The Hamilton Law Association

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February 2015

President's Report

John Krawchenko

I recently reacquainted myself with my professional practice. During the 2014 "end of year" slow down, I took the opportunity to wander around the office and tried to put myself in the shoes of my staff and clients. I tried to imagine how it would be to either work in a particular space or be a client seeking legal services. This exercise forced me to look at things from another perspective, and to challenge myself to critically assess what I was offering and how it was being presented.

I think this type of low key "under cover boss" operational assessment could be of value to all our members (time permitting) and I highly recommend it. Undertaking this review will either reaffirm that things are fine or show you areas that require attention. In my case, I made a few changes and modifications, which renewed and revitalized my practice of law for 2015.

The HLA is delighted to announce that it too has planned on some renewal and revitalization for later this year. Our association will be making improvements to the lawyers' lounge at the Family Court House. We believe that the planned changes and enhancements will make the time our family law lawyers spend away from their offices more comfortable and productive.

I hope that in the coming weeks our members will take the opportunity to explore professional revitalization through the many upcoming CPD events the HLA will be offering. These include the 13th Annual Estates and Trusts Seminar, the 10th Annual Commercial Litigation Seminar and the 29th Annual Joint Insurance Seminar. For those seeking social outlets, we will also be hosting a get together at Slainte Irish Pub, a Solicitors' Dinner and our premier event, the HLA Annual Dinner. Please visit our association website for further details.

In our journal from early 2014, we provided the local bar with information regarding the local Hamilton pilot initiative to improve access to justice, a program that was being led by the Honourable Mr. Justice Arrell. This is a three year pilot initiative for civil, non-jury cases in the nature of simple real estate disputes, defamation, wrongful dismissal, slips and falls and simple contract disputes. The program requires all parties to consent to the use of the streamlined process. We have been advised that since the pilot was launched in June 2014, twelve matters have been enrolled, and nearly half have been settled, either prior to, during or immediately after the first scheduled case conference with their designated judge. With its apparent success rate, it is understandable why Justice Arrell encourages all counsel to consider this program as a useful tool to resolve litigation quickly. You may want to give this option a thought.

In closing, I had the privilege of attending the swearing in of our newest Superior Court Justice, who has been

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OIAA HAMILTON CHAPTER/ HAMILTON LAW ASSOCIATION

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Thursday, April 30th, 2015

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The Chedoke Room | The Hamilton Convention Centre | 1 Summers Lane, Downtown Hamilton

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- **Property Insurance for Extreme Weather** | Presented by: Doug DeRabbie, The Insurance Bureau of Canada
- **The Top 10 Tort Cases** | Plaintiff: Lauren Grimaldi, Scarfone Hawkins LLP and Defense: Lisa Pool, Sullivan Festeryga LLP
- **Social Media and Claims Investigations** | Presented by: Glenn Gibson, Crawford & Company (Canada)
- **Mediations: Demonstration & Panel Discussion** | John Krawchenko, J. Krawchenko Professional Corporation; Dan Rosenkrantz, Sullivan Festeryga LLP; Larry Culver, Conclude Mediation; Rob Hooper, Hooper Law Offices
- **The Top 10 Accident Benefits Cases** | Plaintiff: Allen Wynperle, Allen J. Wynperle Personal Injury Law and Defense: Kevin Griffiths, Evans, Philp LLP
- **Rule 53: Expert Testimonies** | Presented by: Jack Fitch and Rachel Runge, Hughes Amys LLP
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The Hamilton Law Association exists to enable its members to become successful, respected and fulfilled in their profession.

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February 23, 2015

assigned to our jurisdiction. On behalf of the HLA, I welcome the Honourable Justice Braid and wish her success and professional fulfilment in Hamilton. ■

Looking for an older article?
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http://www.hamiltonlaw.on.ca/About-the-HLA/HLA-Journal

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Report from the Executive Director's Office

Rebecca Bentham

A Year in Review

2015 is well underway and things have been very busy at the Hamilton Law Association. We had a record year in 2014 with respect to membership, CPD events, and Library activity. Our membership reached an all-time high of 963 members, our 34 CPD events hosted 2,488 attendees throughout the year, and there were approximately 28,982 patrons who visited our Library. Our 14th Annual Advocacy Conference, for example, was our biggest CPD event in 2014 with approximately 333 attendees compared to 290 attendees in 2013. Our growing membership, CPD attendance, and patron count are a testament to the value of our many services that we provide to enable the lawyers of Hamilton and Ontario to feel appreciated and respected in their profession. I would like to thank our outstanding staff Mary Jane Kearns-Padgett, Wendy Spearing, Chris Wyskiel, Dana Brown, Riane Leonard, Marica Piedigrossi, and Kristen Ball for all of their great work in 2014.

I would also like to extend a heartfelt thanks to all the volunteers who have given their time and expertise in support of the Association over the past year. Our volunteers are the key to the success of our Association.

The Association has also made many demands on our President John O. Krawchenko's time and we greatly appreciate his fine leadership, charismatic style, and the many hours of work that he has put into achieving the mission of the Association. His active participation, along with that of all of our exceptional Trustees, and our various Subcommittee members, will ensure the prosperity and success of the Association for many years to come.

I look forward to what 2015 will bring for our Association.

New Staff at HLA

On behalf of the staff of the Hamilton Law Association I would like to congratulate Riane Leonard, our Event Coordinator & Financial Assistant,

who will soon welcome her first child into her family. We are very excited for Riane and wish her the best as she begins her maternity leave in March.

Welcome, Mackenzie!

We are happy to welcome Mackenzie Faus as the newest staff member to the Association who will be with us in the interim as Riane Leonard is off on maternity leave. Mackenzie is very excited to join the Hamilton Law Association staff as the new Event Coordinator and Financial Assistant. Mackenzie received her Honors Bachelor of Commerce Degree from the University of Guelph in 2014. At her previous employment as an Administrative & Accounting Assistant, she obtained a diverse skill set that she is pleased to expand upon here at the HLA. Mackenzie has an immense appreciation for cultures, developed through her numerous humanitarian trips overseas. She also enjoys volunteering in her own community of Cambridge, where she was born and raised. As she transitions to life in Hamilton, she looks forward to becoming involved in the Hamilton community.

We hope that Mackenzie's time at the Association will be enjoyable, supportive and above all educational as she embarks on the beginning of her professional career. We look forward to what Mackenzie will bring to the Association in 2015.

2015 Annual Dinner

I am pleased to announce a few changes to our Annual Dinner scheduled for April 16th, 2015. This year, the Annual Dinner will be held at Liuna Station in the heart of downtown Hamilton. Instead of our usual Silent Auction, we have decided to try a new twist on the 50/50 draw with a game called 'Heads & Tails'. We hope this elimination game will be fun, upbeat and fast-paced and become a new favourite for our membership to raise funds for our designated charity of choice. We can't wait to see who our Heads & Tails winners will be and encourage all of our attendees to play for a good cause.

Thank you to Marica Piedigrossi for her hard work and co-authorship of this article. ■

The Hamilton Law Association invtes you to attend their

Annual Dinner

to be held at
Liuna Station – King George Ballroom
360 James St. N., Hamilton

Thursday, April 16, 2015

Cocktails at 6:00 p.m. • Dinner at 7:00 p.m.
Bring your spouse, significant other or friend!

Price: **$100.00** per person

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Librarian's Report

Mary Jane Kearns-Padgett

By the time this article is published we will all have survived the winds and snows and deep cold of January and now will be contemplating a holiday somewhere warm – or at least looking forward to Spring. At the Library we are happily ensconced in 2015 and learning to benefit from what the New Year has to offer. Before I begin this article I would like to extend best wishes for 2015 from the library staff to all members of the HLA and their families. It is our pleasure to continue working with members of the Hamilton Law Association in 2015.

One of the positive announcements for the Library in 2015 was the news that, while the Toolkit is no longer exactly as it was, LibraryCo has renewed the contract with LexisNexis. The most significant change in this year's contract is the elimination of home desktop access to members of court house associations in remote areas. Users at our Hamilton library **will** continue to have in library access to Quicklaw, Halsbury's, Solicitors Forms and Precedents, court forms, and quantums. In addition, the 2015 subscription has a new LexisNexis Practice Page –Employment Law – to complement the Criminal Law, Family Law, and Litigation Practice Pages already accessible in the library. We are delighted that we are able to continue to provide members with 24/7 access to these resources – in particular to Quicklaw. This is an invaluable resource – and as a reminder to all – we are always happy to send members electronic versions of cases at no charge. All it takes is a phone call (905-522-1563) or an email to either me (mkearnspadgett@hamiltonlaw.on.ca) or Chris Wyskiel (cwyskiel@hamiltonlaw.on.ca) and you will have the cases in your electronic mailbox in minutes. Also, we will once again be offering QL training sessions in the Spring so stay tuned for updates in this regard.

There are many advantages to coming to the Library and accessing the resources we have available on our computers. Quicklaw has a number of helpful components. Not only does it provide you with fast access to the cases you need, it allows you to email these cases directly to your own computers. As well, using a keyword search, you can find articles in all Canadian Journals as well as in a number of international sources. Again, you have the option to email these resources to your computer to allow you to create a folder of material if you are, for example, writing an article or preparing a paper or presentation. O'Brien's Encyclopedia of Forms and the CCH Online bundle are also useful resources available on the computer desktops 24/7. The CCH bundle includes newsletters that members can have sent to them electronically on request. These newsletters focus on updates in legislation and significant new cases in areas of law including Family, Insurance, Real Estate and Wills and Estates. Please email me (mkearnspadgett@hamiltonlaw.on.ca) if you would like to receive regularly updated electronic versions of these newsletters.

Reviewing our statistics for 2014, I was pleased to note an increase in the number of reference and research requests. We encourage our members to utilize the Library and hope to see these numbers grow in 2015. The HLA has some amazing resources and the 24/7 access to the Library and free research assistance is definitely a value of membership. Looking forward to seeing each and every one of you in the Library in 2015! ■

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 Mackenzie Faus by phone at (905) 522.1563 or by email at mfaus@hamiltonlaw.on.ca for your free ticket to the Annual Dinner.

Criminal Law News

Geoffrey Read

It's practically perverse – just as my comments about wordsmithing were being published in last month's edition, the Ministry of the Attorney General for Ontario committed one of the most egregious linguistic *faux pas* by advertising (see OR's, Dec. 12, 2014, p. *liv*) for "counsels" (*sic*) when they really should have said "counsel" because, like the words "you" or "deer", the plural is the same as the singular. Incidentally, it is indeed ironic that my point last month, that some persons mistakenly refer to "complainants" as "complaintants", was completely lost because the printer, unbeknownst to me, "corrected" that to "complainants". In any event, let's get on to some interesting legal developments.

Warrantless Cell Phone Searches

I queried in last August's issue what our highest court would do with the appeal from the decision of the Ontario Court of Appeal in *R. v. Fearon*, 2013 ONCA 106. Now we know and, with the dismissal of the appeal in *R. v. Fearon*, 2014 SCC 77, it seems that the Supreme Court of Canada has paused in its run of progressive cases enhancing protection of privacy in the rapidly evolving world of electronic communications.

The police had discovered a cell phone in the accused's pocket during the pat-down search incident to arrest and then searched the phone at that time and again within less than two hours of the arrest. They found text and a photo that was inculpatory. Months later, police applied for and were granted a warrant to search the contents of the phone at which time no new evidence was discovered. The trial judge having found on a *voir dire* that the search of the cell phone incident to arrest had not breached s. 8 of the *Charter*, admitted the incriminating evidence and convicted the accused of robbery with a firearm and related offences.

The Court of Appeal (2013 ONCA 106) dismissed an appeal. Armstrong J.A. distinguished *R. v. Polius*, [2009] O.J. No. 3074 (S.C.) on its facts. There, the defendant was charged with counselling first-degree murder. At the time of arrest, the police seized a cell phone from the accused but did not examine it without a warrant until the next day. That search led the police to the accused's cell phone number, which they used to obtain the production of his cell phone records, which were then tendered by the Crown in evidence. Trafford J. concluded that there was a s. 8 breach (but admitted the records pursuant to s. 24(2) of the *Charter*), observing (in para. 47) that a warrant is required to search a locked briefcase and that "[a] cell phone is the functional equivalent of a locked briefcase in today's technologically sophisticated world." Armstrong J.A. said (at paras. 72 and 73) that the facts in *Fearon*, with the correct application of the existing law, suggest that the search and seizure of the cell phone at the scene of the arrest were carried out appropriately and within the limits of the law articulated by the Supreme Court in *Caslake*, [1998] 1 S.C.R. 51. In *Fearon*, it is significant that the cell phone was apparently not password protected or otherwise "locked" to users other than the appellant when it was seized. Furthermore, the police had a reasonable belief that it would contain relevant evidence. The police were within the limits of *Caslake* to examine the contents of the cell phone in a cursory fashion to ascertain if it contained evidence relevant to the alleged crime. If a cursory examination did not reveal any such evidence, then at that point the search incident to arrest should have ceased.

Cromwell J., writing for the four-judge majority in the Supreme Court of Canada, said (at paras. 3 and 4) that "... we must strike a balance between the demands of effective law

enforcement and everyone's right to be free of unreasonable searches and seizures. In short, we must identify the point at which the "public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement": *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at pp. 159-60. In my view, we can achieve that balance with a rule that permits searches of cell phones incident to arrest, provided that the search — both what is searched and how it is searched— is strictly incidental to the arrest and that the police keep detailed notes of what has been searched and why." He then held that the initial search of the cell phone breached *Charter* s.8 because, although it was truly incidental to Fearon's arrest for robbery, it was for valid law enforcement objectives, and was appropriately linked to the offence for which he had been lawfully arrested, detailed evidence about precisely what was searched, how and why, was lacking.

However, he decided (at paras. 80-98) that the evidence should still not be excluded. The *Charter*-infringing state conduct was found to not be serious because the police had acted in good faith considering the weight of the case law at the time of the search approved cell phone searches incident to arrest. He cautioned that the police should, when faced with real uncertainty, choose a course of action that is more respectful of the accused's potential privacy rights, but this was an honest mistake, reasonably made, and so was not state misconduct that required the exclusion of evidence. The impact of the breach on Fearon's *Charter*-protected interests only weakly favoured exclusion of the evidence because, although any search of any cell phone has the potential to be a very significant invasion of a person's informational privacy interests, the invasion of Fearon's privacy was not particularly grave. Finally, the seriousness of society's interest in the adjudication of the case on its merits favoured admission because the evidence was cogent and reliable, and its exclusion would undermine the truth-seeking function of the justice system.

Karakatsanis J., on behalf of the three-judge minority, wrote a powerful dissent that may well provide fodder for defences of the right to privacy that are bound to arise in future cases. She warned (at para. 102) that as technology changes, our law must also evolve so that modern mobile devices do not become the telescreens of George Orwell's *1984*, and observed (at para. 103) that an individual's right to a private sphere is a hallmark of our free and democratic society, and that the Supreme Court of Canada has recognized that privacy is essential to human dignity, to democracy, and to self-determination. She said (at paras. 104 and 105) that "... our law recognizes that pre-authorization is not always feasible, such as when a search is reasonably necessary to affect an arrest. For this reason, the police have a limited power to search lawfully arrested individuals and their immediate vicinity. However, this police power does not extend to searches which encroach on the arrested person's most private spheres — searches of the home, or the taking of bodily samples. In my view, searches of personal digital devices risk similarly serious encroachments on privacy and are therefore not authorized under the common law power to search incident to arrest. The intensely personal and uniquely pervasive sphere of privacy in our personal computers requires protection that is clear, practical and effective. An overly complicated template, such as the one proposed by the majority, does not ensure sufficient protection. Only judicial pre-authorization can provide the effective and impartial balancing of the state's law enforcement objectives with the privacy interests in our personal computers."

Under-Age Presumption Of Belief Invalidated In Luring Cases

Gage J. in *Morrison* , 2014 ONCJ 673 (CanLII) considered *Criminal Code* ss. 172.1(3) and (4) regarding proof of accused's belief in the age of the child for the purposes of the offence of luring a child by means of a computer. He found (in para. 21) that ss. (4), which provides that belief that the person was of age is not a defence unless the accused took reasonable steps to ascertain

that, is not constitutionally offensive. However, he held (in para. 33) that the operation of the statutory presumption found in ss. (3), which provides that, in the absence of evidence to the contrary, a representation of the computer respondent being underage is proof that the accused believed that the respondent was underage, is in breach of section 11(d) of the *Charter* and is constitutionally objectionable, particularly when it is applied in concert with the reasonable steps provisions found in subsection (4) of section 172.1.

De Minimis Obstruction Of Police By False Name

This common occurrence was considered in *Khan*, 2014 ONSC 6541where the question was what the Crown must prove to establish the *actus reus* of the offence of obstruct police when the basis of the charge is an allegation that the accused provided a false name to the police. The police officer in this case was almost immediately able to identify the accused, and so the *de minimis* principle was engaged. Dawson J. (at para. 24) was unable to agree with the trial judge's rejection of the requirement that there must be more than causing a police officer a fleeting or momentary diversion or expenditure of effort to establish obstruction. Finally, he stressed at para. 76) that the ultimate question of whether there was an obstruction is a factual one to be determined in the circumstances of each case. The appeal against conviction was allowed and a new trial, at which the correct legal test could be applied, was ordered.

The Last Pillar Of "Truth In Sentencing"

I observed last October's issue that the validity of *Criminal Code* s. 719(3.1) that denies enhanced credit for pre-trial/sentence custody ("dead time") in s. 524 cases (cancelling previous releases and detaining the accused where the court finds that the previous release was contravened or that there were reasonable grounds to believe that an indictable offence had been committed after being released) remains to be decided. It has survived for the time being in the Yukon, but will inevitably be considered by the higher courts here in Ontario and elsewhere, not to mention ultimately in the Supreme Court of Canada.

The Territorial Court of Yukon in *R. v. Chambers*, 2013 YKTC 77 (CanLII) declared that s. 719(3.1) is of no force and effect as it pertains to the s. 524(4) and (8) exceptions. The Court Of Appeal Of Yukon in *R. v. Chambers*, 2014 YKCA 13 (CanLII) allowed the Crown's appeal, set that declaration aside, and directed that the calculation of Mr. Chambers' sentence take into account a credit of 1:1 for the disputed period of pre-sentence custody. Chief Justice Bauman (at paras. 129-140) noted that, since writing the reasons, the Ontario Court of Appeal had pronounced judgment in *R. v. Safarzadeh-Markhali*, 2014 ONCA 627 (CanLII). He distinguished it and, noting the primary concern in *Safarzadeh-Markhali* was that s. 515(9.1) potentially distinguished between at least "three identically placed accused who commit exactly the same offences and have the same criminal record", he stated that "In the case before us, on the contrary, the question is this: 'Is <u>any</u> similarly placed offender who has been subject to a revocation of bail by reason of s. 524(4) or (8) entitled to the same credit for pre-sentence custody as a dissimilarly placed offender who has been denied bail for reasons unrelated to his or her conduct after the offence?' Parliament has said "No". I cannot gainsay its wisdom in doing so. In my respectful view, the decision in *Safarzadeh-Markhali* raises no impediment to my conclusions in this case."

That appeal court decision was applied, apparently with some reluctance, by Cozens T.C.J. in *R. v. Smarch*, 2014 YKTC 51 (CanLII) (at paras. 245 *et seq*) who described the result as "... disproportionate and unfair. At this point in time Parliament has legislated so as to create this unfairness and, based upon the decision of the Court of Appeal in *Chambers*, the law in the Yukon is that such unfairness does not violate the rights granted under the *Canadian Charter of Rights and Freedoms*. While I have difficulty believing that the ordinary reasonable resident of Canada, properly informed, would find such unfairness acceptable and in accord with the manner in which

we want justice to be administered, this is law in the Yukon at this time and I am bound to follow it."

Interestingly, shortly after that, and just before sentencing, he remarked that "...This said, there are many situations where the delay in proceeding to trial and/or a sentencing hearing is not due to any actions of the individual to delay proceedings but due to the operation of the justice system and its participants, including the availability of judges, justices, counsel, including Crown counsel and court facilities. In such cases it would seem that the fundamental principle of proportionality would be offended if an individual, as a result of the sentence imposed, spends more time in custody than necessary due to delays beyond his or her control, than had the individual been able to conclude his or her matter earlier and serve time as a sentenced inmate or be capable of making bail. This situation also seems to be somewhat inconsistent with the reasoning of the Supreme Court of Canada in other cases." This writer is left wondering if that thought influenced the sentence that he then imposed.

Warrants For Isp Data

It has been suggested that the Supreme Court of Canada's decision in *R. v. Spencer*, 2014 SCC 43 (CanLII) that says the police must get a search warrant for ISP data that includes the name and address of the subscriber using an IP address. It was thought that this might merely add a relatively easy investigative step for the police, but Tim Cushing has suggested in an article dated December 5, 2014 in *techdirt* that it has instead caused the RCMP to simply drop some cases. Here's where you can find it on the Internet:
https://www.techdirt.com/articles/20141130/20421229281/canadian-law-enforcement-agency-dropping-cases-rather-than-deal-with-new-warrant-requirements-isp-subscriber-info.shtml

Can Cellphone Records Prove Times And Places?

An article by Tom Jackman published online in the *Washington Post* reported that the use of cellphone records to place suspects at or near crime scenes is coming under attack in courts across the United States of America because of expert evidence of the severe limitations of using a single tower to precisely locate where someone was at the time of a crime. It's all about how cellphone calls are routed and the range of the cell towers with which the phones connect. According to the experts, cellphone signals do not always use the closest tower when in use but instead are routed by a computerized switching center to the tower that best serves the phone network based on a variety of factors. In addition, the range of cell towers varies greatly, and tower ranges overlap significantly, and the size and shape of a tower's range shifts constantly. More specifically, the use of historical cell-site locator data is different than real-time triangulation of three cell towers to locate a phone, or GPS technology using satellites. The accuracy of those technologies is not in dispute, but phone companies do not save GPS or triangulation data for an individual phone — so that information is not used as evidence. Check this interesting article at
http://www.washingtonpost.com/local/experts-say-law-enforcements-use-of-cellphone-records-can-be-inaccurate/2014/06/27/028be93c-faf3-11e3-932c-0a55b81f48ce_story.html

Judge's Science Manual

This brings us to conclude with a tip to check the "Science Manual for Canadian Judges" published by the National Judicial Institute for the information Canadian judges have at their finger-tips. Here's where to find it on the Internet:
https://www.nji-inm.ca/nji/inm/nouvelles-news/Manuel_scientifique_Science_Manual.cfm
Happy reading. ■

Geoffrey Read is a sole practitioner in Hamilton ON. He is certified by the Law Society as a Specialist in Criminal Law.

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New Lawyers' News

Anne-Louise Cole

The New Lawyers' Subcommittee has been busy planning CPD programs and events to address the needs of our members. We are already planning for the fall of 2015. If you have an idea for an event or a CPD program, please let someone on the New Lawyers' Subcommittee know or post it on our Facebook page (search HLA New Lawyers' Subcommittee in Facebook). We are always looking for new ideas!

At our meeting in November, we had the privilege and pleasure of having Gerald Swaye join us on his birthday. As we shared birthday cake, he discussed with us the importance of work-life balance for young lawyers. He candidly admitted that work-life balance is something that he struggled with early on in his career. However, thanks to the love, care and support of his wife, he's been able to strike a balance. It was an inspirational talk and we are quite thankful that he joined us at our meeting.

By the time this article is printed, we would have recently held a CPD program which addressed the issue of financial planning for lawyers. As lawyers, we are used to planning our cases. However, we sometimes get caught up in the practice of law and forget to plan for ourselves and the future. With the cost of tuition for law school increasing, the need to learn how to plan for our financial future is even more important. This seminar brought together financial professionals who discussed strategies specific to lawyers for planning for their financial future.

Mark your calendar for a new lawyers' subcommittee social event for February 12, 2015 at Slainte's. This has traditionally been one of our most well-attended events. It is a great way to shake off the winter blues and socialize with your colleagues. Be sure to invite fellow new lawyers and articling students.

I look forward to seeing you at one of our events! On behalf of the New Lawyers' Subcommittee, I wish you the best in 2015! ■

Anne-Louise Cole practices civil and criminal litigation at Yachetti, Lanza & Restivo LLP. She can be reached at:

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The Hamilton Law Association's New Lawyers' Subcommittee invites you to a ...

Social/Pub Night

Thursday, February 12th 2015

5:30 pm to 7:30 pm

Slainte's

(33 Bowen Street)

All are welcome! A great chance to mix and mingle with HLA members and the Hamilton legal community!

This event is FREE and no RSVP is needed.

Questions?

Contact Dana Brown at 905.522.1563 or at dbrown@hamiltonlaw.on.ca

Are Experts Hired Guns?

Ryan C. Bensen

The *Moore v. Getahun* Decision - One Year Later

The *Moore v. Getahun* decision by Justice Janet Wilson has certainly made waves amongst the Expert Witness Industry over the past year – but whether all the commotion has accomplished what it set out to do is up for discussion.

To review, Plaintiff Counsel discovered that a Defence Medical Expert had made changes to his Draft Report in a 90 minute phone call with Defence Counsel. Justice Wilson took exception to this practice, in no uncertain terms.

Her decision spells out the conditions in which a Draft Report should be issued (spoiler alert: it's never) and states that any changes to a Final Report should be documented in writing, and provided to opposing counsel. Her decision reads as follows (my emphasis in bold):

"*The expert's primary duty is to the court. In light of this change in the role of the expert witness under the new rule, I conclude that counsel's practice of reviewing draft reports should stop. There should be full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections, suggestions, or clarifications,* ***to ensure transparency in the process and to ensure that the expert witness is neutral.***"

Her goals are two-fold: Transparency in the process, and Expert Neutrality. Justice Wilson has implied that counsel's involvement in shaping the draft report introduces unnecessary bias to the system. Is this true?

Transparency

Interestingly, the goal of transparency appears to have been met already in this decision. Opposing counsel reviewed the file of the Defence Expert, and found notes regarding a 90 minute discussion between the expert and counsel in developing the report.

In this regard, Plaintiff counsel may have had to request the defendant expert's file and notes, but Transparency in this regard appears to be intact.

Expert Neutrality

The issue of Expert Neutrality, which I suspect is at the core of Justice Wilson's decision, is another matter entirely. After years, in fact, decades, of playing proverbial hot potato between the Plaintiff and Defence Bar, there has yet to be a cohesive approach to ensuring this neutrality.

At first, it was the Defence Bar who objected to the use of certain Experts, such as attending physicians, under fears that their testimony is neither impartial nor objective. The argument was that Physicians who had relatively long histories and involvement with their patients would inherently be biased to advocate on behalf of their patient in Court. This is certainly a plausible assumption – eliminating this bias meant inserting independence to the system.

And so, the role was changed to retain Experts with specific and unbiased knowledge of the facts at hand, without prior history with patient to bias their opinion. This change was a complete swing of the pendulum, from experts who knew the plaintiff, to those who were entirely independent.

While Defence Counsel has generally been happy with the change, the Plaintiff Bar has been concerned about Experts becoming a "Hired Gun".

To date, I have yet to encounter any circumstance with a Lawyer who has suggested drastic and biased changes to a Report. In fact, changes of any substance as suggested by counsel are veritable Unicorns.You've heard of

them, but haven't seen them.

Simply put, Lawyers aren't the causation of bias in the system. It's the Experts.

Just as Counsel tends to specialize in Plaintiff or Defence work, Experts have moved in this direction as well. Physicians, Accountants, Engineers, and the plethora of further professionals in the field end up, by virtue of personal views, market dynamics, and social circles, either testifying more frequently on behalf of the Plaintiff, or the Defendant.

Does this necessarily make one a hired gun? No. But it does mean that Expert opinions may be biased if left unchecked.

What's the Solution?

The biggest impact of the *Moore v. Getahun* decision is that it has re-opened the debate on objectivity and bias in Expert Testimony.

I applaud Justice Wilson for recognizing just how prevalent this issue is. By attacking bias head on, this decision has certainly made Experts across the industry think twice before issuing a report.

However, the best way forward is not through ending the use of Draft Reports. In fact, I would say it's the opposite.

Limiting discussion between Counsel and Experts will only serve to produce less focused, and less valuable evidence. In dealing with Asymmetrical Information, Experts are far more likely to hedge their report and present multiple opinions (rendering each single opinion less valuable), or double-down on this bias and present a report with an opinion that they "think" counsel would want. Neither of these outcomes were the intended consequences of Madam Justice Wilson's decision, and I would posit they are a dilution of the value of the Expert's Opinion in Court.

The winner in *Moore v. Getahun* was an undeniably effective due-diligence and cross-examination by Plaintiff Counsel upon realizing that the Expert's opinion posed a credibility issue to the Court. This led to significantly less weight on the evidence placed on the medical report in question, and a better quality decision.

Counsel could benefit from scrutinizing their Expert's Reports in more detail, and asking whether the Report, and their Expert, are able to withstand a similarly competent and effective cross-examination.

Ask yourself, does the Report make sense based on your knowledge of case facts? Is this report objective and unbiased, or are there concerns of credibility in this regard? Are there additional important elements that have been left out? Is the report focused on inconsequential data, when more relevant factors exist? What is the reputation of your Expert?

Asking these questions can help to eliminate bias, rather than amplifying it, before the Report reaches Opposing Counsel and Trial. In addition, this will enhance your advocacy for your client, as a better understanding of your Expert's opinion will lead to a better cross-examination of Opposing Counsel's.

Every Expert trades on their name and reputation. Increasing the likelihood of this reputation being tarnished when an unduly biased report is issued is the most effective way to ensure the Report, and the Expert, remain neutral. ■

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Charity Law News

David van der Woerd

What Constitutes a Charitable Gift?

The case of Imoh v. The Queen, 2014 TCC 258 (CanLII) demonstrates what goes into making a legitimate gift to a charity, and, conversely, the expectations of a charity in issuing appropriate charitable receipts so that tax payers can claim tax credits for their charitable gifts in their income tax returns. The case was actually comprised of two cases with common facts, involving two individuals, David Anele Imoh and Oladele Bello, and two charitable organizations, Revival Time Ministries and Revival Time Ministries International, but for purposes of this article we will simply refer to the Imoh case and the two organizations as the "organization".

Messrs. Imoh and Mr. Bello had each appealed the Minister of National Revenue's disallowance of charitable donation tax credits claimed under section 118.1 of the Income Tax Act. Mr. Imoh claimed to have made charitable donations totalling $15,000, in cash for each of the 2007, 2008 and 2009 taxation years. Mr. Bello claimed to have made charitable donations totalling $15,000, by cheque and cash, in 2009. There were two issues in the appeals: 1) whether Messrs. Imoh and Mr. Bello had each made donations which would enable them to claim tax credits, 2) whether the charitable donation receipts they received from the organization complied with the Income Tax Act and its Regulations.

The genesis of the problems for these gentlemen began when Canada Revenue Agency's ("CRA") Charities Audit Group audited the organization. During the audit, Daniel Mokwe, speaking for the organization, informed the CRA initially that it was unable to produce its books and records because they had been lost in the repossession of a storage unit because of an unpaid $258 storage bill. However, six months later, records were given to the CRA. Unfortunately they were suspect because the organization appeared to have falsified its bank statements relating to its revenues and expenditures. There were significant receipting discrepancies. Donation receipts totalling $830,000 conflicted with other information showing $1.6 million or $1.7 million in donation receipts for 2007. The CRA cross referenced the records with bank statements received directly from the organization. According to those bank statements, $1.8 million or $1.9 million in donations was deposited but the bank statements were unusual and contained irregularities in the dates. Consequently, the CRA issued requirements to various banks. Documents obtained from one bank showed that over a two-year period only $3,000 was received and deposited into the bank account whereas the organization's bank statements for the same period showed $2.5 million as having been receipted as bank deposits.

CRA also tested the veracity of the organization's receipted cash donations. To determine if there was proof of payment by cash, CRA officials conducted a sampling of the organization's donors and it subsequently expanded its review to 900 of its donors from 2006 to 2008. None of the 900 donors contacted by the CRA were able to provide cancelled cheques or proof supporting cash donations.

The bank statements also showed expenses being paid by the issuance of bank drafts to Africa, reggae bands and an amount to a Toronto city councillor. No proof was provided that the goods shipped to Africa were for charitable purposes. Daniel Mokwe was also involved in another organization. The CRA issued requirements against him for 2009 and 2010 but he failed to comply. He was referred for criminal prosecution charges but he fled Cana-

da before the charges were laid.

Effective January 8, 2011 the organization's charitable registration was revoked for cause. The revocation was challenged at, but was ultimately dismissed by, the Federal Court of Appeal without leave being granted to the Supreme Court of Canada.

David Imoh testified he was introduced to the organization by a friend who explained that the programs for giving encompassed such purposes as the less privileged, scholarships for children, hospitals and other programs in Angola, South Africa, Kenya and Zimbabwe. Mr. Imoh telephoned Daniel Mokwe and he expanded the explanation of the programs as helping "all of Africa" as and "when need arises". He said he decided to donate, made monthly cash donations and received receipts.

By 2009, he had received a letter from the CRA requesting receipts. After six months, he was informed that the singular receipt that he had provided for each of 2007, 2008 and 2009 was insufficient. He informed the CRA that the contributions were made in cash and he obtained two letters, each dated May 3, 2009 relating to 2007 and 2008, which he sent to the CRA. The two letters provided a breakdown of the $15,000 showing contributions of $1,250 per month. After six months, the CRA told him that the receipts and letters were insufficient and disallowed his claims.

Mr. Bello testified that a friend had introduced him to an accountant, George. George explained the organization's charitable activities as helping the poor in West Africa. Later, he met Dan who represented the organization. Mr. Bello was impressed and "in the spirit of giving" he decided to contribute, as a first time contributor, in 2009. A log, which he signed, which was maintained by George, itemized the instalment cheques and cash contributions he had made in 2009.

Except for one "Official Donation Receipt (Receipt #72)" provided to Mr. Bello dated December 31, 2009, no receipts were provided when he made his contributions. That receipt described the donation as a "cheque" with the value ascribed as $15,000. It was issued by the organization to Mr. Bello, shows his address and its address, a charity number and a reference to the CRA website relating to charities.

According to Mr. Bello, the bank statements he provided for 2009 show various transactions relating to his claim for the donations as outlined below:

	Cheques issued/Cash withdrawals	**Amount**
January 9, 2009	#54	$100.00
January 12, 2009	#53	$200.00
January 20, 2009	#99	$300.00
April 1, 2009	#45	$300.00
May 14, 2009	#89	$190.00
September 3, 2009	Cash	$5,000.00
September 8, 2009	Cash	$200.00 Instant teller Boivard location
September 8, 2009	Cash	$300.00 Instant teller Dundas location
October 1, 2009	Cash	$1,000.00

Figure 1

CRA asserted that neither Mr. Imoh nor Mr. Bello have provided sufficient evidence that they made the donations that they claim were made, and that each of them did not have a receipt containing all the prescribed information as mandated by the legislation and that Messrs. Imoh and Bello each had the onus to show, on a balance of probabilities, that they made the donations they claimed they had made.

Mr. Imoh argued that he had the option to make monthly cash donations, and that the three receipts show that he made cash donations totalling $15,000 in each of 2007, 2008 and 2009, respectively, and contain all of the elements required by the legislation. Clearly, Mr. Imoh had that option as supported by the Regulations. However, Justice Lyons said that the Act strictly regulates the conditions of eligibility for charitable donation deductions in requiring that donations be supported and verifiable. The only proof offered by Mr. Imoh that he made the donations was his testimony, the three receipts, the two letters and his explanations for how payments were made. Justice Lyons found them to be implausible. Of some import to Justice Lyons was Mr. Imoh's failure to produce the various receipts - of which there would have been many over a three-year period – and Justice Lyons drew adverse inferences from the failure of Mr. Imoh to call witnesses which could have confirmed his assertions.

Justice Lyons accepted the evidence of

CRA that the bank statements provided to them by Daniel Mokwe had been falsified and that there were discrepancies in the receipting which could not be validated in the books and records. And that none of the 900 donors contacted were able to provide cancelled cheques or other proof of payment by cash to support donations except for a singular receipt for the year of the contribution similar to the three receipts presented by Mr. Imoh. All of which casted doubt on the reliability of Mr. Imoh's evidence, and for that reason, he was found not to have proved that he made the donations.

With respect to Mr. Bello, that he made his cheques payable to the accountant, not the organization, in itself did not amount to making a charitable donation to a charitable organization would have been sufficient to conclude that no donations were made by Mr. Bello to the organization. However, Justice Lyons went on to say that Mr. Bello's testimony contradicted the information in his Notice of Appeal which indicated that instalment cheques were issued to the organization, not the accountant and that inconsistencies made his evidence unreliable. Justice Lyons drew a negative inference from his failure to produce documentation that he should have had to confirm the purported donations were made and found that Mr. Bello's evidence was not reliable. Justice Lyons therefore concluded that he has not shown that he made any donations in 2009.

Justice Lyons explained that when read together, paragraph 118.1(2)(a) of the Income Tax Act and subsection 3501(1) of the Regulations require that there must be a gift and also an official receipt containing all the prescribed information. Section 118.1 of the Income Tax Act provides for a tax credit to persons for donations to qualified charities. Subsection 118.1(3) allows a deduction from tax payable for gifts made to a registered charity. Paragraph 118.1(2)(a) reads:

An eligible amount of a gift shall not be included in the total charitable gifts, … of an individual unless the making of the gift is evidenced by filing with the Minister

(a) a receipt for the gift that contains prescribed information;

[6] Subsection 3501(1) of the Regulations sets out the requirements for official charitable donation receipts for income tax purposes, which provides as follows:

3501.(1) Every official receipt issued by a registered organization shall contain a statement that it is an official receipt for income tax purposes and shall show clearly in such a manner that it cannot readily be altered,

(a) the name and address in Canada of the organization as recorded with the Minister;

(b) the registration number assigned by the Minister to the organization;

(c) the serial number of the receipt;

(d) the place or locality where the receipt was issued;

(e) where the gift is a cash gift, the date on which or the year during which the gift was received;

(e.1) where the gift is of property other than cash

(i) the date on which the gift was received,

(ii) a brief description of the property, and

(iii) the name and address of the appraiser of the property if an appraisal is done;

(f) the date on which the receipt was issued;

(g) the name and address of the donor including, in the case of an individual, the individual's first name and initial;

(h) the amount that is

(i) the amount of a cash gift, or

(ii) if the gift is of property other than cash, the amount that is the fair market value of the property at the time that the gift is made;

(h.1) a description of the advantage, if any, in respect of the gift and the amount of that advantage;

(h.2) the eligible amount of the gift;

(i) the signature, as provided in subsection (2) or (3), of a responsible individual who has been authorized by the organization to acknowledge gifts; and

(j) the name and Internet website of the Canada Revenue Agency.

Messrs. Imoh and Bello each had the onus to show on a balance of probabilities that they made the donations they claimed to have made. Because Justice Lyons found that neither Mr. Imoh nor Mr. Bello had discharged this onus, the donations were not made. In light of those findings, it was unnecessary for the court to address the second issue, that receipts did not contain all of the information prescribed by paragraph 3501(1)(a) of the Regulations. The appeals were therefore dismissed. ■

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Real Estate News

Catherine Buntain-Jeske

The Municipal Property Assessment Corporation and Municipal Tax Assessments

In Ontario, municipal taxes are determined by taking the assessed value of a property and multiplying that value by the appropriate tax rate determined by the local municipal governments. The Municipal Property Assessment Corporation ("MPAC") is a not-for-profit corporation funded by all 444 municipalities in Ontario and provides annual assessment to each municipality for each property in the province. MPAC does not determine what property taxes should be. It simply determines an appropriate assessed value for each property.

In 2008, MPAC delivered its first province wide assessment for each property in Ontario, starting a four-year cycle for the assessment process. The second province wide assessment was completed in Fall, 2012, updating the classifications and assessments for all properties as of January 1, 2012.

Increases in property values are phased in over a four (4) year period. Any decrease in the assessment is applied immediately.

Between now and the next Assessment Update in 2016, a property owner would receive a Property Assessment Notice as a result of:

a) A change in ownership of a property, legal description or school support;

b) A change in a property's classification;

c) A change in value as a result of a Request for Reconsideration or an Assessment Review Board decision; or

d) An increase or decrease in the value of a property as a result of a new build, renovation, addition, removal or demolition of all or part of a building.

In each non-assessment year, approximately one million Property Assessment Notices are delivered. Changes made in 2014 were delivered in October and November to reflect the changes in the year.

For all properties, land is assessed based on its current value. "Current value" is defined in s. 1(1) of the *Assessment Act*, R.S.O. 1990, c. A. 31 as "… in relation to land, the amount of money the fee simple, if unencumbered, would realize if sold at arm's length by a willing seller to a willing buyer."

For residential properties, MPAC uses a Current Value Assessment (CVA) system where 3 to 5 years of open-market, arm's length sales are used to determine the current value of a property. In addition to sales, MPAC may consider up to 200 other factors such as location, lot dimensions, living area, age of property, renovations and quality of construction. It may also look at secondary structures such as garages, pools, finishing of basement, type of heating, number of bathrooms and fireplaces. Other external factors could include traffic, corner lot location and proximity to green spaces.

Request for Reconsideration ("RFR")

Any owner is entitled to obtain detailed information about their property and up to 24 additional properties, free of charge, which can help the owner assess the fairness of their assessment.

If a taxpayer disagrees with his or her assessment, the owner may ask for a review of the assessment through the Request for Reconsideration ("RFR") process. An RFR is free of charge and can be made in regards to:

- An assessed value being too high (or too low);
- Errors in property data, which can include the size of the building or the area of land;
- Corrections to the effective date for a supplementary or omitted assessment;
- Amendment to Property classification; and/or
- The portion of assessed value attributable to each class for those properties that have more than one property class.

An RFR can be submitted any time after the Notice of Assessment is mailed and before March 31 of the property tax year (or within ninety (90) days of receipt of a Notice, whichever is later). If MPAC finds an adjustment is warranted, Minutes of Settlement must be executed by both parties.

MPAC does not review the amount of tax the taxpayer pays to the municipality.

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Taxpayers may appeal assessments to the Assessment Review Board (ARB), an independent tribunal under the Ministry of the Attorney General. However, residential, farm or managed forest properties may only appeal to the ARB after filing an RFR. The fee for filing an appeal is $75.00 for a Residential, Farm or Manage Forest Property or $150.00 for all others.

Purchase of a New Condominium/ Home – Adjustments with Builder

During the non-assessment years, assessments of new construction still take place. MPAC notifies municipalities throughout the year of changes by issuing Omitted or Supplementary Assessments.

Omitted Assessments are issued when the value of an improvement (such as a new home being built on vacant land), was not previously recorded on the assessment. When an omitted assessment is added, the municipality can collect taxes for the current year and for two years previous. Supplementary Assessments are issued when there has been a change to a property during the current tax year. The municipality can collect additional taxes from the date the use commences to the end of the current taxation year.

Generally a builder of new homes or condominiums will have paid for a portion or all of the vacant land taxes for a given year and adjusted with purchasers on closing accordingly. MPAC does engage with the builder to determine the payments and adjustments made prior to occupancy. The new purchaser is assessed for the increase in the value of the property from its prior use as vacant land, from the date of occupancy. As a result, readjustments as between builders and purchasers should no longer be warranted. If an adjustment is made on closing for the vacant land paid for the year of closing, the purchaser is simply responsible for the Supplementary and/or Omitted tax bill from the date of occupancy. The only caveat may be in a situation where the home was ready for occupancy prior to the purchaser taking occupancy/ownership, in which case, an adjustment between the purchaser and builder may be required.

MPAC advises that it now aims to assess new residential buildings within six months of occupation. Purchasers should be reminded however that even if MPAC is delayed in determining the actual Assessed Value of a new home, the purchaser remains responsible from the date of occupancy.

Non-Residential Assessments

In addition to valuing a property, MPAC is responsible for determining the classification of a property which, in addition to residential assessments, includes multi-residential, commercial, industrial, pipeline, farm and managed forests. There are also subcategories where the unique qualities of individual properties can be addressed such as for golf courses, hotels, industrial malls, large industrial sites, long term care facilities, motels, office buildings, etc. Some properties may fall into two or more classes of assessment.

The classification of a property can have a significant impact on the tax burden of a property, not only because it affects the method by which the value of the land is assessed, but also because the municipality will charge a different tax rate based upon the property classification.

Although residential properties (including homes, condominiums, vacant lands and development lands) are assessed based upon the direct CVA method, this method may not be appropriate for properties that have few or no similar properties sales available for comparison, such as large office towers or industrial plants. As a result, properties such as office buildings, hotels and apartments have come to be assessed based upon their rental income capacity (the "income approach"), while industrial properties will be assessed based upon the "bricks and mortar" replacement cost of buildings and improvements (less depreciation) plus the cost of the land.

The tax rate to be applied to the assessed value by a municipality can vary greatly depending upon the classification of the property. For example, in Hamilton, the rate applied to a residential property for 2014 is 1.3872111%, as opposed to a farm at the lowest end at .2452564 and a large industrial site at 5.7481140 at the high end.

Farm Assessments

A farm property is a good example of how multi-faceted and complicated an assessment can be for one particular property. A farm itself is generally assessed based upon its current market farm value only (based on comparisons of farmer to farmer sales), and not its potential development value. In addition, other factors are considered with respect to a farm's value, including the land's productive capability (which is affected by climate, soil, location and depth to bedrock). A residential building occupied by someone involved with the farm operation and one-acre would be classified as residential. Other buildings of the farm may be assessed based on the replacement cost, less depreciation method. There are more factors that go into assessing a farm property than are set out here, but as you can see, the assessment for a property such as a farm, with many moving parts, can get complicated.

There is currently an interesting situation evolving in Creemore, Ontario where a dairy farmer started pasteurizing and bottling his own milk, rather than sending it to a processing plant, in an effort to move forward with the "keep it local" movement. As a result, MPAC re-classified the milk processing plant on his farm as an industrial use, which had the end result of significantly increasing his tax assessment. An industrial classification includes "land that is used for or in connection with manufacturing, producing or processing anything". On the face of the classification definition, the assessment does not appear to be incorrect. The farmer intends to take up his case with MPAC, supported by his municipal government.

The Income Approach

As indicated above, there are certain properties, such as hotels, office buildings and apartment buildings, which are not sold on the open marketplace very frequently or when they do sell, the purchase price often includes non-assessable items that are difficult to separate from the sale price. On such properties, the income approach is used to assess the value.

A very public example of the inner workings of the income approach worked its way through the ARB and Courts several years ago when Toronto's twelve (12) biggest office tower owners appealed their municipal assessments to the ARB. Both MPAC and the tower owners agreed that the "income approach" was the best way to determine the current value of the buildings; however, the specific methods applied by each party differed greatly, resulting in a $1.5 billion difference between what the tower owners thought their collective properties should be valued at and what MPAC had assessed.

The ARB agreed with the tower owners' approach of determining "current value" based upon the vacant building value only (not including the value of current tenants and leases), but acknowledging a future income stream. MPAC and the City of Toronto appealed. Both the Divisional Court and the Court of Appeal agreed with MPAC that the office towers were to be assessed in accordance with the income approach using current market rents and allowing for only a normal vacancy rate [see BCE Place Limited et. al. vs. Municipal Property Assessment Corporation, et. al. (2010) 103 OR (3d) 520 (CA) for a concise but illustrative discussion of the issues].

Conclusion

The MPAC system of assessment appears to be quite transparent and eager to ensure that property assessments have been established by a fair and rational process. The fact the RFR process is free, and the further appeal process is available at a relatively low cost, speaks to the point of view that MPAC appears to be willing to review its assessments regularly in an effort to maintain the integrity of the system.

If you are approached by a client who has concerns about their assessment, it is certainly worth making some enquiries of MPAC with a view to potentially putting forth an RFR or Appeal, if warranted. Be mindful of the fact that it may not only be the market value of the property that may be at issue. It could also be the assessment category or subcategory or the valuation method that should be called into question. All of these factors may have an impact on your client's bottom line municipal tax payment.

Interestingly, MPAC has a simple test on its web site that may be helpful if you are dealing with a client who may be unhappy with the assessed value of their land and is looking to appeal. A property owner simply needs to ask him or herself, "could I have sold my property for the assessed value on the valuation date listed". If the answer is yes, then an appeal of the property is not likely justified. ■

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Family Law News

Michael Wilson

The Spousal Support Advisory Guidelines and Variation Applications

The Court of Appeal reaffirms the role of the Spousal Support Advisory Guidelines and clarifies that they can be a useful tool on spousal support variation applications.

Gray v. Gray, 2014 ONCA 659; 122 O.R. (3d) 337.

The objective of the Spousal Support Advisory Guidelines ("SSAG") was to bring certainty and predictability to the determination of spousal support. The Ontario Court of Appeal in *Fisher v. Fisher* (2008 ONCA 11, 88 O.R. (3d) 241) commented extensively upon the SSAG, confirming the Guidelines were a useful tool in determining the quantum and range of support, and suggesting that a trier of fact should offer an explanation if he or she chooses to deviate from the SSAG support range. For many family law practitioners in Ontario, *Fisher* represented a general validation of the Guidelines, cementing the SSAG as an integral part of our daily practice; however, *Fisher* also left family law practitioners with questions.

One such question was whether the SSAG were applicable upon an application to review or vary spousal support. As SSAG authors Professors Carol Rogerson and Rollie Thompson describe following *Fisher*, "There is a pervasive myth that the Advisory Guidelines 'do not apply' on variation or review or if they do, only after much angst and soul-searching by lawyers and judges" (*The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version*, March 2010, Department of Justice Canada). With the release of its decision in *Gray v. Gray* (2014 ONCA 659, 122 O.R. (3d) 337), the Court of Appeal addresses its own confusing comments made in *Fisher* and clarifies the issue: the SSAGs may be applied in applications to vary support.

As confirmed in *Fisher*, the SSAG are advisory in nature. They are a useful tool, but are neither legislated nor binding. The SSAG are to be considered in context, applied in their entirety, with consideration for applicable variables, exceptions and restructuring. The SSAG do not impose a radically new approach, but rather suggest a range of both quantum and duration of support that reflects the current case law. Accordingly, the Guidelines are comparable to a lawyer's submissions regarding the appropriate range of support based upon jurisprudence. Perhaps most notably in *Fisher*, the Court of Appeal noted that when the SSAG are addressed in argument by counsel and a trial judge decides to award a quantum of support outside the SSAG range, the appellate court would be assisted by the inclusion of reasons why the Guidelines do not provide an appropriate result.

While spousal support remains one of the more difficult areas of family law to navigate, the SSAGS, thanks in no small part to *Fisher*, have succeeded in bringing a degree of certainty and predictability to the determination of spousal support. Family law practitioners routinely use the SSAG to advise their clients with greater confidence. Our clients are better able to make informed decisions relying upon the SSAG and our legal advice, which hopefully saves them time, legal fees and aggravation.

While *Fisher* may have cemented the place of the SSAG in the daily practice of family law, *Fisher* is also a source of confusion as to the applicability of the SSAG to applications for review or variation of support. The Court of Appeal in *Fisher* clearly stated, "*Importantly, the Guidelines do not apply in many cases. […] they only apply to initial orders for support and not variation orders. They are thus prospective in application.*"

Following *Fisher*, Professors Rogerson and Thompson, directly addressed the issue by flatly stating that the SSAG do apply on variation and review, adding that how the SSAG apply depends on the issues raised in any given application to vary or review (*The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version*, March 2010, Department of Justice Canada). In *Gray*, the Court of Appeal acknowledges this view and clarifies their comments made in *Fisher* regarding the applicability of the SSAG to variation proceedings:

"*This court commented in Fisher v. Fisher, 2008 ONCA 11, 88 O.R. (3d) 241, at para. 96 that the SSAG only apply to initial support applications, and not to variation proceedings. Fisher was not a variation proceeding that entailed consideration of s. 15.3 of the Divorce Act. At the time of Fisher the final publication of the SSAG had not been released. The July 2008 SSAG publication contemplates that the guidelines have a role to play on variation.*"

In *Gray, t*he Court of Appeal not only discusses and reaffirms the role of the SSAG, it also puts to rest the myth that the SSAG do not apply on variations; however, the Court cautions:

"*In some cases, there are complicating factors that must be considered before a court applies the SSAG wholesale. Complicating factors that courts ought to consider include variations based on the post-separation income increase of the payor, or situations with second families. In such cases, the court must conduct an analysis of the facts of the specific case to assess whether the SSAG ranges are appropriate."*

It would seem that the Court of Appeal, by specifically revisiting its comments in *Fisher* about the applicability of the SSAG on a variation proceeding, is sending the legal community a clear message that there is a place for the SSAG in variation applications; however, *Gray* also serves to remind us against applying the SSAG indiscriminately. *Gray* reminds us that despite their widespread use, the Guidelines are advisory. They are a tool to help determine quantum and duration. The SSAG do not determine a spouse's compensatory or needs based entitlement to support. Even experienced family law lawyers would be well advised to revisit the discussion surrounding exceptions, restructuring, and adjustments in both the Guidelines themselves and the User's Guide. ■

Michael Wilson is a family law lawyer practicing in Grimsby, Ontario.

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Fax: 1-888-509-7080

www.wilsonfamilylaw.ca

Intellectual Property Law

Ryan Smith

Ripping Off the Movies – Who Owns the Stories We Tell

Billion dollar blockbuster? You can be sure there will be lawsuits to follow. They will claim that stories they wrote while being employed by a movie studio, stories they wrote in their own published books, and stories they wrote on napkins during a moment of inspiration and sent to movie directors, were stolen to create Hollywood's newest blockbuster. Surely there exists some legal protection against movies being made based on previously existing stories. But how far does that protection extend? When are the limits of protection reached?

Ancient Stories

I will call ancient stories those written more than two thousand years ago. There are no protections for those antiquated stories likely finding their origin in Egypt or China or even around campfires around the world. If any of those stories have survived to our times, anyone can shamelessly retell those stories in whatever media they wish and also make changes to the stories that the original storytellers may have vehemently disagreed with.

You are not going to get away from another cinematic telling of Hercules. And if the heirs of the original writer of the Hercules story were ever found, they would not have any legal basis to stop you from retelling it or from changing the story.

Stories from the 1900s

Depending on when a story was written in the 1900s and when the author passed away if at all, it may be that the original author or the heirs of the original author still have legally enforceable rights in a story penned in the 1900s.

Under the *Copyright Act* in Canada, an author receives protection for a story during the author's life and for fifty years following the author's death. It is generally the same rule around the world with some countries having a different period of protection following death. In the case of a work that more than one author creates, the term of protection is generally the life of the last surviving author and for fifty years after such last author's death.

Those wishing to adopt stories created in the 1900s had better closely examine whether the story is still protected under the law or whether it may now be used free from anyone else's legal rights.

Contemporary Stories

Stories written in the present time are protected under our *Copyright Act*. As a result you will not be permitted to adapt or use that contemporary story as the basis for another kind of work without the consent of the original owner.

Film Stories in Dispute

In the context of the lawsuits concerning films the facts typically go as follows: a plaintiff, who was not involved

in the making of the film, claims that it created an original story that was fixed in some tangible form, e.g. a software file or a handwritten story. The plaintiff claims that the defendant director, writer, and/or movie studio, took substantive parts from its original story in order to create the plot for the film. If the film makes millions of dollars, the plaintiff claims a right to a portion of those profits. The defendants typically deny the plaintiff's claim and argue that the story used for the film was an original work that someone on the payroll of the movie studio created.

The Question of Originality – Film Lawsuits

Disputes between large movie studios and authors usually revolve around whether the filmmakers had created an original work and whether that work was made by copying in whole or in part someone else's work when creating the relevant movie.

Seth MacFarlane was sued for allegedly stealing the movie idea for *Ted*, a comedy about a foul-mouthed animated teddy bear. The plaintiff in the lawsuit made "Charlie The Abusive Teddy Bear" which was a web series created in 2009. The plaintiff alleged that Charlie "has a penchant for drinking, smoking, prostitutes, and is generally vulgar, yet humorous character" similar to the Ted character in the movie.

Tom Cruise, along with ten other defendants was sued for $1 billion for allegedly stealing the idea for the plot of *Mission Impossible – Ghost Protocol*. The plaintiff alleges that his original 1988 script for *Head On* was shown to Tom Cruise's agent. On watching the *Mission Impossible* movie, the plaintiff alleged that the script for the movie has been illegally written and produced from *Head On*.

The author of two autobiographical books about her upbringing in the Andean mountains of Peru has filed a lawsuit alleging that Disney stole her story, characters, plots, and subplots, to create the movie *Frozen*. The author claims that her works include a betrayal, as her first love played with her affections and did not return her love; the plaintiff compared that with Anna's first love Hans who played with her affections and did not return her love. There was no mention of a talking snowman in the plaintiff's books. Disney representatives have stated that the plaintiff needs to "let it go".

James Cameron has been sued at least eight times over claims that the movie *Avatar* stole the storyline of their works. Plaintiffs have claimed that the movie has stolen ideas about blue aliens, flora/plant life, unbreathable atmospheres, and matriarch support of hero vs. heroine.

The crux of all of these lawsuits is the consideration of whether a copying or a substantial copying of the stories took place.

Originality in Storytelling

At first glance, it seems as if writing an original story should be quite simple. However, if you read some academic books on stories, you will hear claims that every kind of story has already been written, at least as far as the general framework goes. Though the particulars of newly created stories may indeed be original, the fact that a story unfolds in a certain way, the characters have certain experiences, and a certain resolution or ending is achieved, is not something that lends itself to genuine endless possibilities, especially in film which has limits on running time.

Copyright Infringement in the Law

Under the *Copyright Act* the creator of an original story owns it and has the exclusive right to reproduce that story in any form, such as a film. That means that the form of the original story, for example a printed book, is irrelevant to whether the original story was infringed as a result of the making of the film. It is copyright infringement to copy or substantially copy someone else's work without their consent.

The Supreme Court of Canada has stated in *Cinar Corporation* v. *Robinson*, 2013 SCC 73, that its approach to assessing copyright infringement will be a holistic and qualitative one. The Court said that one has to look at two competing works as whole works and not as isolated parts. In assessing whether substantial copying has occurred, the analysis should not be conducted piecemeal where a work is dissected into its component parts. Rather, the cumulative effect of the features copied from the original

work must be considered to determine whether those features amounted to a substantial part of the original work. In determining substantial copying, the Court said you have to assess whether the copied features constitute a substantial part of the plaintiff's work, not whether they amount to a substantial part of the defendant's work. Simply because a defendant has altered copied features or integrated them into a work that is noticeably different from the plaintiff's work does not necessarily preclude a claim that substantial copying of a work has occurred.

As a result, a court's approach, when assessing allegations of infringement, will be to examine the story as a whole, so an underlying similar or identical narrative will not be determinative of whether infringement happened. Instead, the examination will look at the narrative and all other elements in the story, such as characterization, to determine whether a succeeding work infringed the copyright of the first work. Further, a court will have to examine whether the features the defendant is alleged to have copied constitute a substantial part of the plaintiff's work.

Infringement of a Story in Film

As the holistic and qualitative approach is the method to determine copyright infringement in Canada, it stands to reason that plaintiffs who believe that their stories have been unfairly used in films will launch lawsuits against such alleged infringement. The reason being is that it is very difficult to predict what kind of decisions a court will make under the holistic and qualitative approach.

In that case, filmmakers need to carefully document who contributed what to a film script and ensure that all legal rights have been managed. It is critical that scriptwriters and others who work on the original plot for a film detail carefully how and when the plot for the film took shape. In actions where film makers were able to establish that they completed the script well before a plaintiff sent their own script to the film production company, lawsuits were quickly dispensed with. Furthermore, filmmakers should avoid to the greatest extent all unsolicited idea and draft scripts sent to them in order to limit their liability from the lawsuits sure to follow a successful film. And if filmmakers do draw inspiration from other people's stories, they must make sure that they do not copy a substantial part of the other party's work. ■

Ryan Smith is a lawyer and trademark agent at Feltmate Delibato Heagle LLP. Ryan can be reached at 905-287-2215 and rsmith@fdhlawyers.com.

The Hamilton Law Association's Family Law Subcommittee presents..

Family Law Seminar
"What's the Right Number?"
& The Patricia Wallace Community Service Award

Thursday, April 9th, 2015

12:00 pm to 5:00 pm

Royal Pavilion B | The Crowne Plaza Hamilton | 150 King Street East, Hamilton

TOPICS & SPEAKERS

- **Introduction & Presentation of HLA Patricia Wallace Community Service Award to D. Gordon F. Morton, Q.C., C.S.**

- **Considerations in Determining Child Support Under Section 9** | Presented by: Mr. Justice George Czutrin, Senior Family Judge, Superior Court of Justice (Family)
- **The Grey Divorce: 55 and Up** | Presented by: Marion Korn and Eva Sachs, Mutual Solutions Inc.
- **Panel Discussion: Different Perspectives / Different Roles** | Panelists: Madam Justice Caroline Brown, Superior Court of Justice (Family); Michael Carnegie, Taylor Leibow LLP; Lene Madsen, Bluewater Mediation; and Robert J. Murdoch, Sole Practitioner
- **Question & Answer Period** | Moderated by: Vicky Ringuette, Bingham Ringuette LLP

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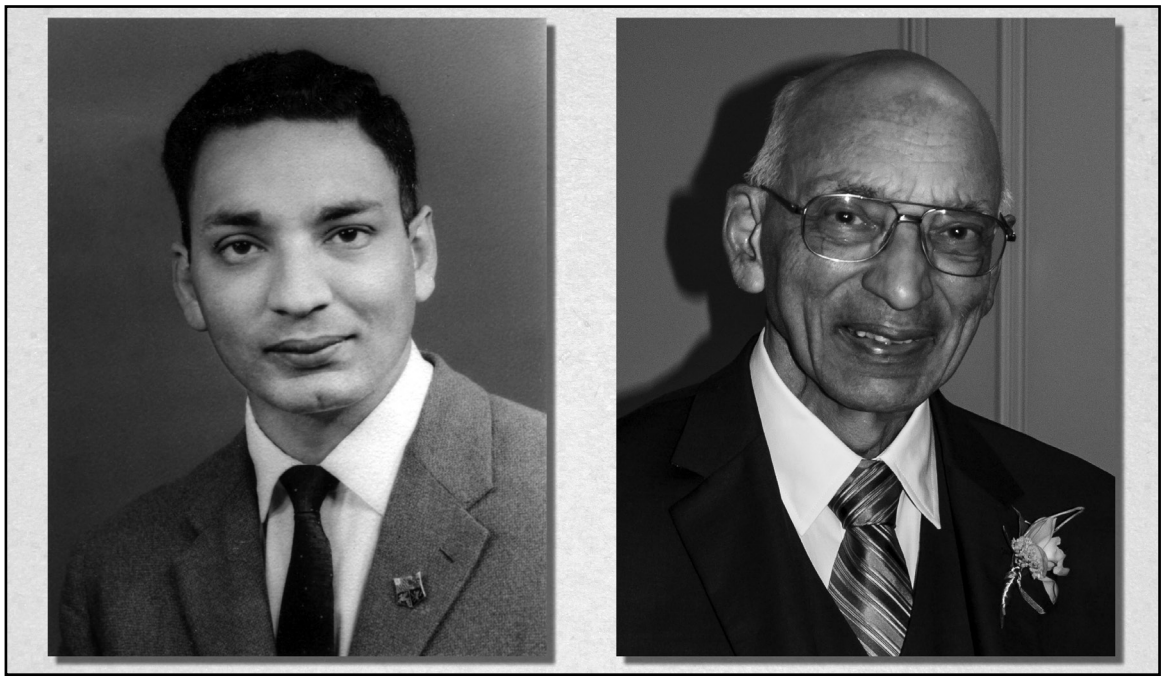
In Memoriam:
Krishan (Kris) Kumar Channan
LL.B, LL.M.
April 16, 1987 - December 15, 2014



Barrister, Solicitor, Notary Public (Ontario, Alberta and England), Attorney & Counsellor at Law (N.Y.)
Member Masonic Lodge and Royal Arch St. John Chapter No. 6, Knight Templar, Ionic 549

A lifelong learner

After a year of multiple afflictions, peacefully at sleep with a smile, surrounded by his family and love on December 15, 2014, Kris passed away in his 77th year.

Born in Kisumu, Kenya to the late Shanti Bai (nee Sahajpal) and the late Dev Dhar Channan, Kris leaves behind his loving wife Adrien (nee Tait), his beloved son Dr. Peter (Dr. Heather Badalato), his pride and joy, his granddaughters Alexis and Olivia, his brothers, brother-in-law, sisters-in-law and their families.

Kris studied the law at Lincoln's Inn and at the Law Society's School of Law and the University of London in England where he earned his LL.B., and LL.M. degrees, Barrister and Solicitor, and at the Law Society of Upper Canada where he earned his Barrister and Solicitor. Kris was called to the bar in 1972 in Canada.

Kris was the fourth child of a family of five brothers; he was only four years old when his father passed away. A life of hardship, determination and perseverance followed. Kris was determined to get an education and become a lawyer, a dream since he was an eleven year old, after reading a biography of Abraham Lincoln. He saved all his money so that he could go to England from Kenya to study. He was admitted to practice law in 1967 in England. While in England he met and married the beautiful Adrien, his lifelong partner, his strength and his supporter.

In 1970 Kris and Adrien immigrated to Canada, a land that he was proud to live in. He helped all his brothers move from Kenya and England to Canada as he was convinced that Canada would provide them and their children education and opportunity. He was right. Each and every one of his brothers, their spouses, nieces and nephews has gone on to successful

careers in Canada. But his true pride was his son Dr. Peter Channan.

Kris believed in helping people. He was a Liberal candidate for Hamilton Mountain in the provincial government and was named the Pilipino Canadian Association of Hamilton Man of the Year in 1996 – the only non-Filipino to be awarded this honour. He helped with the founding of the Hamilton Redbirds baseball team and provided service to the Hamilton community.

He was a passionate learner and encouraged everyone around him to constantly learn. He went to night classes and took online courses always expanding his knowledge. Although a lawyer by profession, he read medical books for fun. He took classes on how to refinish furniture, photography and a myriad of other subjects, nothing was off limits. He read the encyclopedia from cover to cover, read a page of the dictionary a day and tried to convince his not so studious family members to do the same! Even a couple of weeks prior to his passing, he was re-reading the Windows 7 manual "to refresh his knowledge"! To say he loved studying was an understatement.

Kris loved his family, learning, golf and travelling. He was a fighter. Whether it was fighting for his family, his dreams, his friends, his clients or his health he never gave up and many a time teetered on the edge but valiantly fought his way back. Now it is time for Kris to rest.

The entire family are very thankful to the wonderful care he received by the physicians, nurses, and all multidisciplinary staff at Hamilton Health Sciences as well as St. Joseph's Healthcare Hamilton ER, medicine wards, CCU, and ICU. We are especially thankful to Dr. H. Tihal, Dr. C. Allan, Dr. M. Switchuk and Dr. D. Cook.

Remembrance Day 2014:
Centenary event featured Honorary Call to Bar

The Law Society of Upper Canada Gazette

Between 1914-18, hundreds of young men aspiring to join Ontario's growing legal profession put their studies on hold to serve their country in what was then called the "Great War."

Most returned from the trenches of the First World War, were called to the Bar of Ontario and became lawyers. Others were not as fortunate.

Each year, as the names of lawyers and law students who perished during the war are read aloud at the Law Society's annual Remembrance Day ceremony, the students' names are followed by the words, "never called." That changed on Nov. 10 when the Law Society held an honorary Call to the Bar for this group of students as part of a special Remembrance Day ceremony to commemorate the Centenary of the outset of the First World War.

"Throughout history, we've seen that war is often an outcome when political leaders fail to uphold the supremacy of the rule of law," said Law Society Treasurer Janet E. Minor, before the ceremony.

"Our annual Remembrance Day service helps people realize and appreciate the hardships and losses of war — and this year's Honorary Call will highlight and acknowledge the sacrifice made by the young law students who volunteered to serve their country during World War I and lost their lives at the threshold of joining the profession."

The Honorary Call ceremony was the brainchild of Toronto lawyer Patrick Shea, who became inspired after attending Remembrance Day ceremonies at Osgoode Hall.

"I thought we should do something in tandem with the 100th anniversary of World War I, by providing these men and their families with what the fates denied them almost a century ago," he explained.

A former Reserve Officer in the Canadian Armed Forces and a partner at Gowling Lafleur Henderson LLP, Shea proposed the idea to former Treasurer Thomas Conway in 2013. It was accepted and the 'Great War Law Student Memorial Project' was launched.

Shea spent almost two years scouring through archives in Toronto and Ottawa to find out more about the

fallen students so he could create detailed biographies, complete with photos.

Through his exhaustive research, he was successful in locating several family members of the soldiers; they provided additional details.

The compiled bios were published prior to the November 10th ceremony. Soldiers to be remembered on social media. To further pay tribute to the 59 soldiers, the Law Society tweeted their names all day on Remembrance Day, November 11, 2014. Join the online ceremony at http://twitter.com/lawsocietylsuc.

Incredible loss

Before last night's ceremony, Shea wondered what Ontario's legal profession would have been like if these young men had survived and returned to become lawyers.

"There is so much lost youth," he said. "And there are so many interesting stories. They came from all walks of life, from throughout the province and served in a variety of roles and ranks."

Shea pointed out that in 1914, anyone interested in becoming a lawyer needed to serve as a clerk under a practising lawyer for three or five years, depending on their education (three years for university graduates and five years for high school graduates).

They also were required to attend lectures at Osgoode Hall for three years, pass the necessary examinations and pay the required fees.

The minimum age to seek admittance to law school was 16, while the minimum age to be called to the Bar was 21.

Shea's research showed that the majority of fallen students were between 20 and 25 years old.

"They didn't have to volunteer to serve, but they did," he said.

Hamilton Lawyers in Attendance

Also in attendance were Lieutenant-Colonel Lawrence Hatfield, the commanding officer of the Argyll & Sutherland Highlanders of Canada, and his wife, Shari Hatfield, who are lawyers in Hamilton and members of the Hamilton Law Association. Hatfield was the commanding officer of Corporal Nathan Cirillo, who was fatally shot while doing sentry duty at the National War Memorial in Ottawa on October 22nd, 2014.

The names of the 59 fallen soldiers called to the Bar are as follows:

Private Thomas William Edward Allen
Lieutenant William Kay Anderson
Lieutenant William Douglas Bell
Lieutenant Roy Warren Biggar
Captain Gerald Edward Blake
First Lieutenant Harold Staples Brewster
Captain Stanley Howson Brocklebank, MC
Private Walter Everard Alway Brown
Major Jeffrey Harper Bull, DSO
Lieutenant Lawrence Code
Lieutenant Bryce Thomas Davidson
Gunner Grant Douglas
Second Lieutenant Guy Peirce Dunstan
Private George Clemens Ellis
Cadet Alman Minor Froom
Captain Hal Charles Fryer, MC
Second Lieutenant William Miller Geggie
Lieutenant Francis Malloch Gibson
Lieutenant Ambrose Harold Goodman
Second Lieutenant Thomas Gordon
Captain Oswald Wetherald Grant, MC
Second Lieutenant Robert G. Hamilton
Lieutenant William Neil Hanna
Sargeant Henry Stuart Hayes, MM
Lieutenant Bernard Stanley Heath, MC
Major Hugh Ethelred McCarthy Ince
Private William Adam Irving
Lieutenant Ernest R. Kappele
Private Henry Kelleher
Private Thomas Ewart Kelly
Lieutenant Lloyd Butler Kyles
Captain Edward Joseph Kylie
Lieutenant Geoffrey Lynch-Staunton
Lieutenant George L. B. MacKenzie
Second Lieutenant Roderick Ward MacLennan
Lieutenant George Geoffrey May
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Link to original LSUC Gazette Article:
http://www.lawsocietygazette.ca/news/world-war-centenary-event/

Photographs by: Tim Fraser for the Law Society.

The Effective Use of ADR in Commercial Disputes

Charles Criminisi

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

In the first part of this series I discussed the unique nature of Commercial Disputes and how they lend themselves naturally to the effective use of Alternative Dispute Resolution ("ADR").

In this segment I will focus on the temporal aspect of these disputes.

As is often said in the business world, "time is money". Although this expression is somewhat cliché, it is very relevant when it comes to resolving some business disputes. Using the industrial sector as an example, disputes sometimes arise on the fly: an order is placed and partially filled. The purchaser finds some defect in the material supplied and refuses to pay. The vendor says it's fine and in accordance with what the customer specified. They experience the proverbial stalemate. Production comes to a grinding halt. Similar disputes often arise on construction sites. They happen in the midst of major commercial transactions. All of these situations have one thing in common: a dispute that is holding things up and thereby putting profits at risk.

Business owners who find themselves in these situations and their legal advisors have a wonderful tool at their disposal: Real time mediation and arbitration. This can be a perfect adjunct or alternative to real time litigation. Commercial litigators are familiar with these types of files and rarely forget them because they become all consuming, time sucking endeavors that move so fast that it is difficult to keep up with the torrent of facts, arguments, new developments, motions, factums, etc. Calling on a Mediator or Arbitrator early in the process helps the parties to resolve their dispute before it escalates into something larger and more difficult to fix.

These early attempts at dispute resolution can be made even more efficient by the recognition that, notwithstanding the above noted flurry of activity and apparent complication, most of these cases have at their core one or two issues upon which everything turns. Astute counsel can isolate those issues and either litigate them or, better yet, put them before a Mediator or Arbitrator for an early resolution. By doing so they cut down the amount of time and money spent on the dispute. They also provide a great service to their clients who simply want to resolve matters and move on with production, construction, deal-making or whatever it is they are working on. The above noted isolation or narrowing of the issues facilitates the process of dispute resolution in that it cuts away the "noise" and gets to the heart of the matter. It allows the Mediator, or Arbitrator to hone in and help the parties to unlock the stalemate.

In future installments of this series I will address other topics such as:

- "Test driving" the issues
- Arbitration / Mediation 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 or visit me at www.commercialmediations.com ■

The Hamilton Law Association presents…

THE 10th ANNUAL CURRENT ISSUES IN COMMERCIAL LITIGATION SEMINAR

WEDNESDAY, FEBRUARY 25th, 2015 – 9:00 a.m. to 1:45 p.m.

Sheraton Hotel Hamilton, East Ballroom (116 King Street West, Hamilton)

Host: Mark Abradjian, *Ross & McBride LLP*

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AGENDA

8:30 a.m. – 8:55 a.m. **Registration & Refreshments**

8:55 a.m. – 9:05 a.m. **Introduction & Opening Remarks**

9:05 a.m. – 9:35 a.m. **Top Tax Tips & Pitfalls for Commercial Litigators**
Presented by: **John Loukidelis**, *Loukidelis Professional Corporation*

9:40 a.m. – 10:10 a.m. **Claims against Professionals**
Presented by: **Nicholas A. Richter**, *Barrister & Solicitor*

10:15 a.m. – 10:45 a.m. ***(professionalism content)*** **Effective Mediation Advocacy**
Presented by: **The Honourable Mr. George Adams**, *Adams ADR Services Ltd.*

10:50 a.m. – 11:05 a.m. **Break**

11:10 a.m. – 11:55 a.m. ***(professionalism content)*** **Issues in Acting for a Corporation**
Who's your Client: **John M. Wigle**, *SimpsonWigle LAW LLP*
Derivative Claims vs. Oppression Claims: **Michal Bordin**, *ESB Lawyers LLP*
Indoor Management Rule and Ostensible Authority: **Colleen Yamashita**, *Scarfone Hawkins LLP*

12:00 p.m. – 12:20 p.m. **Limitation Issues in Commercial Litigation**

- What constitutes an acknowledgment of debt?
- When does the limitation period run in cases of ongoing oppression?
- How much "damage" do you need before the limitation period begins to run?

Presented by: **J. Ross MacFarlane**, Flett Beccario

12:25 p.m. – 12:45 p.m. ***(professionalism content)*** **What We Can Learn From Hollywood about Advocacy: A Multimedia Presentation & Closing Remarks**
Presented by: **David Thompson**, *Scarfone Hawkins LLP*

12:45 p.m. – 1:45 p.m. **Lunch (Included)**

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CALENDAR OF EVENTS

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)
For more information please contact Dana Brown at 905-522-1563.

Wednesday, February 25, 2015
The 10th Annual Commercial Litigation Seminar
9:00 a.m. - 1:45 p.m.
The Sheraton Hotel
(116 King Street West, Hamilton)
For more information please contact Riane Leonard at 905-522-1563.

Thursday, March 5, 2015
HLA Solicitors' Dinner
5:30 p.m. - 8:30 p,m.
The Hamilton Club
(6 Main Street West, Hamilton)
For more information please contact Mackenzie Faus at 905-522-1563.

Tuesday, March 24, 2015
HLA CPD Technology Roundtable Session "Best Practices with Technology"
12:15 p.m. - 1:30 p.m.
John Sopinka Courthouse
(45 Main Street East, Hamilton)
For more information please contact Mackenzie Faus at 905-522-1563.

Thursday, April 9, 2015
Family Law Seminar "What's the Right Number?"
12:00 p.m. - 5:00 p.m.
The Crowne Plaza Hamilton
(150 King Street East, Hamilton)
For more information please contact Chris Wyskiel at 905-522-1563.

Thursday, April 16, 2015
HLA Annual Dinner
5:30 p.m. - 9:30 p.m.
Liuna Station
(360 James Street North, Hamilton)
For more information please contact Mackenzie Faus at 905-522-1563.

Thursday, April 30, 2015
The 29th Annual Joint Insurance Seminar
8:00 a.m. - 3:30 p.m.
The Hamilton Convention Centre
(1 Summers Lane, Hamilton)
For more information please contact Dana Brown at 905-522-1563.

For a complete, up-to-date listing of all events, please visit our website at:
http://www.hamiltonlaw.on.ca/events-cpd

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HLA MEMORY BOOK
Some lawyers have expressed an interest in the idea of creating an HLA "History Book". The purpose of the book would be to preserve the history of the HLA and its members, primarily through creating and publishing brief biographies of HLA members. I have volunteered to chair a steering committee that would explore this concept and then make a proposal to the HLA for creating such a book. If you are interested in serving on the committee, please contact me at john@jltax.ca or (289) 799-9509.

You are cordially invited to a

Solicitors' Dinner

Presented by the Hamilton Law Association's
Corporate Commercial & Real Estate
Subcommittees

to be held on
Thursday, March 5, 2015
at the **Hamilton Club**
6 Main Street East Hamilton

Cost: **$75.00** (HST included)

Cocktails at 5:30 p.m.
Dinner at 6:30 p.m.

Please make cheque payable to:
The Hamilton Law Association
45 Main Street East, Suite 500 Hamilton, ON
L8N 2B7

Please RSVP to Riane Leonard by February 26, 2015
as pre-selections are required
905.522.1563 or rleonard@hamiltonlaw.on.ca

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