a course through Frank Lloyd Wrights' architectural school at Taliesin in Wisconsin, do some motorcycling, writing non-legal stuff, maybe some fiction.

Of course, there are no shortage of Judges that end up going back into private practice. I gather you're not terribly interested in doing that?

Well, maybe I think that a lot of people do it and I really do have this thing about not hanging around like a bad smell. I really do. I don't want to punch a clock… I don't want to have a job. I might want to try it just to see whether it's a fit, but I don't feel this compulsion to do that at this point. Right now I'm focused on maintaining the quality of what I've done to date and to get some new experiences in the equation as well.

Thank you for your time.

You're welcome Lou. ■

Louis Frapporti is an advocate and partner at Gowling, Lafleur Henderson LLP in Hamilton.

Intellectual Property Law

Michele Ballagh

Are Your Common Law Trademarks at Risk?

Do you or any of your clients use a trademark without the benefit of a trademark registration? Many businesses do. Sometimes, the trademark is being "test driven" before the business invests in filing a formal application to register the trademark. Sometimes, the trademark is used by a local business with no plans to expand. Sometimes, the business simply can't afford the cost of filing a trademark application.

In legal parlance, such unregistered trademarks are known as "common law" trademarks and the owner of such marks are generally entitled to exercise a monopoly over his or her trademark in the geographic region of the country where it enjoys a reputation. By contrast, the owner of a registered trademark is entitled to exercise a monopoly over his or her trademark throughout Canada.

While the potential conflict between registered trademarks and common law trademarks is longstanding, recent amendments to the *Trademarks Act* have drawn renewed attention to the issue. Some have even alleged that the amendments are unconstitutional.[1] This article will try to explain the controversy.

The Existing Act

Historically, Canada has recognized property rights in trademarks only after they have been used in Canada to promote a product or service. The first business to adopt the trademark was the party entitled to its registration. This is often referred to as the principle of "first in time, first in right". However, there is a longstanding exception to this rule that has rarely attracted much attention.[2]

After a trademark registration passes its fifth anniversary, it cannot be expunged from the register on the grounds that another business in Canada had prior common law property rights in the mark. In other words, the registration is incontestable. The only exception is where the registrant adopted the mark with knowledge of its prior use by a third party.[3]

What does this mean for a business that had prior common law property rights in a trademark now registered to a different business? The Act provides that it may apply to the courts for permission to continue to use its longstanding trademark in a "defined territorial area concurrently with the use of the registered trademark". However, it cannot prevent use of the registered trademark in that same territorial area.[4] In other words, the geographic monopoly that it previously enjoyed in its common law trademark has been extinguished by a trademark registration.

The fundamental trait of all forms of property is the right to exclude others from using it. Trademarks, like all forms of intellectual property, are intangible. If you take away its monopoly, an intellectual property will cease to exist. There is simply no property right left for the "owner" to exercise.

The Constitution

An important role of the *Constitution Act, 1867* is to define the division of powers between the federal and provincial governments. Although power may be exercised concurrently in some areas, power in other areas is exclusively granted to one level of government or the other.

For instance, the federal government is expressly granted exclusive authority to enact laws governing copyright and patents.[5] Although the constitution is silent with respect to trademarks, the courts have since decided that the

federal government is also entitled to enact laws governing trademarks under its power to regulate "trade and commerce".[6]

On the other hand, the provincial governments have exclusive authority to govern "property and civil rights" in their respective provinces.[7]

Given the *Trademarks Act* is federal legislation, the obvious question is whether the federal government has intruded on exclusive provincial powers in granting rights to one party that can effectively extinguish the property rights of another party?

Under the existing *Trademarks Act*, the answer to this question was likely something along the lines of:

Property rights in a trademark are acquired through their use by businesses in the Canadian marketplace. Through the Trademarks Act, the federal government is merely regulating the property rights already acquired by the parties through such trade and commerce. Where there is a conflict between two parties in the same property, the Trademarks Act provides a solution, albeit imperfect. Parties should register their trademarks to avoid such an imperfect result.

The New Act

In pending amendments to the *Trademarks Act*, the federal government has effectively removed steps from the application process that were intended to prevent the registration of trademarks that had never been used in Canada.[8] Although the federal government claims that "use" is still required for a valid trademark registration[9], the amendments seem to permit the registration of a trademark on the basis of proposed use.[10]

In other words, the pending amendments seem to permit the registration of a trademark before the registrant has started to use the trademark, but provide means to expunge the registration as invalid if it is not used by the registrant. This suggests that the failure to use a trademark prior to its registration may be "cured" by commencing use after the date of its registration.[11] This may prove to be especially unfair to businesses with prior common law property rights in the trademark.

For example, it appears that the failure to use a trademark prior to its registration may be "cured" when the registrant finally starts to use the trademark 6 or more years after its registration. At that point, the registration is also incontestable simply because it has been registered for more than five years and its validity was not previously challenged. In such circumstances, a business with prior common law property rights in the trademark may not become aware of the potential conflict until after the registrant starts to use of the trademark. Unfortunately, by that point, its common law property rights have been effectively extinguished without recourse.

So we come back to the constitutional question: in its pending amendments to the *Trademarks Act*, has the federal government intruded on exclusive provincial powers in granting rights to one party that can effectively extinguish the property rights of another party? As noted above, the answer for the existing *Trademarks Act* is that the federal government is merely exercising its power to regulate "trade and commerce" by regulating property rights acquired by the parties through such trade and commerce.

However, the pending amendments to the *Trademarks Act* seem to create presumptive property rights that do not exist at common law and do so in circumstances where no "trade or commerce" has occurred. By exercising these new property rights, a registrant may obtain property rights not recognized at common law and these rights can, moreover, defeat the prior common law property rights of another party.

At first blush, it therefore appears that the federal government may have intruded on exclusive provincial powers without any apparent justification.

Potential Solutions

For the individual business owner, the simplest solution is to file applications to register their common law trademarks without delay where feasible. If it's already too late, they may be facing the daunting prospect of a constitutional challenge to

effectively preserve exclusive rights in their trademark.

For the provincial governments, the solution may be to challenge the constitutionality of the pending amendments through the courts. There are already rumours that Quebec is considering such a challenge.

For the federal government, the solution is more amendments to the *Trademarks Act,* hopefully before the already pending amendments come into force in late 2015.

Frankly, I'm hoping for the latter solution, but I'm not optimistic. ■

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1 Daniel Bereskin, "Canada's Ill-Conceived New 'Trademark' Law: A Venture into Constitutional Quicksand" (2014) 104 TMR 1112

2 *Trademarks Act*, section 14 may be considered a second exception. However, it is only available to foreign applicants who may currently file applications for registration in Canada on the basis of "use and registration" of their trademarks abroad and this ground will be abolished by the pending amendments.

3 *Trademarks Act*, section 17(2)

4 *Trademarks Act,* section 21

5 *Constitution Act, 1867*, section 91(22) & 91(23)

6 *Constitution Act, 1867*, section 91(2); *Macdonald* v. *Vapour Canada Ltd.*, [1977] AC 405 (SCC)

7 *Constitution Act, 1867*, section 92(13) & 92(16)

8 Under the existing *Trademarks Act*, an application to register a trademark can be filed on the basis of proposed use, but the applicant has to file a declaration of use prior to registration. Under the pending amendments, applications will not have to specify any grounds and declarations of use will no longer be required: *Economic Action Plan 2014, No. 1* at Division 25, ss. 317-359.

9 Under the pending amendments, section 45 will still authorize the expungement of a registration at any time after the third anniversary of its registration if the registrant fails to file evidence that the registered trademark has been used in Canada. However, it is an open question as to whether it will still be possible to expunge a trademark registration prior to its third anniversary on the grounds of non-use as you can under the existing legislation.

10 Previously, only foreign applicants were able to obtain a registration on the basis of "use and registration" abroad. Under the pending amendments, applications will no longer be required to specify any grounds and a trademark will be defined to include a mark "that is used or proposed to be used": *Economic Action Plan 2014, No. 1* at Division 25, s. 319. This seems to indicate that both domestic and foreign applicants may obtain a registration before the subject trademark has ever been used in Canada.

11 Under the current law, such a "cure" is not permitted. A trademark registration is always vulnerable to expungement if the registrant did not commence use of the trademark prior to the date of registration: *Unitel Communications Inc.* v. *Bell Canada* (1995), 61 CPR(3d) 12 (FCTD) at para 131

The Effective Use of ADR in Commercial Disputes

Charles Criminisi

The Effective Use of ADR in Commercial Disputes – Part One of a Series

Commercial disputes are a breed unto themselves.

They are different than most of the other mainstream legal conflicts. Personal injury litigation virtually always pits the personal life of an injured Plaintiff against the interests of a large insurance company in processing claims and maximizing profit for its shareholders. Criminal law places the public interest against that of individual rights and freedoms.

Commercial disputes, on the other hand, have at their core in the vast majority of cases, business interests. These business interests are inherently financial in nature, with the litigants' focus being the bottom line. Most of these litigants are owners of small and medium sized businesses that can ill afford protracted and/or repeat legal disputes. My personal observation over the past 30 years is that a business that engages in too much litigation is a business in trouble. The smart entrepreneur either avoids litigation or, when faced with a dispute, attempts to resolve it in an effective and cost efficient manner.

It is this in the context of this unique breed of dispute that I will explore the effective use of Alternative Dispute Resolution ("ADR") in this and a series of articles to be published in the coming months.

Today, I will give a brief overview of the time frames during which ADR can be effectively used.

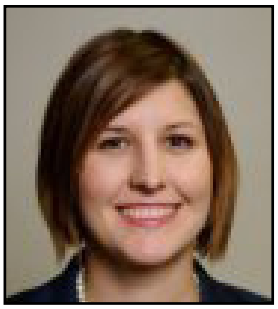
Unlike many other forms of litigation, those of a Commercial nature lend themselves naturally to resolution at many stages of the dispute. The main reason for this is that, unlike the personal injury realm, where the parties usually have no prior history together and the case usually arises out of a sudden incident, in Commercial disputes the parties usually have known one another for a significant period of time and the issues have arisen over a lengthy time frame. As such, the parties have had a long time to "live" with the dispute and think about it. Their issues are often well documented in terms of correspondence, meetings, contracts, etc.

Given that these disputes usually have a lengthy and well-documented history, the parties are better able to get to the task of resolution without necessarily needing a time-consuming discovery process. This is particularly important when the dispute needs to be resolved in "real time" (to be explored further in a future article). As such, the opportunities for the effective use of ADR are greater than that in other mainstream forms of litigation. The parties can engage in ADR pre-litigation, post-pleadings and pre-discovery, post-discovery, pre-trial, and even post-trial and pre-appeal.

Some or all of the following other topics will be covered in this series, in no particular order:

- How to use ADR in the resolution of "real time" disputes
- "Test driving" the issues
- Narrowing the scope of the dispute
- Arbitration of all or some of the issues
- Private motions
- Blending ADR with the Court process
- Adding to the settlement mix the business relationship amongst the parties
- ADR that is mandated by contract and/or statute
- Commercial disputes outside of the business realm

If there are other topics you would like me to cover please don't hesitate to send suggestions to me by email to cpc@agrozaffiro.com. ■



Amendments to the Rules of Civil Procedure

Anne-Louise Cole

Significant amendments to the *Rules of Civil Procedure* have been made which will come into force on January 1, 2015. The purpose of this article is to highlight some of the more important changes and how they may affect your practice. The complete set of amendments is published in the September 6, 2014 edition of the *Ontario Gazette.*[1]

Rule 48 – Administrative Dismissals

The amendments which will likely have the most impact on your civil litigation practice are the revocation of Rules 48.14 (Action not on Trial List) and 48.15 (Dismissal of an action for Delay). In their place will be a new Rule 48.14. You should carefully review the new Rule 48.14 and update your tickler system as **you will <u>not</u> be given any notice of upcoming administrative dismissals.**

Under the new Rule 48.14, Statements of Claim will contain the following warning: "TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.".[2]

For actions started after January 1, 2015, there will be no status hearings. You will not be given notice that your action will be dismissed. The Registrar will automatically dismiss your action after the five-year anniversary of issuance of the Statement of Claim.

For any action started before January 1, 2015, which has not been struck off the trial list or scheduled for a status hearing by January 1, 2015, it will be dismissed on January 1, 2017 without notice. If you had a matter struck from the trial list before January 1, 2015, you must restore it to the trial list by January 1, 2017 or it will be dismissed without notice.

How can you obtain an extension? There are three ways:

1. Court order obtained at a case conference;
2. Court order obtained on a motion for a status hearing; and
3. Filing a consent timetable and consent order at least 30 days prior to the relevant dismissal deadline.

If you bring a motion for a status hearing, the plaintiff must show cause as to why the matter should not be dismissed for delay. There are five potential outcomes of such a motion:

- dismissal of the action;
- adjournment of the matter;
- a Rule 77 case management order;
- setting of a timetable; and
- any order the court deems just.

Below are two flowcharts I have devised which may assist you with implementing new strategies within your firm to address these significant changes with respect to automatic dismissal orders.

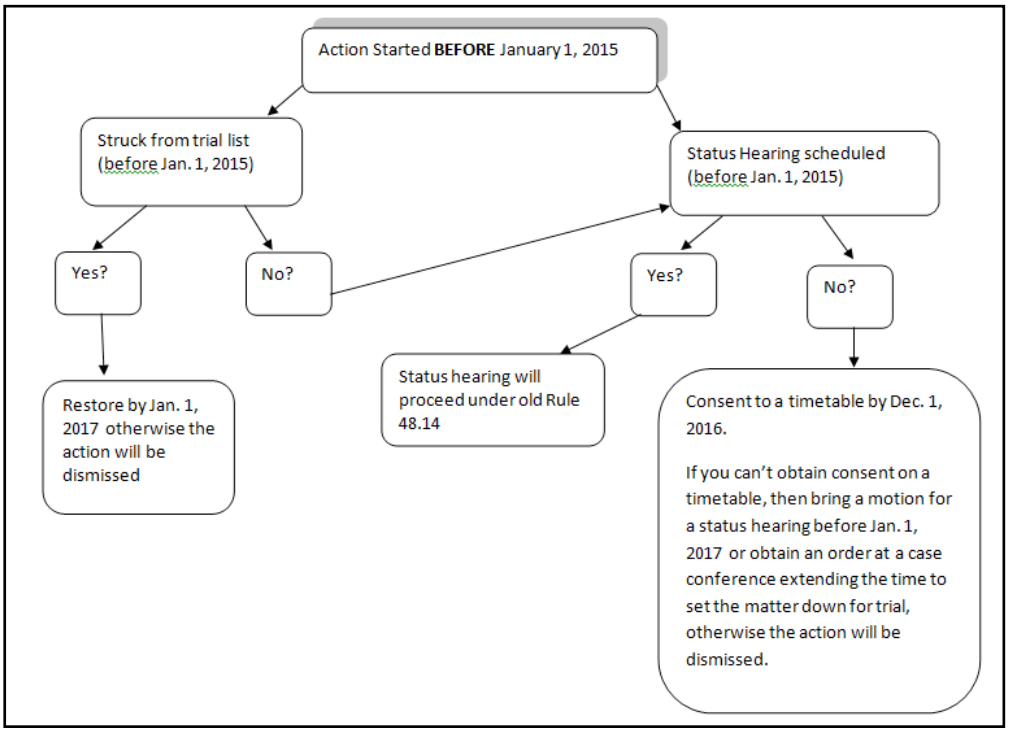


Figure 1

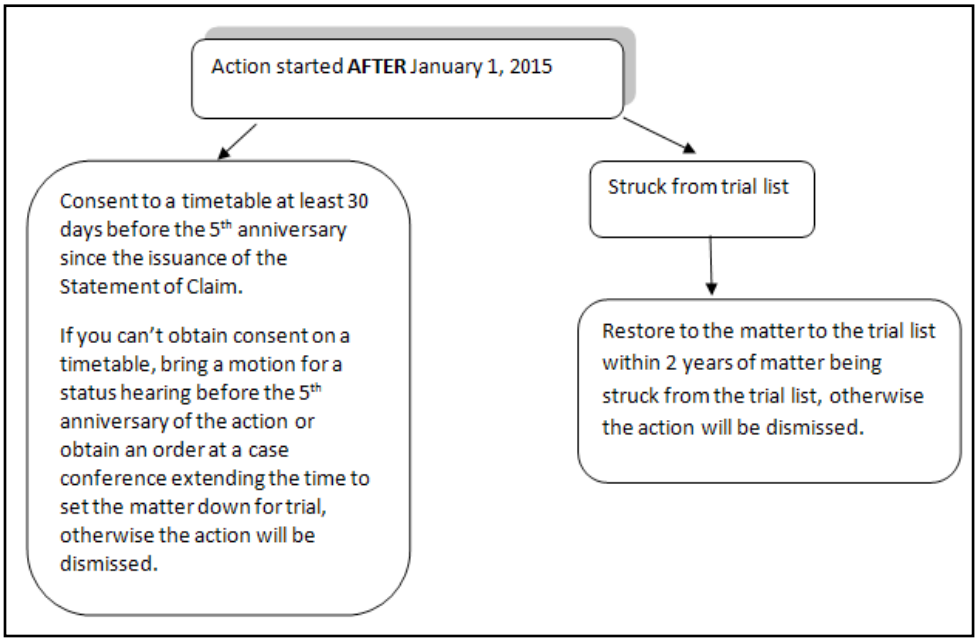


Figure 2

Rule 16 – Service of Documents

Under the former Rule 16, if a document was served by e-mail, it was only deemed to have been served if the lawyer of record provided an acceptance of service. The calculation for the time for service began on the date that the lawyer accepted service by e-mail. If the lawyer accepted service between 4:00 p.m. and midnight, then service was deemed to have been effected the following day.

Under the new Rule 16, a document may be served by email if the parties consent. An acceptance of service is no longer required. If the parties do not consent to service by email, the new Rule 16 grants the court the explicit power to make an order directing that the document be served by email on such terms as are just.

These changes to Rule 16 will now alleviate any potential problems where parties may have consented to the service of the document by email prior to its transmission, but the lawyer who received the document did not provide proof of acceptance upon receipt.

This new Rule 16 also shows a shift towards more of an acceptance of technology under the *Rules*. Although theoretically the court could always use its discretion to deem service by email effective, it is now an explicit power under the *Rules*.

Rule 50 – Conferences

The most significant amendment under Rule 50 is the addition of a duty on lawyers under Rule 50.05. Pursuant to this amendment, every lawyer attending the pre-trial conference is required to ensure that he or she has the authority to deal with the matters *and* that he or she is fully acquainted with the facts and legal issues in the proceeding.

Prior to this amendment, lawyers were only required to attend with the authority to deal with the matters. Pragmatically speaking, for the vast majority of counsel this amendment is academic.

Rule 62.02 – Motion for Leave to Appeal

Prior to the amendments, motions for leave to appeal to the Divisional Court were heard orally. The amendments provide that the motion for leave to appeal to the Divisional Court shall be heard in writing, without the attendance of parties or lawyers.

The amendments have also clarified that only one (1) copy of the motion record, factum, transcripts and book of authorities is required to be filed on a motion for leave to appeal to the Divisional Court.

Conclusion

While this paper does not exhaustively address all of the amendments made in the changes to the *Rules of Civil Procedure,* it has highlighted some of the more significant changes. I hope this paper will assist you in implementing changes within your firm in order to address the amendments. ■

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1 A PDF version of the September 6, 2014 of the *Ontario Gazette* is available for free at the following link: http://files.ontariogovernment.ca/gazette_docs/ontariogazette_147-36_wa.pdf.

2 The new 2015 Statement of Claim form is available in PDF and Word format for free at the following link: http://www.ontariocourtforms.on.ca/forms/civil/14a/RCP-E-14A-0614.pdf.

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Thursday, December 11, 2014
HLA CPD Video Replay "The First Client Interview"
12:00 p.m. - 1:30 p.m.
The John Sopinka Courthouse
(45 Main St. E. Hamilton)
For more information please contact Riane Leonard at 905-522-1563.

Wednesday, January 14, 2015
HLA CPD Roundtable Session "Parental Leave Tips for Lawyers"
12:15 p.m. - 1:30 p.m.
The John Sopinka Courthouse
(45 Main St. E. Hamilton)
For more information please contact Riane Leonard at 905-522-1563.

Tuesday, January 20, 2015
CPD Roundtable Session "Shareholder Agreements & Income Tax Issues"
12:15 p.m. - 1:30 p.m.
The John Sopinka Courthouse
For more information please contact Dana Brown at 905-522-1563.

Tuesday, January 27, 2015
CPD Roundtable Session "Financial Planning for Young Lawyers"
12:15 p.m. - 1:30 p.m.
The John Sopinka Courthouse
For more information please contact Dana Brown at 905-522-1563.

Thursday, February 12, 2015
The 13th Annual Estates & Trusts Seminar
1:00 p.m. - 5:00 p.m.
The Sheraton Hotel
(116 King Street West, Hamilton)
For more information please contact Riane Leonard at 905-522-1563.

Thursday, February 12, 2015
New Lawyers' Social Night
5:30 p.m. - 7:30 p.m.
Slainte's
(33 Bowen Street, Hamilton)
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