The Hamilton Law Association

HLA JOURNAL

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President's Report

Hussein Hamdani

As I have previously written, part of the aim of the HLA is to promote a sense of community amongst the local lawyers. Belonging to a community holds profound significance in shaping individual well-being and societal cohesion. Human beings are inherently social creatures, and the need for connection, understanding, and shared experiences is deeply ingrained in our nature. The HLA believes that sustaining and supporting a legal community is crucial.

The HLA builds community in many ways. For instance, by providing lawyers an opportunity to gather and to learn together, to socialize together, and to celebrate individual and collective accomplishments.

I would like to recognize the accomplishment of one of our most esteemed members of the legal community, Mr. Jim Scarfone. Recently, Jim was awarded the HLA's Ed Orzel Award for excellence in trial advocacy. For some of you who may not know Jim, please allow me to share a bit about his background. After completing his articles in 1975 (he was the articling student of Ed Orzel, as it turns out), Jim started a new law firm in Hamilton with two new lawyers. That small firm of Brown Scarfone Fernihough has grown over the decades into Scarfone Hawkins LLP, one of the pre-eminent law firms in the city with over 35 lawyers. If you are doing the math, that means that Jim has been practicing law for 50 years, all in Hamilton, and from what I have been told, he is not slowing down on this litigation practice. His endurance should be an inspiration to us all.

Some of Jim's notable professional memberships include past president and founding member of the Ontario Trial Lawyers' Association; Hamilton-Wentworth Legal Aid Committee (Past Chair), Mohawk College Law Clerks Advisory Committee, past president of the HLA, and an elected bencher of the Law Society of Upper Canada (as it was known then) from 2011 to 2015.

I have been told by those who know Jim well, that he is an excellent mentor and considerate soul. We are truly blessed to have Jim in our Hamilton legal community. Congratulations once again Jim on winning the HLA Ed Orzel Award!

Another way that the HLA tries to form a legal community is by hosting social events from time to time that members are invited to participate in. On February 29th, the HLA hosted the Annual Solicitors' Dinner at the Hamilton Club. It was another sold out event this year. The Solicitors' Dinner is jointly hosted by three subcommittees of the HLA – the Estates and

continued on page 3

In This Issue

THE HAMILTON LAW ASSOCIATION

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HLA Journal

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The Hamilton Law Association Journal is primarily a volunteer written publication, including contributions by Hamilton Law Association members and staff, published bi-monthly, primarily for the benefit of lawyers within the municipal boundaries of the city of Hamilton. As a volunteer written publication, the patience and flexibility of all writers and readers is greatly appreciated.

Any opinions or views published in the HLA Journal are those of the contributor and not necessarily the opinions or views of the Association or the Managing Editor, and neither the Association nor the Managing Editor accepts responsibility for them. The Managing Editor reserves the right to publish or not. The Managing Editor may refer issues including the decision of whether to publish or not publish articles to the President of the HLA or the Board of Trustees.

The Article Submission Policy is currently under review.
Opportunity will be provided to all members for comment.

Publication of any advertisement should not be deemed an endorsement of the products or services advertised.

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Trusts, the Real Estate, and the Corporate Commercial. It gives an opportunity to solicitors to gather and enjoy a night of revelry and good times. This year, Patrick Mc Ilhone and I M.C.'ed the event.

I had the honour of sitting beside current LSO bencher and former president of the HLA, Mr. Andrew Spurgeon. Andrew asked me if I knew the reason the HLA started the Solicitors' Dinner. Like most lawyers, when I did not know the answer, I just made something up hoping to sound intelligent. Well, my answer was wrong, and Andrew was kind enough to explain the genesis of the Solicitors' Dinner.

As some of the members may recall, prior to the year 2000, if you wanted to convey real property, you or a representative of your law firm physically attended the land registry office in the Ontario municipal building to meet with a representative of the other party. At that point, you physically exchanged paperwork, documents, and funds and walked together to the teller to attempt to register the transfer of title. Fortunately for me, I articled at SimpsonWigle in 2000 and I had the opportunity to witness the majestic chaos of the land registry office when lawyers, clerks, and articling students tried to find one another to close a deal. It was a beautiful site but a hectic gathering. However, Teranet was established to convert and automate the land registry system from an archaic paper-based system to an electronic database. Hamilton was one of the first cities where this new system rolled out. From that point onward, lawyers did not attend in person at the registry office but could close real estate transactions from the comfort of their offices. It has been a welcome addition to a practitioner's life.

One consequence with the change is that real estate lawyers were no longer meeting together at the registry office. All these deals were being concluded electronically at the respective lawyer's offices. The HLA recognized this loss and started hosting the Solicitors' Dinner so that these transactional lawyers could still have at least one opportunity to meet and greet one another.

I thanked Andrew for educating me on the history of the Solicitors' Dinner and the insight that the HLA had at the turn of the millennium. We are fortunate to have such institutional memory like Andrew around.

Speaking of institutional memory, there is probably no one more important to the HLA in the last quarter century then the current Executive Director, Ms. Rebecca Bentham. Rebecca has dutifully served the HLA for over 25 years. Earlier this year, Rebecca notified me that she plans to retire as the E.D. of the HLA in a few months. More information will be forthcoming regarding when and where the HLA intends to recognize Rebecca's contributions to the organization, where more words and ink will be used to try to capture the impact that Rebecca has had on the HLA. But I want to take this opportunity to thank Rebecca on behalf of the HLA and its members for her years of sacrifice and service. She has touched the lives of thousands of lawyers who have practiced in Hamilton over the years. Thank you, Rebecca, for all that you have done and continue to do for lawyers in Hamilton. You have touched the professional lives of many of us and we appreciate you. ■

Report from the Executive Director

Rebecca Bentham

A FOND FAREWELL

I started at the Hamilton Law Association on Monday, March 9th, 1999. It was a chilly day and I remember entering the library at the old courthouse at 55 Main Street East, filled with dismay and trepidation as I surveyed the shag carpeting. I shared a 1950's teacher's desk with another person, with whom I also shared a computer that boasted dial-up internet access. The library was a bustling place, and the library staff of the day seemed professional and knowledgeable. I wondered what I was doing here as I reflected on the government job I had given up, all the while reviewing the financial statements of The Hamilton Law Association, I resolved to do my best.

A few days after I started, I attended my first board meeting. Larry Bremner, an enormously erudite and kind man, at that time from Martin and Martin, was the current chair. Paul Dixon, whom I initially feared but came to like and admire, asked me with some impatience when I would have a handle on the finances. Fearing that success was not possible, I enrolled in a master's degree at McMaster University and began to study part-time.

Not long afterward, John Evans and Dermot Nolan summoned me to provide input regarding the new lounge being planned for the suite on the 5th floor of 45 Main. (Mr. Evans Senior provided funding for the lounge which was greatly appreciated). We secretly regarded each other, mutually weighing the threats and opportunities respectively presented. I am not sure what they thought, but eventually I seemed to gain their acceptance, and in due course, a very nice lounge appeared that gave offense to none.

Little by little I became more at home at the HLA, and was able to appreciate the tremendous vision and determination evidenced by the procession of volunteers at the association. We worked together to demonstrate conclusively to the lawyers of the province that Hamilton is second to none, through our state-of-the-art library, lounge, and courthouse, as well as our education offerings, Journal, and our participation with the Law Society of Ontario and numerous other legal organizations. On page two of this Journal, you will have found a list of presidents of the association; the majority of these volunteered for more than 1000 hours each. For many, what started out as a humdrum responsibility became an adventure, enhancing their overview of the profession, with all its summits and perils, as well as a chance to forge new friendships – many of them lifelong.

What started out for me as a job became a mission, and a life filled with interesting people, problems, and a whirl of committee meetings, wherein I tried to help our volunteers achieve their vision as best as I could. Look-

ing up from my desk, I realize that 25 years have flown by and that it is time for me to acknowledge the influence of time, to lay down my tools and busy myself with a new chapter of life. I enjoyed working with every president, volunteer, and member, and acknowledge that my life has been made incomparably richer by their efforts. I would like to particularly acknowledge Helen Pelton, who initially hired me and became a lifelong friend until her passing, as well as Virginia McKenna, who recruited me to the position, and finally, Justice Kendra Coats. These three individuals provided the HLA and I with an ocean of input that continues to benefit the membership each and every day.

I would also like to thank our current staff Shega Berisha, Nicole Strandholm, Stephanie Zordan, Maria Morales, and Cat Workman. We have had a wonderful procession of staff over the years. I want to thank Wendy Spearing especially for her contributions to the HLA over the incredible 22 years she served our membership. I would also like to thank our President, Hussein Hamdani and the members of the Board of Trustees: Andrew Keesmaat, Colleen Yamashita, Laura Dickson, Eric Nanayakkara, Paul Lawson, Li Cheng, Lacey Bazoian, Andrea Hill, Sean Heeley, Renee Roy, Patrick Mc Ilhone, and David van der Woerd for your service, your leadership, and your guidance.

I can never thank you enough for the privilege of such a wonderful working life, for your trust, your kindness, and for sharing with me your ingenuity, knowledge, and determination. I am humbled by your talents, as well as your achievements, and wish you every success on your continued journey.

EVENTS UPDATE

On February 29th, The Hamilton Law Association held its Solicitors' Dinner at the Hamilton Club. This lively event was well attended and received. Thank you to our incredible Event Specialist, Stephanie Zordan, for her efforts in organizing this wonderful event and to our fabulous hosts Hussein Hamdani and Patrick Mc Ilhone for making it all so memorable.

We have had a highly successful start to the year with respect to CPD events. Our 19th Annual Commercial Litigation Seminar received exceedingly positive reviews. Thank you to the planners of the seminar George Limberis of SimpsonWigle Law LLP, Eric Nanayakkara of Regency Law Group and Michael Stanton of Scarfone Hawkins LLP and thank you to all the wonderful speakers.

I look forward to our many upcoming quality in-person CPD programs scheduled for the spring, most notably our Real Estate Workshop to be held on April 11th, the 22nd Annual Advocacy Conference to be held on April 16th, the 22nd Annual Estate and Trusts update to be held on April 25th, and our Professionalism Session to be held on May 7th. Don't forget to mark your calendars for our Annual General Meeting, to be held on May 16th. Thank you to all our volunteer planners and speakers for giving their time and expertise in support of the Association.

Finally, I would like to acknowledge the departure of Kubra Solmaz, our Library Coordinator who departed the HLA effective March 1st, 2024. Kubra was an outstanding, helpful, and dynamic colleague, who worked hard to serve the members of the HLA. We wish her every success in her new endeavors!■

Librarian's Report

Shega Berisha

Although I have been with the Hamilton Law Association (HLA) for almost 5 years, this is my first time addressing you through the Librarian's Report.

I would also like to begin my report by acknowledging the upcoming retirement of Rebecca Bentham, our long-time Executive Director. The HLA staff owe Rebecca a debt of gratitude for her leadership, guidance, and support over the years. She has truly built the association into what it is today, and I have enjoyed my time working and learning from her. We all wish her a rewarding and enjoyable retirement.

The HLA welcomed a new member to the team on March 11th, 2024, Carroll-Lynn (Cat) Workman. Cat is our new Library and Office Assistant, and she has training and experience as a Library Technician. For more information, please see her biography:

"Carroll-Lynn (Cat) Workman has always had a deep love for libraries and reading. After getting all her high school volunteer hours at her local library, she went to Seneca college in Toronto to get a degree in Library and Information Technology. The job market being was it is, meant that after finishing school her library dreams were dashed, and she instead started working in the technical support field. After many interesting years she has now landed the position of Office and Library assistant at Hamiliton Law association. She is already anticipating all the things she will learn and how she can contribute to this wonderful association."

Please join me in welcoming Cat to the team!

As we have done many times over the past 15 years, the HLA is surveying our members to develop an accurate and detailed profile of our membership. The information collected from the survey will help us better meet the changing needs of our membership. The survey and analysis are being done by an external consultant (Gerald Bierling), who has helped us with this in the past. The data will be used only to produce statistical summaries in the form of tables and graphs by Gerald. Only he will have access to individual responses.

The survey is completely anonymous and will only take about 5 minutes to complete. You can access the survey at the following link: https://www.surveymonkey.com/r/hla2024

The New Lawyers' Subcommittee held a charity fundraising competition that took place from Friday, February 9th until March 11th, 2024. The donations

went directly to Food4Kids Hamilton, which is a Hamilton based organization that provides healthy food to elementary and secondary school students with little or no access to food during the weekend and summer months. For more information, please visit the following website: https://www.food4kidshamilton.ca/. Thank you to Braden Adsett of *Lamont Law*, Jarrett Putt of *Ross & McBride LLP*, and Alexandra Petermann of *Ross & McBride LLP* for leading this initiative, and thank you to Stephanie Zordan for all of your hard work in organizing this fundraising competition.

We had over eight firms participate in the charity fundraiser, and we thank them all for their contributions to the Hamilton community. However, I would like to acknowledge the first-place winner of the charity fundraising competition, Ross & McBride LLP, led by subcommittee members Jarret Putt, Alexandra Petermann, and Greta Ladanyi. Please see the image above! Additionally, I would like to acknowledge the firm that came in second place, AgroZaffiro LLP, led by subcommittee members Effie Lin and Ally Buchanan.

Libraries are a complex and dynamic network of information, resources, and people, and particularly here at the HLA, our libraries' most valuable resource is our membership. With that being said, I would like to take this opportunity to highlight some of the new books that we have available at the HLA. Please see the list below:

- MacDonald, Wilton, 2024 Annotated Ontario Family Law Act; Thompson Reuters
- Snyder, 2024 Annotated Canada Labour Code; Thompson Reuters
- Watson & McGowan, Ontario Civil Practice; Thompson Reuters

Please don't hesitate to reach out to us by emailing reference@hamiltonlaw.on.ca or calling 905-522-1563 with any research or library related questions! ■

Corporate Commercial News

David van der Woerd

CHANGING HOUSING MARKETS CREATE CLASH BETWEEN CONDOMINIUM ACT AND RESIDENTIAL TENANCIES ACT

With multi-generational housing on the rise and housing affordability at a critical low, the Divisional Court put an important cap on section 51 of the Residential Tenancies Act 2006 S.O. 2006, c.17 ("RTA") in their recent decision, *Smith v. Gega* et al, 2023 ONSC 4723 ("*Gega*"). The decision sheds light on a dangerous ramification of this arcane section of the RTA in the backdrop of the current housing market in Canada and created a crucial precedent in protecting affordable housing.

For context, section 51(1) of the RTA serves to protect tenants who's units are converted into condominiums from being evicted by landlords for personal use, or renovations under sections 48 and 49 of the RTA. This section, in effect, places tenant rights above ownership rights. The issue put in front of the Divisional Court in *Gega*, is whether this right could apply to "heirs" of the tenant, potentially creating a powerful right that extends for generations, effectively creating an indefinite un-evictable tenancy.

The appellant, Smith, was a 59 year old woman who grew up in a rental unit where she lived continuously with her parents until their passing in 2015 and 2018, after which she continued to reside as a tenant at the property. The fixed-term lease was signed by her parents in 1978 prior to the unit being converted to a condominium. The Board found she was not a tenant in her own right at the time the Condominium Declaration was prepared, however, Smith further argued that the definition of "tenant" under section 2(1) of the RTA includes "the tenant's heirs", submitting that she was an heir to her parents at the time that the Condominium Declaration was prepared, and therefore she could not be evicted pursuant to Section 51(1) of the RTA.[1]

The Honourable Justice Wilkinson found that Smith was not a tenant as defined in 2(1) of the RTA and unable to access the protection provided to tenants in section 51(1) thereby avoiding a potentially devastating consequence of an indefinite un-evictable tenancy. This is a particularly crucial precedent when considering the current housing market in Ontario.

According to Canada Mortgage and Housing Corporation (CMHC), restoring housing affordability in Canada would require an additional 3.5 million affordable housing units to be available on the market by 2030. Condominiums are often the first step in creating entry-level housing for people to enter the market, therefore, there is an incentive for developers to convert residential rental units into condominiums which would subsequently fall under the protection of section 51.

It is undoubtable that protecting tenants in rental units in these cases contributes to housing affordability and plays an important role. However, it also creates a dangerous risk when coupled with the related consequence of the affordability crisis, being the rise in multigenerational living arrangements as young adults are unable to afford living on their own. Statistics Canada in 2021 reported the number of homes being shared by multiple generations of a family, two or more families living together or one family living with people they may or may not be related to grew by 45 per cent over the last 20 years, with only 39% of Canadians between the age of 20 and 34 that lived without their parents, down from almost 50% in 2001.[2]

1 Smith v. Gega, 2023 ONSC 4723 (CanLII), at para 10.

2 StatCan: Multi-generational

Therefore, if not for the decision in *Gega*, section 51 could potentially expand for generations, making it impossible for any owner, current or future, to live in the unit they purchased. This completely contradicts the purpose of most first-time home buyers looking to gain independence, placing their life savings into an entry-level condo and substantial mortgage payments, only to find themselves homeless.

An example of this was recently reported in an article in The Globe and Mail where at least three buyers purchased townhouses in a project development in Cambridge, Ontario that were rented prior to 1986 and converted into condominiums. The buyer purchased a 3 bedroom townhouse during the peak of a frenzied real estate market in 2022 for $485,000, however, section 51 protected the tenant he inherited as part of the Agreement of Purchase and Sale, leaving him to cover a $21,000/month mortgage payment while renting a $2,000/month apartment for his family of 5, with the rent of the purchased unit only covering less than a third of his costs at $1,300.[3] While this represents a good lesson in caveat emptor, it also illustrates an unwelcome absurdity of section 51 which would have been exacerbated, but for the Gega decision. Not to mention the property value of such condos would inevitably decrease due to their limitations in use and become extremely difficult to sell.

Furthermore, in limiting the definition of "tenant's heir", *Gega* has the potential to set an important precedent in the 65+ senior residential setting. A common response to plurality of cultures in Canada and the increasing cost of housing has been an onset of multi-generational housing. Even seniors only communities, such as care facilities or aging in place communities, or event life lease complexes are feeling the pressures where there is downward trending of the age of the occupants, such as where children move in with their parents under the rubric of being care givers but also to alleviate financial stresses, which can disrupt the culture and climate of seniors' communities. Multi-generational housing complexes must find ways to accommodate a broadened population, and face challenges of maintaining community or cultural harmony while preserving the reasonable enjoyment of all the residents. Despite section 51 seeming to be a rare occurrence,[4]

homes rising amid increasing costs | CTV News

3 Reluctant landlords: Condo buyers find they are unable to evict tenants - The Globe and Mail

4 Reluctant landlords: Condo buyers find they are unable to evict tenants - The Globe and Mail

the current housing market seems to have created a rise in potential issues surrounding its effect on commercial and residential leasing. In limiting the definition of "tenant's heirs", *Gega* has mitigated the damages of section 51 in relation to multigenerational housing. ■

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Q. What do you get when you mix 26 lawyers, 4 judges and 1 paralegal with a world renowned director, a professional theatre company and the stage adaptation of a best picture Oscar winning film classic?
A. You get:
The Hamilton Lawyers' Show 2024
The Sting
by David Rogers
Four Performances Only!
May 30th, 31st & June 1st, 2024
ALL TICKETS $60.00
Don't wait until they're sold out – Order your tickets NOW!
Call: Theatre Aquarius box office at 905-522-7529
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Criminal Law News

Geoff Read

LEGAL AID ONTARIO CRIMINAL TARIFF IMPROVEMENTS

Some welcomed relief for those who accept legal aid was announced by Legal Aid Ontario on February 27, 2024. Once again, with permission of Daniel Brown, President of the *Criminal Lawyers Association*, here's his summary of the tariff improvements, although he cautions that it was done in a hurry, and one should check for oneself. For those who don't already know, the *Criminal Lawyers Association* is instrumental in negotiating these improvements and is one of the best bangs-for-your-buck for members of the Criminal Law Bar.

These tariff changes will apply to all certificates issued after March 4, 2024, and another tariff increase is expected later this year, raising the hourly rate 15% in total since October 2023. The second half of the Phase 2 initiative is expected to be in place by the Fall, which will include the final 5% increase to the hourly tariff and a few other important initiatives. The key changes to this round of increases includes a further 5% bump to the hourly rate and block fees, as well as several further increases to the allotment of hours per certificate.

All trial, including summary and indictable matters now include uncapped court time from the start of the trial. Indictable guilty pleas have been increased to 15 hours preparation for all matters.

Bail matters have also seen an increase in hours allotted. Initial bail hearings without a s. 524 application pay four hours, whereas 524 applications pay five hours. A second bail hearing on a certificate pays an additional four hours where a s. 524 isn't brought. Bail reviews and 90 day "Myers" reviews pay 10 hours.

Gladue submissions at bail or sentencing now pay an additional five hours of preparation, and cases involving clients with mental health issues pay an additional two hours.

Here's the LAO Summary: https://www.legalaid.on.ca/wp-content/uploads/Tariff-reform-2024_Summary-of-changes_Phase2A-EN.pdf.

AMICUS CURIAE

The Supreme Court of Canada described the role, its ambit and the duties of *amicus curiae* in *R. v. Kahsai*, 2023 SCC 20 (CanLII), <https://canlii.ca/t/jzcv2>. Members of the Criminal Defence Bar who accept *amicus* appointments, including *Criminal Code* s. 486.3 appointments to cross-examine on behalf of unrepresented accused, would be well advised to have a look at this instructive decision.

The accused chose to represent himself at his trial on two counts of first-degree murder and was convicted by a jury on both counts. The SCC headnote succinctly summarizes this most challenging situation. When given the opportunity to address the court, he failed to cooperate with the trial process or advance any coherent defence. He was repeatedly excluded from the courtroom and trial process because of his chronically disruptive behaviour. Partway through the trial, the trial judge determined that the appointment of *amicus curiae* was necessary to ensure a fair trial. An *amicus* was appointed to cross-examine Crown witnesses but was instructed not to advocate on behalf of the defence. The accused resisted the appointment and mostly refused to cooperate with the *amicus*.The accused's attempt to deliver his own

closing argument was cut short by the trial judge, who did not solicit any supplementary closing argument from trial *amicus*.

The judgement of the 7-member Court was delivered by Karakatsanis J. who summarized the case in her Overview (para. nos. indicated):

> [1] At issue in this appeal is the proper scope of the role that amicus curiae — a "friend of the court" —can play at criminal trial. When an unrepresented accused seems unable to advance a competent defence, does the guarantee of trial fairness permit or require the trial judge to appoint amicus with an adversarial mandate to advance the interests of the defence?
>
> [2] This appeal invites us to define the limits to the role of amicus. It also presents an opportunity to clarify and affirm the principles established by this Court in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 (CLAO). As I will explain, in exceptional circumstances, the trial judge retains wide discretion to appoint amicus with adversarial functions that can respond to the needs of a particular case. In tailoring the role for amicus, the judge must respect both the right of the accused to conduct their own defence and the right to a fair trial. These principles of fundamental justice, along with the nature of the role, help define the assistance that amicus can provide. While the role of amicus therefore has limits, the scope is broad enough to assist the judge where necessary to ensure a fair trial.
>
> [3] We must also determine whether a miscarriage of justice arose from the circumstances of Mr. Kahsai's trial: Did the delayed and limited appointment of amicus create an appearance of unfairness so serious that it taints the administration of justice?
>
> [4] There is no doubt there was a striking imbalance in this trial. Mr. Kahsai was unrepresented and often excluded from participating in the proceeding because of his disruptive behavior. When he did participate, he advanced no meaningful defence. Although amicus assisted with cross-examination of Crown witnesses and submissions to the court, more

preparation time and a broader adversarial role could have enhanced his ability to advance the interests of the accused.

[5] That said, the law imposes a high standard for proving a miscarriage of justice. The inquiry must consider the circumstances of the trial as a whole. Here, the trial judge faced the difficult task of managing a jury trial that Mr. Kahsai seemed determined to derail. Once it became obvious that Mr. Kahsai would not cooperate with the court or advance any viable defence, the trial judge took several measures to preserve trial fairness and restore balance to the proceeding. This included the appointment of an amicus. Although the trial judge seems to have held the view that amicus could not play a more adversarial role, it is not clear that he would have granted a broader mandate in the circumstances, particularly given Mr. Kahsai's objections to the appointment of the amicus, and he was under no obligation to do so. Any irregularity does not result in a miscarriage of justice. I would dismiss the appeal.

The headnote summarizes the highlights of the decision this way.

The power to appoint *amicus curiae* flows from the inherent jurisdiction of courts to manage their own procedure to ensure a fair trial. In specific and exceptional circumstances, a judge may appoint *amicus* when the judge believes doing so is required for the just adjudication of a case. The role of *amicus* is highly adaptable and can encompass a broad spectrum of functions, including adversarial functions.

However, the role is not without limits, as there are dangers that arise from blending the roles of defence counsel and *amicus*. The court may not appoint *amicus* with functions that would interfere with the right of the accused to represent themselves or undermine the duty of loyalty that an *amicus* owes to the court. Similarly, an *amicus* may not perform functions that would undermine the impartiality of the court, a provincial legal aid scheme or a judicial decision to refuse to grant state-funded counsel to the accused. These dangers preclude appointing *amicus* to assume all of the powers and duties of defence counsel, but they do not impose a bar on appointing *amicus* with defence-like functions when an adversarial perspective is needed to ensure a fair trial.

The discretion to appoint *amicus* and to determine their mandate is informed by the nature of Canada's adversarial system of justice. The adversarial system depends on the ability of parties to advance their own position and to challenge the case presented by an opposing party. A risk of imbalance is particularly acute when an accused is unrepresented. In the vast majority of cases, the duty of the trial judge and Crown counsel to ensure a fair trial for an unrepresented accused will suffice to prevent a miscarriage of justice. However, appointing *amicus* with adversarial functions may be required in unusual cases, including when an unrepresented accused displays symptoms of mental health challenges but is fit to stand trial or where the unrepresented accused refuses to participate in the trial process. Where assistance from the trial judge and the Crown may not suffice, *amicus* can be a flexible tool to maintain the integrity of the trial process. The trial judge is best positioned to determine what help is required and has wide discretion to tailor the *amicus* appointment to the exigencies of a case. Exceptionally,

appointing *amicus* with an adversarial mandate may be necessary, particularly when imbalance in the adversarial process threatens to create a miscarriage of justice.

In determining the scope of an *amicus* appointment, the trial judge should consider the circumstances of the trial as a whole, including the nature and complexity of the charges; whether it is a jury trial or judge alone; the attributes of the accused; whether assistance is needed to test the Crown's case or advance a meaningful defence; and what assistance the Crown and trial judge can provide. The judge should canvass the parties for their perspectives about an *amicus* appointment and should consider whether a limited appointment would suffice. The trial judge should consider whether the mandate assigned to an *amicus* will make a confidentiality order necessary for the *amicus* to effectively discharge their role.

COURTROOM ETIQUETTE

Let's wrap-up with a look at this. Specifically, have a look at *A judge's view: things lawyers do that annoy judges; things they do that impress judges*, a paper presented by the Honourable Justice Joseph W. Quinn at the 2012 Family Law Institute in Toronto on February 10, 2012. Take a moment to find it at https://www.oba.org/en/pdf/JudgesView.pdf. Your time will be rewarded in both entertainment and instruction!

He reviews, with characteristic entertaining and pithy wit, what counsel ought to do and not do when advocating in the courtroom. We all transgress at some point or another, but it is particularly challenging for younger lawyers who have had less opportunity through experience or mentorship (especially with the isolation of the virtual world brought on by Covid) to learn this stuff. This might help and instil justifiable confidence.

And, while we're on this subject, have a look at this amusing but insightful article published in the Law Society Gazette, the publication of record to solicitors in England and Wales. Find it at https://www.lawgazette.co.uk/news/understand-the-judge-and-skip-a-wigging/41037.article. Even allowing for some differences in practice, it's pretty much on the mark for what's best said - or left unsaid - on the courtroom. ■

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Avoidable Addidavit Miscues

David Thomson

"LESS WORDS, NOT MORE"

"UNNECESSARY = NOT NEEDED"

We have all done it. We are creatures of habit and slaves to precedents.

But to improve our written advocacy, we need to break some of those bad habits and re-evaluate our precedents.

Almost every affidavit I see starts with, "I, John Doe, of the City of Hamilton, in the Province of Ontario, make oath and say as follows…". Adhering to the guide of less words rather than more, in almost every case, that opening sentence can be shortened to "I, John Doe, of Hamilton, Ontario…", eliminating 12 words. It may seem like a minor point, however, if you are a Judge reading literally hundreds of affidavits every year, year after year, eliminating even those few words will result in significant time savings and an increase in efficiency. Don't treat the Judge like an idiot. He or she knows that Hamilton is a City and that Ontario is a Province. The title of the document is "Affidavit". The Judge knows the deponent has sworn or affirmed the contents to be true.

On this point, most affidavits start with the deponent stating that he or she verily believes that the contents of the affidavit are true and accurate. More redundancy and unnecessary verbiage.

"Verily" equals "honestly". Duh, it's an affidavit, a sworn document. The Judge assumes that the deponent honestly believes the contents of the affidavit to be true. Once again, eliminating these unnecessary and redundant, antiquated phrases will streamline an affidavit. Multiplied by hundreds of affidavits over many years, will result in increased efficiency.

When it comes to attaching exhibits, most affidavits indicate something along the following lines, "Attached hereto as exhibit "A" to this my affidavit is a true copy of ….". That can be abbreviated to simply "Attached as exhibit "A…". "Hereto as exhibit "A" to this my affidavit…" is again completely unnecessary. It is redundant and pretentious. "A true copy", as opposed to what? An untrue, doctored, altered copy? Again, it is a sworn document. The court assumes that exhibits have not been altered or manipulated.

If you are a fan of one single jurat page covering all exhibits instead of a discreet individual jurat page for each exhibit (which I am a fan of), that does save multiple pages in a record, re-

quiring less scrolling. However, there still has to be a separation between exhibits and an indication on the face of each document which exhibit the document is. Otherwise, there is simply an aggregation of documents without separation, and without an indication that documents are discreet and separate. Further, all exhibits must be properly bookmarked in CaseLines and in your index, so that the Judge can easily navigate the document, rather than scrolling through a lengthy and often endless record.

In drafting an affidavit, and in particular substantive content, ask yourself why you are including information in the affidavit. Is it something that the court needs in order to grant the relief being requested? If not, it is likely irrelevant. Do not include irrelevant and unnecessary information. Include only what is needed.

Most affidavits close with an indication from the deponent that he/she, "I make this affidavit in support of a motion for …. and for no other or improper purpose." Once again, this is a completely unnecessary paragraph. The Judge knows why the affidavit is being filed, and assumes that it is being provided in support of relief being sought from the court, without nefarious intent.

Now, this may seem like a bit of a childish rant, however, if we all attempt to employ these suggestions, I am quite confident that Judges, having to read literally hundreds and hundreds of pages of material every year, will be most appreciative. We ought to be doing anything and everything we can as advocates to streamline the judicial process.

If we all revisit our precedents and make the suggested changes, our new and improved precedents will become the norm. Brevity and simplicity in advocacy is hard. But it is the gold standard.

As Mark Twain said, "I apologize for such a long letter. I didn't have time to write a short one."■

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Family Law Update

Michaela Newman

THE TRIALS AND TRIBULATIONS OF KITCHEN TABLE SEPARATION AGREEMENTS

The term "kitchen table agreement" refers to an agreement wherein the parties (hypothetically) sit down at the kitchen table, roll up their sleeves, and hash out the terms of their separation amongst themselves, without legal input and often without a financial disclosure or a full understanding of their rights and entitlements under the law. The resulting agreements are often informal and unconventional. These agreements are a stark contrast to the formal separation agreements prepared by counsel, typically after the exchange of financial disclosure, and reflective of each party's rights and entitlements under the relevant legislation.

It is not uncommon for one party to ultimately regret the decision to enter into these "kitchen table agreements" – but are these agreements considered legally binding and enforceable? The Supreme Court of Canada recently opined on this question in the case of *Anderson v. Anderson*, 2023 SCC 13.

At the end of a three year marriage, the wife and the husband executed an agreement which essentially provided that each party would retain the property held in their own name and give up all rights to the other's property, except for the family home and the household goods. The agreement was prepared by the wife and executed at the end of a meeting with two friends of the parties, who witnessed its execution. There was no financial disclosure between the parties and neither party had the benefit of independent legal advice before signing. About a year after the agreement was executed, the wife petitioned the Court for a divorce and the husband counter petitioned seeking family property division and arguing that the agreement was signed without legal advice and under duress.

At trial, the judge found that the agreement was not binding and declined to give it any weight. The trial judge instead equalized the net family property under Saskatchewan's family property legislation, the *Family Property Act* ("FPA"), and ordered the wife to pay the husband a net equalization payment of approximately $90,000.00.

The Court of Appeal for Saskatchewan set aside the trial judge's division of family property and found that the agreement was binding. The Court of Appeal applied the framework developed by the Court in *Miglin v. Miglin*, to conclude that the agreement should be afforded great weight. Based on family property values at the date closest in time to the agreement, the Court of Appeal ordered the husband to pay the wife about $5,000.00.

The Supreme Court of Canada allowed the appeal of the Court of Appeal's decision. The Supreme Court found that the agreement was binding and that there was no substantial concern with the fairness of the agreement. The Court relied on the fact that the agreement was "short and uncomplicated" and that it reflected the intention of the parties to effect a clean break from their partnership.

Importantly, the Court held that while a lack of independent legal advice and formal disclosure can undermine informed choice, that was not the case in this matter. The husband could not point to any resulting prejudice that arose from the lack of independent legal advice and/or formal disclosure. These "safeguards" did not undermine the integrity of the bargaining process or the fairness of the agreement, at least in these circumstances. The agreement was therefore entitled to

Welcoming our newest associate

Ross & McBride is pleased to welcome Azin Teimoortagh as our newest associate. Practicing in our Litigation Group, Azin represents a broad range of businesses and individuals in commercial, construction, and estate litigation matters.

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serious consideration given that it reflects the parties' understanding of what division of property was fair in the context of their relationship at the time of separation. Of course, this factor may result in a different outcome in alternative circumstances.

The Court provided helpful guidance for lawyers and future litigants who encounter these types of issues. The Court's jurisprudence on domestic contracts signals to lower courts to approach domestic contracts with caution and to have regard to important procedural protections that help ensure the deal struck is fair. Moreover, while the Court has long supported the freedom of parties to settle their domestic affairs privately, respect for private ordering cannot be permitted to thwart the public policy objectives enshrined in family law legislation. Courts must approach family law settlements with a view to balancing the values of contractual autonomy and certainty with concerns of fairness. In essence, Courts must review domestic contracts with particular sensitivity to the vulnerabilities that can arise in the family law context, without presuming that spouses lack the agency to contract simply because the agreement was negotiated in an emotionally stressful context.

The below is a summary of the key features of the decision, which offers substantive guidance to everyone drafting agreements in the family law context:

- Assuming there is a valid agreement (meaning the agreement reflects the basic hallmarks of a binding contract), the Court's attention shifts to whether the agreement merits consideration in the equalization analysis. The Court must assess the agreement for its procedural integrity, where such concerns are raised. By examining the integrity of the bargaining process for undue pressure, or exploitation of a power imbalance or other vulnerability, the judge can determine whether the parties concluded the agreement freely and understanding its meaning and consequences.

- Once the Court is satisfied that an agreement is entitled to consideration, it may assess the substantive fairness of the agreement, in order to determine how much weight to afford the agreement in fashioning an order for property division. Ultimately, the weight given to the agreement in an order for the distribution of property depends on how its substance accords with what is fair and equitable in the circumstances, considering the objectives and factors of the legislative scheme.

- Given the respect for spousal autonomy reflected in both the legislation and the jurisprudence, unless the Court is satisfied that the agreement arose from an unfair bargaining process, an agreement is entitled to serious consideration.

- As a starting point, domestic contracts should generally be encouraged and supported by Courts, within the bounds permitted by the legislature, absent a compelling reason to discount the agreement. This deference flows from the recognition that self-sufficiency, autonomy and finality are important objectives in the family law context. Not only are parties better placed than courts to understand what is fair within the context of their relationship, but the private resolution of family affairs outside the adversarial process avoids the cost and

> tumult of protracted litigation. - At the same time, negotiations over domestic contracts take place in a singularly challenging environment, often at a time of acute emotional stress, "in which one or both of the parties may be particularly vulnerable". In this context, the simple application of ordinary principles of contractual validity may be inadequate to quiet concerns of imbalance and exploitation. Rather, judges must approach family law settlements with a view to balancing the values of contractual autonomy and certainty with concerns of fairness. In essence, judges are to review domestic contracts with particular sensitivity to the vulnerabilities that can arise in the family law context, without presuming that spouses lack the agency to contract simply because the agreement was negotiated in an emotionally stressful context.

The Supreme Court found that the trial judge erred in finding the agreement not binding on the parties and failing to consider its substance in his property distribution. The Court intervened with the Court of Appeal decision because, while both Courts agreed that the agreement should be upheld, the Court of Appeal proceeded to equalize the family property in a way that defeated the intent of the parties agreement and resulted in unfairness. The Supreme Court instead concluded that the "most fair and equitable solution" was for the parties' simple agreement to be given full effect.

There have been three Ontario bases cases which have applied the *Anderson* decision since its release. Recently in *McIntyre v. McIntyre*, 2023 ONSC 4504 (S.C.J.), the Superior Court opined on what is required of lawyers when providing Independent Legal Advice to their clients on agreements. The Court provided a helpful and concise summary as follows:

> *[41] The provision of ILA is not the act of rubber-stamping agreements already reached by self-represented litigants. A lawyer who accepts such a retainer is expected to meet with the client for a reasonable amount of time, and often more than once. In anticipation of the provision of legal advice the lawyer is also expected to review relevant court and related documents. Typically this includes the pleadings, financial disclosure, sworn financial statements, parenting assessments and reports, and any other issue-specific documents.*

The Courts have offered clear and authoritative guidance on the treatment of separation agreements which may be deficient in one (or many) areas. There is a distinct possibility that these kitchen table style agreements may be upheld by the Courts when challenged, binding the parties to an imperfect resolution. Caution should always be exercised, and independent legal advice sought out. ■

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New Lawyers' Update

Sarah Gulas

WHAT HAPPENS IN THE BOARDROOM MAY NOT STAY IN THE BOARDROOM:

CASE REVIEW OF SINGH ET AL. V BRAICH, 2023 ONSC 5053

In the decision of S*ingh et al. v Braich*[1], the court commented on the importance of co-operation between counsel and how inappropriate conduct of counsel at a discovery may make its way before a Judge.

In *Singh*, the court heard a motion brought by the Defendant seeking to compel the Plaintiff to answer questions that Plaintiff's counsel objected to at the discovery. The Defendant relied on Rule 34.14 of the *Rules of Civil Procedure*. Rule 34.14 allows a lawyer to adjourn an examination when continuing with it would be futile because of improper objections or interruptions, or where the person being examined is being evasive, non-responsive, or verbose.

During the discovery at issue, counsel for the Defendant asked the Plaintiff if she had hurt her wrist in 2015. Plaintiff's counsel objected to the question stating that she would refuse questions about the Plaintiff's medical history more than three years before the accident unless there was reference to it in medical records as an ongoing issue. Defendant's counsel stated that he would adjourn the discovery unless Plaintiff's counsel changed her mind. Counsel went back and forth on the record and things escalated. The court stated that based on the transcript, Defendant's counsel was "posturing more than listening". Defendant's counsel left twenty-two minutes after asking his first question as a result of the refusal and soon after brought his motion. In his motion, he argued that Plaintiff's counsel disrupted his "flow" with her objection, relying on Rule 34.14.

The Plaintiff opposed the motion and argued that the defendant had improperly adjourned the motion. She argued that she had a legitimate objection to the question and that the examination could have continued despite the refusal.

1 Singh et. al. v Braich, 2023 ONSC 5053 (CanLII)

Ultimately the court found that Defenant's counsel improperly adjourned the examination and that the examination should have continued for the refusal to be dealt with after. The court did not find Rule 34.14 applied and held that the conduct of Plaintiff's counsel did not render the examination futile. The court further found that while Plaintiff's counsel acted appropriately, Defendant's counsel could have continued and brought a motion under Rule 34.12(3) later, but deliberately chose not to.

In the court's analysis, the decision of *Kay v Posluns*[2] was referred to in finding that Rule 34.14 does not permit adjournments based on "the subjective feelings of counsel" and that the courts have previously recognized the problems that may arise when the rule is used too quickly.

The court further went on to remark that the conduct of Defendant's counsel, a lawyer called to the Bar in 1984, was not acceptable and stated "it appears to have been an attempt by a senior lawyer to bully a junior lawyer. This is unfortunately a common occurrence in the practice of law. It should not happen…senior members of the bar should serve as examples to their junior counterparts. They should not use their seniority to try and gain a tactical advantage".

This decision serves as a reminder to all counsel that our actions outside of the courtroom could very well end up before a Judge at some point or another. While displaying courtesy and civility in dealing with opposing counsel seems like an obvious approach for most, our Rules of Professional Conduct also require us to be "courteous, civil, and act in good faith with all persons" with all of whom with have dealings with. ■

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2 Kay v Posluns, 1989 CanLII 4297 (ON SC), [1989] O.J. No. 1914

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Personal Injury Update

Andrew Spurgeon

Its spring – and a young lawyer's heart of course, turns to case law. I, however, have two cases that will break that young lawyer's heart. The first case concerns the perennial problem of limitations. The second case relates to a lawyer in B.C. who touched the hot stove of artificial intelligence and got burned.

Sanei v. Debarros, 2024 ONCA 104

On February 9th the Court of Appeal for Ontario released a judgment, dismissing a plaintiff's appeal of an order dismissing his action on summary judgment for missing a limitation period. The plaintiff / appellant was injured in an auto accident on February 2, 2013, but did not issue his action until March 3, 2016. The motions judge, based upon the medical evidence and the evidence of the plaintiff, concluded that the plaintiff had suffered "serious and permanent injuries" in the MVA which were "discoverable within the two-year limitation period". As a result, the motions judge concluded that there was no genuine issue for trial and consequently dismissed the action.

In his appeal the plaintiff / appellant asserted that the motions judge erred in three ways:

1. That the motions judge, in determining that the serious and permanent nature of the plaintiff's injuries was discoverable within the two-year period failed to specify on what date within that two-year period the injuries were discoverable.

2. That there was no evidence demonstrating that the appellant discovered that he had a serious and permanent impairment prior to March 2, 2014 (two years before the date the claim was issued).

3. That the motion judge applied the wrong threshold test, characterizing the appellant's injuries as "serious and permanent injuries" rather than considering whether they constituted "serious and permanent impairment" as defined under O. Reg. 461/96 which defines the proof that must be adduced at a "threshold motion" showing that the plaintiff meets the requirements of s. 267.5 of the *Insurance Act.*

After a careful review of the operation of section 5 of the *Limitations Act*, the Court of Appeal rejected each ground of appeal advanced. The Court of Appeal took note of the issue of determining when a person knows or ought reasonably to know that they have a potential cause of action premised upon the suffering of an injury, that section 5(2) has the effect of creating a presumption that the plaintiff knew of their loss on the day the impugned act or omission they allege caused the loss "unless the contrary is proved". The court then canvassed the leading cases on point.[1]

Addressing the first of three grounds advanced the Court of Appeal and acknowledged that the motions judge did not identify a specific date upon which the plaintiff was aware of the severity and permanence of his impairment. However, that was not a reversable error because he referenced the correct analysis under *Piexiero* and tethered himself to the available evidence which was demonstrative of the fact that the plaintiff either knew or ought to have known that "a claim would be an appropriate remedy for the loss" prior to the commencement of the 2 years leading up to the issuance of the action.[2]

On the second ground advanced, the

1 Morrison v. Barzo, 2018 ONCA 979, 144 O.R. (3d) 600 Peixeiro v. Haberman, [1997] 3 S.C.R. 549; Dubreuil v. Lalande, 2014 ONSC 7433; Rockford v. Haque, 2019 ONSC 474; and Yasmin v. Alexander, 2016 ONCA 165.

2 Sanei, at para. 17

Court of Appeal in review of the Motions Judge's reasons noted that he clearly canvassed medical evidence proffered showing that the plaintiff had disclosed, prior to the two-year period (commencing March 2, 2014) leading up to the issuance of the Claim (March 2, 2016) significant health concerns stemming from the accident:

> "In particular, the motion judge noted the December 19, 2013, report of psychiatrist Dr. Azadian, which concluded that the appellant suffered from a serious psychological disorder…".[3]

The Court noted that the December 19, 2013, report contained claims of injuries which continued and were echoed in subsequent medical reports and remained largely unchanged up to and past the date of the statement of claim being issued.

With respect to the third ground, the Court of Appeal indicated that: "it is not the policy of the law or the intent of the limitations provisions to require people to commence actions before they know that they have a substantial chance to succeed in recovering a judgment for damages." [4] Moreover, the Court advised that establishing such a high threshold of knowledge on the plaintiff's part for the discoverability clock to begin to run is too extreme a position for the Court to accept and would essentially "move the needle too close to certainty", which is not the standard required to trigger discovery of a claim and the commencement of the limitation period.[5]

Zhang v. Chen, 2024 BCSC 285

This is not a personal injury case but rather a family law case. However, it is an important case for everyone to know with respect to the use, misuse, and negligent use of artificial intelligence (AI) when doing legal research. It is a warning to not proffer a case found using AI as judicial authority for a proposition without verifying its authenticity yourself.

3 Ibid, at para. 20

4 Ibid, para. 24

5 For this proposition, the Court of Appeal cited: Grant Thornton LLP v. New Brunswick, 2021 SCC 31, at paras. 47-48, citing K.L.B. v. British Columbia, 2003 SCC 51, at para. 55.

In this case, a father and mother had a high conflict separation. They disputed their parenting time and other matters of access to the children. At a contentious juncture, the father felt he was being unreasonably denied access to his children, so he instructed his counsel to bring an application to address his grievance. Counsel for the father, in his materials submitted and relied upon two cases – and only two cases in support of his application: "*M.M. v. A.M.*, 2019 BCSC 2060" and "*B.S. v. S.S.*, 2017 BCSC 2162".

Counsel for the mother in preparing a response to the application contacted counsel for the father seeking copies of those cases as they could not locate and verify the cases. After some back and forth, counsel for the father advised the court and counsel in an email:

> I made a serious mistake when preparing a recent Notice of Application for my client, Mr. Wei Chen, by referring to two cases suggested by Chat GTP (an artificial intelligent tool) without verifying the source of information. I had no idea that these two cases could be erroneous. After my colleague pointed out the fact that these could not be located, I did research of my own and could not detect the issues either. Regardless of the level of reliability of Al aids, I should have used more reliable platforms for doing legal research and should have verified the source of information that was going to be presented in court and/or exchanged with the opposing counsel. I have taken this opportunity to review the relevant professional codes of conduct and reflected on my action. I will not repeat the same mistake again. I had no intention to mislead the opposing counsel or the court and sincerely apologize for the mistake that I made.
>
> ….
>
> I alone made the mistake with respect to the erroneous citations and nobody else in my office was any part of it.[6]

At the hearing of the matter, after receiving this acknowledgement, the court ruled on the substance of the matter before it. It then gave notice to counsel to prepare submissions with respect to the issue of the costs of the matter being borne personally by the lawyer.

After hearing submissions, the Court stated:

> Citing fake cases in court filings and other materials handed up to the court is an abuse of process and is tantamount to making a false statement to the court. Unchecked, it can lead to a miscarriage of justice.[7]

The Court further went on to state:

> The risks of using ChatGPT and other similar tools for legal purposes was recently quantified in a January 2024 study: Matthew Dahl et. al., "Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models" (2024) arxIV:2401.01301. The study found that legal hallucinations are alarmingly prevalent, occurring between 69% of the time with ChatGPT 3.5 and 88% with Llama 2. It further found that large language models ("LLMs") often fail to correct a user's incorrect legal assumptions in a contrafactual question setup, and that LLMs cannot always predict, or do not always know, when they are producing legal hallucinations. The study states that "[t]aken together, these findings caution against the rapid and unsupervised integration of popular LLMs into legal tasks." [8]

Ultimately, the Court accepted that counsel's error was not intentional but unintentional. Regardless, her error precipitated significant excess costs in the proceedings which her client should not have been responsible for. She was ordered to do two things. One, pay costs personally and two, review all files she has before the Court to see if she has used AI to submit hallucinated cases in other matters and advise opposing counsel and the Court if she has.

In a final comment, the Court made a statement we should all remember:

> As this case has unfortunately made clear, generative AI is still no substitute for the professional expertise that the justice system requires of lawyers. Competence in the selection and use of any technology tools, including those powered by AI, is critical. The integrity of the justice system requires no less. [9]■

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6 Zhang v. Chen, 2024 BCSC 285, para. 12.
7 Ibid, para. 29
8 Ibid, para. 38
9 Ibid, para. 46.

Real Estate Law News

Thomas Lazier

THE ONGOING PROBLEM WITH NOTICES OF SECURITY INTEREST

IS HELP ON THE WAY?

Notices of Security Interest ("NOSIs") have become an increasing problem over the last several years. Numerous entities have taken to registering NOSIs to secure equipment. Often NOSIs do not stipulate an expiry date. The registering party is often a numbered company which is difficult to track down. Frequently NOSIs are assigned to different numbered companies further complicating the process of chasing down discharges.

I recently completed an Estate Sale transaction involving a property that was subject to seven NOSIs. The estate trustees were distant relatives of the deceased and had little knowledge as to the origin or background surrounding the NOSIs. Needless to say, the time and expense required to secure the required discharges was extensive.

Strictly speaking, NOSIs do not provide the security holder with an interest in the land; a NOSI only forms security against the equipment specified in the document. The distinction is often immaterial as NOSIs need to be dealt with in order to allow a sale or refinancing transaction to proceed.

In October of 2022 the Director of Titles issued bulletin No. 2022-04 in an attempt to clarify some of the requirements relating to NOSIs. The bulletin is somewhat helpful but does little to assist a lawyer in attempting to deal with a NOSI where the registering party is unresponsive or can't be located.

In addition to dealing with NOSIs, bulletin 2022-04 also dealt with Lodgement of Title Documents. A Lodgement of Title Document will not be accepted for registration after December 31st, 2022. Existing Lodgements that were registered on or before that date are still valid.

The bulletin outlined various requirements for the registration of a NOSI. The bulletin indicates that "All collateral types require a relatively specific collateral description. What constitutes a relatively specific collateral description will vary depending on the type of collateral and there will be a certain subjective element to it". The requirement for a relatively specific collateral description will require the make and model of the collateral unless otherwise approved by the Director of Titles.

Any NOSI pertaining to a category of collateral defined in the bulletin as "HVAC" must have at least the make and model of the equipment included. Serial numbers are permitted but not necessary. "HVAC" collateral is defined as including items such as water heaters, heating systems and air conditioning systems. "HVAC" also includes other items such as water filtration and alarm systems. You should consult bulletin 2022-04 for the full list of what constitutes "HVAC" collateral.

A NOSI is not required to have an expiry date. Even if a NOSI does have an expiry date, the date can be extended multiple times by the registration of a section 71 Notice, provided that the Notice is registered

prior to the expiry date. If the expiry date in a NOSI has passed and has not been extended, the property owner can register an Application General to have the NOSI deleted. That avenue is not available to an owner in the case of a NOSI with no expiry date.

Since December 31, 2022, it has not been possible to register NOSIs to secure windows, doors, or roofs with the exception that NOSIs may still be registered with respect to energy efficient windows which are Energy Star compliant in certain circumstances.

Section 18(1) of the Consumer Protection Act allows a consumer to rescind any agreement entered into by a consumer after or while a person has engaged in an "unfair practice". The consumer is also entitled to any remedy that is available in law, including damages. Unfortunately, Section 18(3) appears to limit the consumer's right to rescind the agreement to the one-year period after the agreement was entered into.

Section 15(1) of the Consumer Protection Act stipulates that it is an unfair practice to make an "unconscionable representation". Section 15(2) lists factors that can be taken into account in determining whether a representation is unconscionable including:

> (a) that the consumer is not reasonably able to protect his or her interests because of disability, ignorance, illiteracy, inability to understand the language of an agreement or similar factors.
>
> (b) that the price grossly exceeds the price at which similar goods or services are readily available to like consumers.
>
> (e) that the consumer transaction is excessively one-sided in favour of someone other than the consumer.
>
> (h) that the consumer is being subjected to undue pressure to enter into a consumer transaction.

Clearly the provisions of section 15(2) would appear to have some application to cases where vulnerable consumers are preyed upon by unscrupulous equipment vendors.

Section 18(14) of the Consumer Protection Act provides that, where an agreement is rescinded under 18(1),

the agreement is cancelled as though it never existed.

Section 18(9) stipulates that a consumer has the right to commence an action in the Ontario Superior Court of Justice. Bulletin 2022-04 goes a step further in that it allows a consumer to apply to Small Claims Court for an order which can then be incorporated into an Application to Amend the Register to have the NOSI deleted from the title abstract. Note that a Covenant to Indemnify is required in such a case.

Although the procedures set out in bulletin 2022-04 may be useful in some cases, for the vast majority of NOSIs the bulletin is of little assistance. Most NOSIs have no expiry date and do contain a basic description of the collateral. It is also rare that a consumer attempts to rescind the NOSI within one year.

It appears that help may be on the way in dealing with NOSIs. In the fall of 2023, the Provincial Government released a Consultation Paper. The paper identified numerous issues respecting NOSIs and provided the Public the opportunity to provide comments up to December 1, 2023.

The following is a list of some of the issues that were identified in the Consultation Paper:

- Homeowners are often not aware of the existence of a registered NOSI until they are in the midst of a sale or refinancing transaction such that the security holder has significant leverage in connection with removing the NOSI;

- The need to clarify what interests NOSIs can be secured against;

- Whether there should be a maximum permitted registration period for NOSIs;

- Whether consumers should be provided with notices regarding the registration or assignment of a NOSI;

- Whether NOSIs should be capped at a maximum permitted amount;

- Whether consumers should be able to seek a discharge of a NOSI in certain circumstances;

- Whether who has the authority to register NOSIs should be limited;

- Whether punishments for the misuse of NOSIs should be strengthened;

- Whether a registrant of a NOSI should be required to provide additional information upon registration.

Hopefully the Provincial Government will bring forward some reforms in the near future as a result of the consultation process, such that lawyers will be given additional tools to deal with the ongoing problem of NOSIs.■

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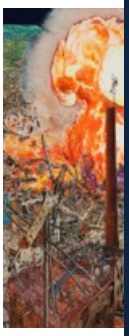
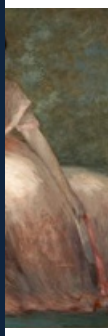
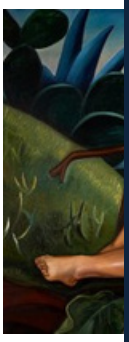
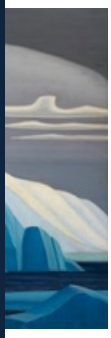
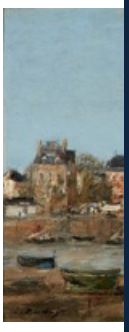
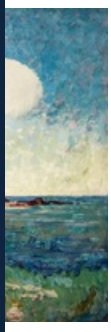
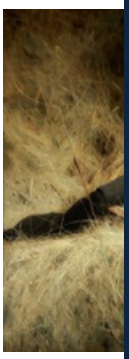
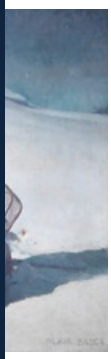

The Hamilton Law Association's

Annual Dinner

to be held at

The Art Gallery of Hamilton

(The Joey and Toby Tanenbaum Pavilion)

123 King Street West, Hamilton

Thursday June 6th, 2024

Drinks at 5:30 p.m.

Dinner at 6:30 p.m.

Including the presentation of the Edward Orzel Award to Jim Scarfone

HLA Member Price:

$145.00+HST =$163.85

per person

Please RSVP please visit

https://HLAAnnualDinner2024.eventbrite.com

If you have questions or concerns please
email events@hamiltonlaw.on.ca or call 905.522.1563

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Are you looking to move out of downtown?
We have a bright new location at 835 Paramount Drive, Stoney Creek able to accommodate a small firm or sole practitioner. Bonus for a general litigation or family lawyer who can take on new files.
Contact Ben A. De Rubeis at De Rubeis, Chetcuti LLP at 905 541 4263, or email ben.derubeis@dcllaw.ca.

HLA Website Careers Page Policy

1. The use of this service is limited to paid-up Category 1, Part-Time, and New members of the Hamilton Law Association;
2. Available positions for lawyers, articling students, paralegals, legal support staff, legal volunteer opportunities, and available office space can be posted;
3. Those seeking a position as a lawyer, articling student, paralegal, legal support staff, legal volunteer, or seeking available office space can be posted;
4. Postings are limited to jobs where the location of the primary place of work is within the municipal boundaries of The City of Hamilton;
5. Job notices will be posted for a **period of 90 days** from the date of submission;
6. Prospective applicants and employers may renew their posting or resubmit a new job submission form after the 90 day period, **upon request only;**
7. To post a job notice, a Job Notice Submission Form must be completed and submitted to the designated HLA staff member tasked with website administration. HLA staff will not draft job notices on behalf of prospective advertisers.

Approved by the Board of Trustees, December 13th, 2017.

The Hamilton Law Association • Hamilton Legal Community

2024 CALENDAR OF EVENTS

The Hamilton Lawyers' Show of 2024: The Sting

With four performances only on Thursday, May 30th and Friday, May 31st at 8 PM and Saturday June 1st at 1:30 PM and 8 PM at Theatre Aquarius 190 King William Street, Hamilton

For tickets please scan the QR code below:

Thursday April 11th, 2024
Real Estate Workshop: Title Searching 101
12:00pm – 2:00pm
HLA Library

Tuesday April 16th, 2024
The Annual Advocacy Conference
8:50am – 4:00pm (Lunch & Social included)
The Sheraton Hotel Hamilton

Thursday, April 25, 2024
The 22nd Annual Estates and Trusts Update
1:00 p.m. - 4:00 p.m.
HLA Library

Tuesday May 7th, 2024
Professionalism Session
2:30pm – 5:00pm
HLA Library

Thursday May 9th, 2024
Corporate Commercial Workshop: Startup Business Formation
12:00pm – 2:00pm
HLA Library

Thursday May 16th, 2024
Annual General Meeting & Presidents Reception
AGM at 4:00 pm & Reception Starting at 4:30 pm
The Hamilton Club

Thursday June 6th, 2024
Hamilton Law Association Annual Dinner
5:30pm – 9:00pm
The Hamilton Art Gallery

For more information on upcoming events, please email: events@hamiltonlaw.on.ca. Please note that registration and additional information may not be available for some events at this time.

The Hamilton Law Association Presents...

THE ANNUAL GENERAL MEETING

THURSDAY, MAY 16TH, 2024
4:00 PM
THE HAMILTON CLUB, ALEXANDER HALL
6 MAIN STREET EAST

The Incoming President Invites you to attend...

THE PRESIDENT'S RECEPTION

Thursday, May 16th, 2024
4:30 pm
The Hamilton Club Bar & Lounge

Please RSVP to one or both events by contacting Maria Morales at: mmorales@hamiltonlaw.on.ca or 905-522-1563

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