The Hamilton Law Association

HLA JOURNAL

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President's Report

David van der Woerd

Welcome to the heart of the winter and to another year where we are trying to distance ourselves and adjust to the new realities cast upon us by the effects of the pandemic. Allow me to provide you with a brief update on the happenings at our Association. The HLA ended 2022 on a high note. The weight of the pandemic has had an incredible impact on us all, and the teetering economy is now providing us with another significant adversary to face that makes practicing law a continuing challenge. Thankfully the HLA is weathering these storms with amazing grace, and its membership has a safe haven where it can duck into port and forget about the pressures of the profession for a while.

By way of example, perhaps you were one of the 105 people who attended the delightful Members' Appreciation Luncheon which HLA hosted in its bright and beautiful lounge on December 2nd, 2022. In this competitive world, the days of taking two hour lunches is largely in the rearview mirror, but as a throwback to the good old days, most who attended the luncheon likely stayed much longer than they may have scheduled for. This event ran quite smoothly and happily before the world was changed by COVID, and when we all huddled into our cocoons. When the HLA unfurled this event again this year, we really weren't sure what the response from the membership would be like. Well, putting it simply, we were blown away. When preparing for the event, the HLA staff conservatively planned for a respectable complement of attendees. What actually happened was that the lounge was overrun and the staff had to scramble halfway through the event to replenish the offerings in order to feed the entire crowd. It was great to have that kind of logistical issue again. A thank you goes out to the HLA staff for seamlessly ensuring that everyone left satisfied.

It is that type of adaptability that also served the Association well in the management of its 2022 financial resources which had its fiscal year end on December 31, 2022. Budgeting for the HLA has been a nail biting experience over the past number of years for obvious reasons but astute fiscal management overseen by our exceptional board of trustees, lead by our Treasurer, Andrew Keesmaat, and our Executive Director, Rebecca Bentham, supported by a carousel of remarkable staff members, foremost of which being Shega Berisha, allowed the Association to approach year-end again as it has in better times. We are anticipating a possible surplus as opposed to a deficit even in this challenging and uncertain environment, and next year looks promising as well. Among other matters, you should know that we have worked extremely hard with our supporters and funders to ensure that our library grant was fully supplied and increased to meet the rising cost of operations. I am pleased to report

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HLA Journal

The Hamilton Law Association exists to enable its members to become successful, respected and fulfilled in their profession.

The Hamilton Law Association 2022-2023

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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.

CONTRIBUTION DEADLINE FOR NEXT ISSUE: March 8, 2023

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that because of the tireless efforts of our team, we have received a funding commitment for the library again next year along with an increase to meet the inflation costs. The HLA and its sterling reputation allows us to remain relevant, vibrant, and respected in Toronto, and we continue to be a leader of law associations across all of Ontario.

One of the ways we are protecting our valuable library is by resurrecting the dormant library committee. The library has been stewarded by our capable staff as of late but the reestablishment of the library committee is a necessity in order to ensure that our members have a direct impact upon the composition and preservation of our significant collection of paper and electronic titles and resources. This ensures that we remain current and on the cutting edge of what is available. Lawyers' direct involvement in the management of this asset also ensures a stable funding stream and an informed bar which can continue to bolster the HLA's solid reputation as an Ontario law association. Unlike other jurisdictions which may benefit from a law school or higher court library facilities nearby, in Hamilton, the HLA maintains the best legal library available within the city limits, so it is a significant and important responsibility that our association must ensure that the collection remains of the highest quality.

I had the privilege of representing the HLA and Treasurer Jacqueline Horvat of the Law Society of Ontario at the recent in-person swearing-in ceremonies of Justices Krawchenko and MacNeil. It was a great event and a great pleasure to see two of Hamilton's best lawyers elevated to the bench, where they have already been making a significant and positive impact.

Last year, the HLA called for nominations to award the Distinguished Solicitor's Award, which has not been presented since 2018. You will recall Robert Hooper was awarded the Emilius Irving Award at our last Annual Dinner and it was a grand event. Obviously the squeaky wheel litigators had their award prioritized last year, but the HLA Board recognized that it's also that time again to give the more humble and agreeable solicitors their chance to honour one of their own too. Much like with the Emilius Irving Award nomination process, the nominees for the Distinguished Solicitor's Award included an incredible group of worthy practitioners. We could have easily selected multiple recipients, but after some discussion and consideration we came to a consensus to honour former HLA President, David Elliot. David will be honoured at the sold out March 2nd, 2023 Solicitor's Dinner and we are looking forward to celebrating his distinguished career with him, his family, friends, and colleagues on that evening. If you missed getting your ticket for this event, make sure you don't hesitate to sign up for the Annual Dinner as soon as you can. It will be held on June 1st, 2023 at the Art Gallery of Hamilton, and last year's dinner was spectacular, so don't miss it this year.

Thank you again for your ongoing support of the HLA and please make sure to stay involved. We have one of the best and most talented bars in Ontario and this city is an absolutely fantastic place to ply our trade. It is because of the support and contributions of the members that the Association thrives as it does and the board thanks you for your ongoing support and participation. ■

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Report from the Executive Director's Office

Rebecca Bentham

The Hamilton Law Association is busy planning live seminars, roundtables and various other educational events in 2023 for the benefit of the membership. To address this and to effectively use the existing space in the Anthony Pepe Memorial Library, the HLA is expanding the classroom-style space in the back in order to accommodate larger CPD events and meetings. Going forward, the HLA will host more of our seminars, roundtables and workshops at the HLA. We look forward to inviting our members into the Anthony Pepe Memorial Library as we continue to expand our in-person offerings for the 2023 year.

The Law Society of Ontario's 2023 bencher election will take place on April 28th, 2023. This election takes place every four years, and is a crucial aspect for the fair governance of Ontario's lawyers and paralegals.

Lawyers and paralegals from different communities, practice environments, work areas, firm sizes and geographic locations all over Ontario run for bencher, and the City of Hamilton is no exception.

On Wednesday, March 29th, 2023 at 5:00pm, The Hamilton Law Association will host a Bencher Town Hall Meeting in the HLA Library. Please consider attending this meeting and come out and join our benchers and other possible candidates for a discussion regarding the upcoming election. If nothing else, considering coming out to support your fellow colleagues. Complimentary refreshments will be provided, and it is sure to be a valuable and informative event.

Estates and Trusts

This month we are hosting the 21st Annual Estates and Trusts Update on February 24th, 2023, via Webcast from 1:00pm-4:00pm. This annual program is planned and hosted by David Henderson, *Agro Zaffiro LLP,* Andrea Hill, *Turkstra Mazza Law*, Catherine Olsiak, *SimpsonWigle LAW LLP* and Alyson Sweetlove, *George Street Law*. This year's program will cover a variety of topics such as Spousal and House Trusts presented by John Loukidelis, *Loukidelis Professional Corporation*, Trustee Discretion presented by Caroline Abela, *WeirFoulds LLP*, LGBTQ+ Estate Planning and Administration presented by Darren Lund, *Miller Thomson LLP*, Family Law Aspects of Estate Planning and Administration presented by Jennifer Cooper, *Hughes & Cooper LLP,* A US Review presented by Kevin Gluc, *Hodgson Russ* and a panel that covers the Delicacy of Dealing with Death with Adam Cappelli, *Cambridge LLP* and John Kranjc, *Regency Law Group,* moderated by David Henderson, *Agro Zaffiro LLP.* We would like to thank our planners, speakers, and attendees for participating in this year's seminar. We look forward to hosting it again in 2024. ■

Librarian's Report

Nicole Strandholm

Welcome to a new year, with new and exciting things to look forward to. If there is anything to be excited about in the dead of winter, it is definitely the opportunity to reinvent and update yourself on your achievements past and your goals for the future.

This past fall, we hosted two co-op students who assisted us with various tasks around the library. Carla Smith was our morning placement student from Mohawk College's Library Technician program, who graduated in December. Carla was exceptional at processing and shelving new books we purchased for our collection, and also maintaining a neat and organized space for us to enjoy. We wish her all the best in her new career.

Alana Pielechaty was our afternoon co-op student who is a grade 11 student at Westmount Secondary School. Alana was a great help with association tasks, and she assisted us with a few major projects that we had in the works. Alana was also very helpful in assisting us in organizing some of our archival material we have here at the HLA. With her help, we will now be able to catalogue our framed collection from photos to original 19th century documents. I would also like to wish Alana all the best in her studies as she continues her adventure through the rest of her high school career and beyond.

There are a few opportunities to catch you up on taking place here at the HLA Library, as well as at law associations across Ontario.

Electronic Resource Training

A reminder to those who are looking for more information regarding our electronic suite of resources that we offer, for any research questions you may be on the hunt for, or for a quick rundown of the kind of questions and research help we can provide for our members, we have been hosting half-hour virtual updates on how to best search LexisNexis, vLex, and Westlaw. This is helpful for those who need to come in to do their own research and to those who are able to access these resources from their own firms. We will be offering another session sometime in March, but you do not have to wait for it! If you would like a one-on-one rundown, I am happy to arrange one with any interested member.

Library Excellence Committee

This month, the Library Excellence Committee will be reconvening for the first time since 2019. I would like to thank HLA trustee, Colleen Yamashita for stepping up to Chair this committee once again and to lead us into discussions on how to make the HLA the best that it can be for the Hamilton legal community. I would also like to thank all those who have expressed interest in joining the committee, and I am excited for our first committee meeting with this new group of wonderful volunteers.

As always, we value our members and their suggestions on which texts we should look into purchasing, and with this new committee, I am

happy to have more people you can share your suggestions with. Keep an eye out for future updates for a complete list of Library Excellence Committee members.

Damages Compendium

The lovely people at the Carleton County Law Association have updated their Damages Compendium. It has been updated to October 2022 and is now available on the CCLA's website. It can be found permanently on their Civil Litigation Practice Portal. If this is of interest to you, and you cannot find the link, please do not hesitate to contact any of us here at the HLA, and we will be happy to forward you a direct link.

Featured Looseleaf: Canadian Environmental Assessment Act: An Annotated Guide, by Beverly Hobby

Published by Thomson Reuters, The Annotated Canadian Environmental Assessment Act is one of those texts that isn't necessarily needed on a regular basis, but when the time comes, is essential to a case. As one of the most urgently requested looseleafs, I am pleased to say that we now have the most updated version of this title from March of 2022.

The reason I chose this title as the feature for this issue is for just that reason. Smaller law and firm libraries may not have this title in their stacks, and so I want the membership to know that we have it here at the HLA. ■

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For research help, please contact reference@hamiltonlaw.on.ca.

New Books at the HLA Library

- Butkus, The 2023 Annotated Ontario Landlord Tenant Statutes, Thomson Reuters
- Durocher, Environmental Class Actions in Canada, Thomson Reuters
- Fraser, et al., Witnesses and the Law, Canada Law Book
- Gold, Defending Drinking, Drugs and Driving Cases 2022, Thomson Reuters
- HLA, Family Law Seminar
- Honsberger & Dare, Honsberger's Bankruptcy in Canada, Thomson Reuters
- John Sopinka & Mark Gelowitz, Conduct of an Appeal, LexisNexis
- Jones, de Villars, Pinciples of Administrative Law, Thomson Reuters
- Karmali, Corporate Law for Ontario Businesses, Thomson Reuters
- LSO, 25th Estate and Trusts Summit
- MacDonald & Wilton, The 2023 Annotated Ontario Family Law Act, Thomson Reuters
- Ooserhoof, Freedman, McInnes and Parachin, Oosterhoff on Wills, Thomson Reuters
- Sernoskie, Sale of a Business, LexisNexis
- Snyder, The 2023 Annotated Canadian Labour Code, Thomson Reuters
- Waddams, The Law of Contracts, Thomson Reuters
- Waldman & Lorne, Canadian Immigration & Refugee Law Practice, LexisNexis
- Zuker, Mackinnon and Jones, Children's Law Handbook, Thomson Reuters

Corporate Commercial News

Alex Ross & Derek Sheppard

Thinking of using a Non-Disclosure Agreement? Here are some useful considerations.

If you are considering using a Non-Disclosure Agreement (NDA) to establish a confidential relationship and protect valuable or sensitive information, below is an overview of some techniques and strategies that may be useful when engaging in such an agreement.

Generally, NDAs are signed prior to parties sharing information where it is important to protect that information from becoming available to the public or to prevent the receiving party from using the information in any manner that was not previously agreed upon. NDAs may be one-way, two-way or "mutual". In a one-way NDA, only one party is disclosing information and the other party is receiving it. A mutual NDA on the other hand allows either party to disclose and/or receive confidential information. Below is a non-exhaustive list of essential terms that should be included in an NDA:

- Parties – who is involved in the NDA (are any related companies to have access to the information)?
- Exclusions - what is not considered confidential information
- Non-disclosure - what specific steps must be taken to protect the information
- Term - the specified time the NDA will last for
- Defining "confidential information" - what will be considered confidential information
- Permitted Purpose - what the confidential information may be used for
- Non-solicitation - in certain circumstances, it is important to restrict the ability of the receiving party to poach the employees of the disclosing party

Using exclusionary language is a technique commonly deployed when drafting an NDA. Using language that outlines what does not constitute confidential information along with a qualifying statement that outlines that if the receiving party can prove (by reliable written evidence for example) that said party was lawfully in possession (without the obligation of confidentiality) prior to disclosure from the disclosing party, that such information will not be considered confidential. The idea behind using this type of language is to prevent a receiving party from simply claiming they already knew the disclosed information without having documented proof to support the claim.

Another useful strategy when considering an NDA between parties that are in the same or similar fields of business is to prepare non-confidential written descriptions of the technology and/or processes that constitute the confidential information and share these descriptions with the receiving party. Generally, these descriptions would be provided along with an initial NDA that can later be attached as a schedule to a second NDA, should parties decide to proceed, before the

actual details of the confidential information are disclosed. The idea is to describe the confidential information with enough detail so the receiving party can review and determine if the potential confidential information is similar or not to what the receiving party already knows, while still withholding the confidential information itself. If the receiving party does not believe the confidential information planned for disclosure is similar to their own, then the parties may agree to put such an acknowledgement in writing in advance of the second NDA. In situations where, for example, processes are being disclosed that are very similar, this course of action may provide increased risk as there may be a very fine line between providing just enough information to the receiving party to provide an overview and providing information that may allow the party to discern information not previously known.

In situations where processes may be similar as mentioned above, a further possibility is to have a third-party lawyer (not the current lawyer for either party) hold information in escrow. This would involve both parties preparing a detailed description of confidential information in their possession prior to signing the NDA and providing the detailed description to the escrow lawyer. The NDA could then specify that if there is a dispute over who knew what and when, the escrow lawyer could release the information to, for example, a mutually agreed upon arbitrator who is also bound by confidentiality to resolve the issue. The escrow approach avoids someone fabricating documents, since each side has to place their materials in escrow before they receive the other side's information.

It is also important to consider whether the party to whom you intend to disclose the information is trustworthy – not just in the sense of honesty, but whether they fully understand their obligations under the NDA and have appropriate management structures and procedures in place to be able to implement the safeguards specified in the NDA. The process involved in negotiating and entering an NDA (and we recommend taking the time to turn one's mind to it), provides an opportunity to learn more about the operational procedures and sophistication of the other party in these areas and can be invaluable in evaluating risk of disclosure and in further negotiations. While a well-designed NDA can provide legal remedies in the event that confidential information is leaked, in many cases it can be like trying to get toothpaste back into the tube. Nonetheless, a suitable NDA is absolutely indispensable when disclosing confidential information outside of your organization. ■

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Criminal Law News

Geoff Read

BEWARE OF JUNK SCIENCE

Here's the latest that might be coming soon to your friendly local police service: purported 9-1-1 call analysis that claims enable police to discriminate genuine 911 callers from suspects making the call to conceal their guilt. A ProPublica investigation https://www.propublica.org/article/911 -call-analysis-fbi-police-courts into this explained that Tracy Harpster, formerly a deputy police chief from suburban Dayton, Ohio, claims to have created a way to recognize liars on 9-1-1 calls based on their grammar, sentence structure, use of extraneous details, and so on. Of course, you might be thinking, just as the article itself states, that one must account for who a 911 caller is and how that might affect the way they speak: their race, upbringing, geography, dialect and education, not to mention that some callers may have autism or otherwise be neurodivergent, which could also affect their speech patterns.

Nevertheless, 9-1-1 operators and police officers are being taught how to employ this in their testimony to avoid admissibility U.S. Daubert (Mohan in Canada) requirements in which trial judges are responsible for ensuring expert testimony has a reliable foundation. What makes 911 call analysis so pernicious is that it can resemble regular opinion testimony from a witness but prosecutors have deliberately circumvented evidential admissibility rules to disguise expert opinion as merely lay testimony.

ProPublica, which describes itself as a non-profit newsroom that investigates abuses of power, explicitly calls this "junk science". Wikipedia says that ProPublica in 2010 became the first online news source to win a Pulitzer Prize for a piece written by one of its journalists and published in The New York Times Magazine as well as on ProPublica.org, and that ProPublica has partnered with more than 90 different news organizations and has won six Pulitzer Prizes.

Researchers who have tried to corroborate Harpster's claims have failed and the experts most familiar with his work warn that it shouldn't be used to lock people up, nevertheless that's exactly what has happened in several cases. The author, Brett Murphy, is a reporter at ProPublica, and documented more than 100 cases in 26 states where Harpster's methods played a pivotal role in arrests, prosecutions and convictions. Murphy also states that this is likely a fraction of the actual figure.

Do yourself favour and read his article. Whether you're amused, alarmed, or enraged, don't dismiss this as some flakey foreign idea, for it has gradually been gaining traction south of the border. Mr. Murphy points out that in many places, when prosecutors don't introduce witnesses as experts, they also don't have to disclose discovery material like consultations with Harpster or any analysis of the 911 tape. Without those disclosures, defense attorneys are caught off guard during trial and it also helps explain how 911 call analysis has spread far and wide almost undetected. We'd best remember that these things have a habit of being picked-up here, so being forewarned is being forearmed.

A very few extracts from the article will give you some highlights:

"Outside of law enforcement circles, Harpster is elusive. He tries to keep his methods secret and doesn't let outsiders sit in on his classes or look at his data."

"... in a 2020 study, experts from the [F.B.I.]'s Behavioral Analysis Unit finally tried to see whether the methods had any actual merit. They tested Harpster's guilty indicators against a sample of emergency calls, mostly from military bases, to try to replicate what they called 'ground-breaking 911 call analysis research.' Instead, they ended up warning against using that research to bring forth in actual cases. The indicators were so inconsistent, the experts

said, that some went 'in the opposite direction of what was previously found.' This fall, a separate group of FBI experts in the same unit tested Harpster's model, this time in missing child cases. Again, their findings contradicted his, so much so that they said applying 911 call analysis in real life "may exacerbate bias." Academic researchers at Villanova and James Madison universities have come to similar conclusions. Every study, five in total, clashed with Harpster's. The verdict: There was no scientific evidence that 911 call analysis worked."

"Junk science can catch fire in the legal system once so-called experts are allowed to take the stand in a single trial. Prosecutors and judges in future cases cite the previous appearance as precedent."

"[Harpster"s] methods have now surfaced in at least 26 states, where many students embrace him like an oracle. They laud the "science" and send Harpster tales of arrests, prosecutions, and convictions that they attribute at least in part to his program."

"Harpster is at once fiercely proud of his program and at the same time possessive of the data behind it. In today's research community, it's standard practice to follow the scientific method and share data. But he has refused those who ask."

"'This is unconscionable,' David Faigman, Dean of the University of California Hastings College of the Law, told me. As a leading authority on the legal standards for evidence, he's usually one of the first to learn about new junk science. But even he didn't know how some prosecutors were leveraging 911 call analysis. 'There are so many things wrong with this,' Faigman said, 'it's hard to know where to begin.'"

Last, but not least, Defence counsel share responsibility for challenging this pseudo-science as legally inadmissible evidence, on pain of an "ineffective assistance of counsel" accusation. Take a look at Adequacy of Defense Counsel's Representation of Criminal Client—Daubert or Frye Challenge to Expert Witness or Testimony, published at 103 A.L.R. 6th 247, which collects and discusses all state and federal court decisions that have considered claims of ineffective assistance regarding Frye/Daubert-type challenges to scientific evidence. This American Law Reports article shows that defendants have challenged decisions made by counsel in regards to Frye/Daubert-type hearings, held to assess the reliability of expert witness testimony concerning the results of

scientific testing. As our Supreme Court of Canada instructs in Jordan, albeit in the context of Charter s. 11(b), all justice system participants have duties to make it work. While prosecutors are supposed to be "ministers of justice" and not game the rules when they know evidence is unfit for court, and judges are required to be the gatekeepers who screen and scrutinize opinion evidence, defence counsel must also be vigilant and vocal in challenging junk science and the pseudo experts who offer it.

NO MORE APPEALS TO ASSESSMENT OFFICERS ON LAO ACCOUNTS

The former act, the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, under Reg. 106, s. 47, allowed for taxation of an account by appeal to an Assessment Officer. It seems that the new *Legal Aid Services Act, 2020*, S.O. 2020, c. 11 repealed that provision and provided no replacement. Consequently, it seems that there is no longer any avenue of appeal against the decision of an examiner reviewing the settlement decision of a legal accounts although there might be a possible route of appeal due to transitional provisions.

One might well wonder, as did the Roman poet Juvenal, *Quis custodiet ipsos custodes?* - who will guard the guards themselves? Is this not a textbook case of conflict of interest, since the very organization with whom counsel is disputing the settlement of an account is the sole arbiter of that issue? Once again, the classics give us the answer*: Vae victis* - Latin for "woe to the vanquished", or "woe to the conquered", meaning that those defeated in battle are entirely at the mercy of their conquerors and should not expect—or request—leniency. So, if your account is slashed by LAO, there's no independent and impartial review.

POSSIBLE PRISON LAW AMENDMENTS

Bill S-230, an Act to *Amend the Corrections and Conditional Release Act* would:

- require that, if a person who is sentenced, transferred or committed to a penitentiary has disabling mental health issues, they will be transferred to a hospital;
- ensure that a person may only be confined in a structured intervention unit for longer than 48 hours on an order of a superior court;
- allow for the provision of correctional services and plans for release and reintegration into the community to persons from disadvantaged or minority populations by community groups and other similar support services; and
- allow for persons who are sentenced to a period of incarceration or parole ineligibility to apply to the court that imposed that sentence for a reduction if there has been unfairness in the administration of their sentence.

According to the Parliament of Canada's Website, *LEGISinfo,* the bill has been through first and second readings and is now in committee without any reported activity as of January 15, 2023, so we'll have to wait to see what becomes of it.

BLANKET DRUG POSSESSION PARDONS

Bill C5 (https://www.parl.ca/DocumentViewer/en/44-1/bill/C-5/royal-assent), which was passed November 18, 2022, purged criminal records for all simple possession convictions– including those for marijuana and any other controlled drug. It contains these provisions:

Conservation of record — conviction

10. 6 (1) Any record of a conviction that occurs before the day on which this section comes into force in respect of an offence under subsection 4(1) must be kept separate and apart from other records of convictions within two years after that day.

Conservation of record — deeming

(2) A conviction that occurs after this section comes into force in respect of an offence under subsection 4(1) is kept separate and apart from other records of convictions two years after the conviction or two years after the expiry of any sentence imposed for the offence, whichever is later, and the person convicted of the offence is deemed never to have been convicted of that offence.

PEREMPTORY CHALLENGES

1. In the department of closing the barn door after the horse has bolted, consider this U.S. comment on some proposals in the U.S. to eliminate, as has been done in Canada, peremptory challenges. Dr. Ken Broda Bahm, an American senior litigation consultant, has a blog named *Your Trial Message* that draws from social science and practical experience to share insights and research for making your trial message as effective as it can be. His recent edition, entitled *Save the Strikes: ASTC's Research-Based Case Against Prohibiting the Peremptories*, addressed calls to eliminate the peremptory strike in civil and/or criminal cases, noting that several states are looking at the move, and Arizona has been the first in actually eliminating peremptory strikes in all jury trials. You can find the blog at https://yourtrialmessage.com/save-the-strikes-astcs-research-based-case-against-prohibiting-the-peremptories/?utm_source=rss&utm_medium=rss&utm_campaign=save-the-strikes-astcs-research-based-case-against-prohibiting-the-peremptories.

He notes "The argument has been that, because peremptory challenges have been used to discriminate, and because the standards laid down to prevent that abuse haven't tended to work, it is better to simply eliminate the problem by ending the practice." Hmm, sounds familiar.

He reports that The American Society of Trial Consultants has taken a detailed look at the issue, and recently issued its *ASTC Position Paper on the Elimination of Peremptory Challenges: And Then There Were None….* The main findings were that Eliminating Peremptories Won't Diversify Juries and that Eliminating Peremptories Will Make It Harder to Address Bias. The Report advocated several specific measures instead and concluded that the more we

understand about the power and elusiveness of cognitive biases, the more important it becomes to not only defend peremptory strikes, but to make the best use of them as well.

Ah, at least we'll have the cold comfort of being able to say, for once, that we were, unfortunately, ahead of our southern neighbours on this one.

BAIL REACTION

It was reported on January 14, 2023, by the Canadian Press that "Canada's premiers are unanimously urging Ottawa to take "immediate action" to strengthen the country's bail system. The premiers from all 13 provinces and territories signed a letter to Prime Minister Justin Trudeau, dated Friday, January 13, 2023, that says the time for action is now and "our heroic first responders cannot wait." The letter, which originated in Ontario Premier Doug Ford's office, comes amid growing calls for reform after the late December killing of 28-year-old Const. Greg Pierzchala, a member of the Ontario Provincial Police."

...

"The letter from premiers notes a growing number of calls for changes to prevent accused people who are out on bail from committing further criminal acts. 'The justice system fundamentally needs to keep anyone who poses a threat to public safety off the streets,' it reads."

...

"Federal Conservative leader Pierre Poilievre said in late December that Trudeau's government should "reverse its catch and release bail policy," referring to a law the Liberals passed in 2019 that updated bail provisions in the Criminal Code. The law codified a "principle of restraint" that had been reaffirmed in a 2017 Supreme Court case, which directs police and courts to prioritize releasing detainees at the "earliest reasonable opportunity" and "on the least onerous conditions," based on the circumstances of the case. It also gave police more power to impose conditions on accused people in the community to streamline the bail process and reduce the number of unnecessary hearings, and it required judges to consider at bail the circumstances of people who are Indigenous or come from vulnerable populations."

This case might remind us of the notorious 1991 case of Jonathan Yeo that produced overreactions against bail. The analysis of what happened in the current case and the inevitable calls for more restrictive bail must be cautioned by the legal aphorism that "hard cases make bad law". Excessive risk-avoidance solutions would inevitably offend the current bail jurisprudence from our highest court and the provisions of the *Charter* regarding reasonable bail and presumption of innocence. The Defence Bar must be a vigilant and constructive player in protecting these values against ill-considered over-reaction. ■

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Estates Law News

Jennifer Vrancic

Recent Consideration of Armchair Rule by the Court of Appeal

Justices van Rensburg, Sossin and Copeland of the Ontario Court of Appeal recently revisited the application of the "armchair rule" in Jonas v Jonas, 2022 ONCA 845.

The case concerned the estate of a senior lawyer with experience in wills and estates. He was survived by his common law spouse, four children, and four grandchildren. The deceased's common law spouse and two of his daughters were appointed Estate Trustees.

The appeal was brought by a daughter of the deceased.

At the heart of the appeal was the proper interpretation of the clause in the Will dealing with the residue of the estate:

> I DIRECT my trustees to divide the rest, residue and remainder of my estate as follows: forty per cent (40%) to be divided equally among my children who shall survive me and sixty per cent (60%) to be divided equally between my grandchildren and my great grandchildren (if any) who shall survive me or be born within ten years of my decease, in equal shares per stirpes. Provided that the share to my grandchildren shall be kept and invested by my trustee and used for the support of such grandchildren and for their education and then paid to each of them upon such grandchild attaining the age of 40.

The application judge considered six different interpretations of the residue clause. She held that the entire 60 percent was to be divided equally among the grandchildren alive on the death of death plus any grandchildren or great grandchildren born by the vesting date. This had been the interpretation advanced by the Office of the Children's Lawyer.

The standard of review was determined to be correctness for a pure question of law, and palpable and overriding error for a question of fact or mixed fact and law such as the interpretation of the Will itself, which requires determining the testator's intention and surrounding circumstances.

The Court of Appeal held that the application judge had properly applied the "armchair rule". The court must determine the testator's intention as ascertained from the language that was used and the Will as a whole. Where the intention cannot be ascertained from the plain meaning of the language used, the court may consider the surrounding circumstances known to the testator when making the Will. The court sits in place of the testator and assumes the same knowledge they had of the extent of their assets, the size and makeup of their family, and their relationship to family members, based on the evidence presented.

The Court of Appeal found that the clause at issue was ambiguous. A number of different interpretations were open to the application judge, and she chose the one that most closely conformed to her assessment of the testator's intention, reading the Will as a whole at the time it was made. In particular, there was case law supporting different interpretations of per stirpes in different contexts, including the application judge's understanding of per stirpes as an intention to divide a portion of the estate into equal shares at the nearest generation with surviving heirs.

It should also be noted that the Court of Appeal did not disturb the application judge's finding that the rule in Saunders v Vautier applied, such that the funds would be available to each beneficiary as of the vesting date and upon reaching the age of 18. ■

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Family Law Update

Taylor Carson

Tintinalli v Tutolo: The Devil's in the Details

It is no secret that most lawyers could do without docketing (an alternative name for this article might have been: "The Devil's in the Dockets"). If you are one of those lawyers, I might recommend reading Justice Chown's recent endorsement in Tintinalli v Tutolo, 2022 ONSC 6267, a family law decision out of Brampton that provides a compelling reminder that detailed dockets matter.

We have all seen the familiar clause in offers to settle: "if this offer is accepted after X date, the accepting party will pay the offering party's costs, to be determined." In Tintinalli, the Honourable Justice Chown was asked to make that determination after the parties reached a settlement regarding the issue of parenting, only. The May 25, 2018, offer to "settle the access issues" contained a provision that stated, "in the event that this Offer to Settle is accepted after June 1, 2018, Paul shall pay costs to Grace on a full indemnity basis, to be assessed."

Paul accepted the offer on March 31, 2020, nearly two years later. The terms of the offer were incorporated into a consent order which stated that Paul was to pay costs to Grace for "parenting issues on a full indemnity basis, to be assessed." Grace then claimed costs of $120,700.00, comprised of partial indemnity fees to the date of the offer and full indemnity fees thereafter.

Paul did not dispute that by accepting the offer, he had agreed to pay full indemnity costs relating to the parenting issues. What was contested, and what Justice Chown had to determine, was the extent to which the costs claimed by Grace were related to parenting issues, as opposed to ongoing disclosure and financial issues which remained unsettled, and whether these costs were reasonable in light of the tasks completed.

As part of this analysis, His Honour looked to the dockets provided by Grace's lawyers. He found that most of the dockets described activities but provided no information relating those activities to parenting issues - or any other issues, for that matter. Examples of the dockets included: "To reviewing file"; "To reviewing material from client, preparing memo, meeting with client"; "To emails to client, drafting letter"; "To preparing for motion, drafting affidavit"; "To emails."

This presented two problems. The

first was that it was impossible to determine with any degree of precision what time was spent by counsel addressing the parenting issues and thus recoverable under the terms of the offer. Relying on an earlier decision of Justice Pazaratz, Justice Chown recognized that there is an onus on parties claiming costs to provide the court with sufficient information to particularize what work was performed and why, to address varying levels of indemnification which may apply to different issues, and to reassure the court that costs are not being claimed for previous steps or events where costs have already been dealt with.[1] Due to the failure to meet this onus, Justice Chown applied a substantial discount to the legal fees claimed by Grace.[2]

The second problem was that the dockets did not provide enough detail for Justice Chown to determine whether the fees charged were a fair and reasonable amount, given the circumstances of the case and the actions taken. This resulted in His Honour declining to award costs for fees billed by senior counsel at an hourly rate of $1,090.00. While the issues of the case appeared contentious, they were not complex, and there was no evidence before the court to justify extreme legal expenses or high hourly rates.

Ultimately, of the $120,700.00 in costs claimed, only $49,000.00 were awarded.

There are several other important takeaways in the Tintinalli endorsement regarding costs awards in family law matters, including whether a court will award costs associated with a voluntary mediation (likely not); whether pre-litigation fees should be included in an award of costs (perhaps, but not in this case); and what His Honour considers to be an extreme amount for a party to spend litigating a summer parenting time schedule ($26,000.00). However, the lesson that can be applied by nearly every lawyer who reads the decision is this: detailed dockets matter. If nothing else, let Tintinalli be your reminder to docket regularly and fulsomely – failure to do so may not just be to your detriment, it may end up costing your client. ■

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Endnotes

1. Benzeroual v. Issa and Farag, 2017 ONSC 6225 at para 55.

2. To their credit, counsel did file an affidavit setting out a detailed narrative description of the matters in issue, the steps taken and when, and the activities involved which allowed His Honour to infer that a considerable amount of time was spent on the parenting issues. However, it must be asked whether this would have been necessary if the dockets themselves had included this information.

History Update

John Loukidelis

Nick Zaffiro, KC

Nicholas Joseph Zaffiro was born in Hamilton, Ontario, on March 14, 1930, to Francesco and Maria Zaffiro. Francesco was born in Racalmuto, Sicily, in 1901 and emigrated from this mining town to Canada in 1923, after serving in the Italian Army from 1917. He arrived in Hamilton, Ontario, via Halifax, and was received by his uncle who was his sponsor and an employee of Stelco at the time.

Francesco had been trained as a shoemaker in Italy, and so, when he arrived in Canada, his uncle loaned him money to open a shoe making and repair store in Hamilton, on Colborne Street.

Francesco was betrothed to Nick's mother, Maria Madelena, when he left Italy, but several years passed before they were married because Francesco could not afford to return to Sicily for the wedding. In 1926, he travelled to Italy for his wedding because several letters from home hinted that he was running out of time. A friend loaned him $300 on a handshake so that he could make the trip, even after Francesco said he might not be able to repay the debt. Of course, he did repay it eventually.

Francesco had completed only five years of elementary school. He wanted to continue his studies but doing so meant attending a school in the provincial capital 25 miles or so away, which was not practical or affordable. Francesco was for the most part self-educated. He was a voracious reader, knowledgeable, especially about current events, and an eloquent speaker. He insisted on a good education for his children so that he could accomplish through them that which he was unable to do himself. He believed that education was the most important asset for a better future for his family and other immigrants.

Francesco was also a leader in his community. In the years before World War II, he was the Assistant Grand Venerable for Ontario of the Sons of Italy. Francesco, however, like many other Italian immigrants in Hamilton, was interned at the Petawawa Internment Camp from 1940-1943, leaving the family to fend for itself. Nick's eldest sister, having just completed elementary school, had to join their mother in work at a clothing shop to help support the family and Nick's education.

Nick's parents did not have much formal education between them, but they placed a great deal of emphasis on his schooling. A friend of Nick's dropped out of high school to take a job driving a truck for Canada Post. The friend seemed to be earning some good money, and so Nick thought about following his example. He mentioned the possibility to his father. Fireworks ensued: Francesco's imprecations could be heard throughout the house. What awaits you without an education, Francesco said, is a pick and shovel.

The response was very different when Nick decided that, rather than continue at Cathedral High School for grade 13, he would take a university prep year instead. At age 17, he enrolled in McMaster University as a freshman.[1] He believes that the McMaster experience was an excellent preparation for his undergraduate studies. He graduated from McMaster in 1951 with a B.A. in history and economics. Nick

also played intramural football at Mac for four years. He was appointed as the Senior Year Male Athletic Rep for the McMaster Student Association.

Nick was able to afford tuition more easily because he worked during the summers at Dofasco after grade 12. (He had worked in a fish and chip shop previously; from the time he was 10 years old.) His parents supported his schooling, but he also contributed to the family's finances: he and his three sisters would bring their paycheques home and give them to their mother who managed the family's money. She doled out allowances to Francesco, Nick, and his sisters.

After graduating from McMaster, Nick attended Osgoode Hall Law School. He worked with John L. Agro from 1952. Nick was "Mr. Agro's" very first articling student. In 1953, John Parente became the second student. Nick was called to the Bar in 1955. His parents attended the Call ceremony. Nick found the experience quite moving because he could tell how proud his parents were. Nick feels certain they would be prouder still that all of their grandchildren have graduated from university.

In 1956, Nick married Nellida Patarachia who died in 1990. They had three daughters, Marita, Laura and Theresa. He has 9 grandsons, one granddaughter and recently welcomed his first great-granddaughter, Gabriella.

After his Call, Nick re-joined John Agro as a fully-fledged lawyer. In 1955 Don Cooper joined the firm with a complementary practice in family law and litigation. In 1957, Nick and Don Cooper joined John Agro to form the partnership known as Agro Cooper Zaffiro, the predecessor to Agro, Zaffiro, Parente, Orzel and Baker and later Agro Zaffiro LLP. The firm grew over the years to become one of the largest in Hamilton.

For 50 years, Nick's focus was real estate, contracts, wills, trusts, and estate administration. As a practitioner in these areas, he mentored many of the more than 150 articling students who worked at the firm during his years there. Several went on to become prominent members of the legal profession, the judiciary, government and the business and financial sectors throughout Canada. Many of them continue to be a source of great pride and friendship for Nick.

Nick recalls an early firm meeting about future growth and hiring. The focus for recruitment was a balance of "finders" (business/client development and community engagement lawyers), "minders" (lawyers who focused on administration and business support systems) and "grinders" (detail and research-oriented lawyers).

Nick handled some court work. Albert (Bert) Marck was a Hamilton magistrate who had formerly been a lawyer with Marck & Marck. Bert was a friend of John Agro. Nick became friends with Bert—they often ate lunch together—but this didn't stop Mr. Marck from poking fun at Nick in front of a packed courtroom one Monday morning. John had sent Nick to ask for a continuance. Mr Marck, in response to Nick's entreaties, insisted he should proceed with the matter then and there. Eventually, Mr Marck relented. He then summoned Nick to his chambers so that he could enjoy a good laugh at Nick's expense to his face. Nick says that, notwithstanding the foregoing, he developed a good reputation within the firm for his ability to obtain continuances.

Nick also appeared with John Robinson in defence of a group of men who had been charged with robbery and assault in a vicious attack on a night watchman at a foundry. The men were convicted, in part because they

had been arrested on the night of the crime wearing clothes with blood and steel filings on them that matched the blood of the victim and filings found at the scene of the crime. John and Nick's defence was not helped by the fact that Nellida was a lab technician whose review of the evidence confirmed the Crown's interpretation of it. Nevertheless, Mr. Justice Theo McCombs made a point of commending the "fine effort by counsel" for the defence, which helped (somewhat) with the sting of defeat and the fact that the lawyers were not paid a cent for their work, as the trial occurred before the days of legal aid.

In addition to the work he did for his clients, Nick spent long hours working for his community, like his father before him. Nick was also encouraged to join legal and service organizations to build his personal profile and that of the firm's. He believed that an important source of clients would be Hamilton's Italian community, and so he worked on improving his Italian by reading Italian newspapers. He had spoken Sicilian while growing up, but he was concerned that potential clients would not understand his "dialect".

In 1954, Nick joined the Sons of Italy (SOI) Trieste Lodge and is currently its longest living and serving member. He has served in every capacity over the years on committees, relief efforts and the executive, and was President for two years from 1958-59. He was subsequently elected as the Provincial President, wherein which the organization served 12 Ontario Lodges at the time. Nick was also the Ontario representative at the Supreme Convention of the SOI of America and the SOI Canada National Convention

As a member of the SOI, Nick was instrumental in the formation of the SOI Housing Corporation which currently manages a diverse portfolio of over $40 million in not-for-profit affordable housing. He was also the founding Chair of the SOI Charitable Corporation and subsequently of its main undertaking, the Villa Italia Retirement Residence.

Nick also served with the Knights of Columbus and was active in the Liberal Party. In 1967, he was named by Pierre Elliott Trudeau to the Canadian Multicultural Council, on which Nick served for two years.

Nick participated in the Hamilton Lawyers' Club and the Hamilton Law Association in various capacities beginning in 1955. He served as the HLA's President from 1981-82. In 1969, he was appointed a Queen's Counsel for his community involvement.

Nick retired in 2005 at 75 years of age after 50 years of practice. The occasion was marked by a celebration called "The Life, The Law and The Legacy" that was attended by his family, friends, associates, past articling students and community leaders. All proceeds were donated to Villa Italia.

He continues to watch with pride, the evolution of Agro Zaffiro LLP as it grows and changes to meet the diverse needs of the communities it serves. One of his greatest pleasures are visits from his past students and colleagues.

What's his advice for young lawyers today? It's important, he says, that you want to be a lawyer and that you are not doing it to please others. It's also important that you want to help people. You can make a good living in the law, of course, but you will need your ideals to stay motivated and be truly successful. ■

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Endnotes

1. Nick recently received his high school diploma from Cathedral, which had withheld it because he had not completed grade 13 there.

New Lawyers' Update

Rachel Prestayko

Reaching to the Bookshelf & Blogs for Tips on Success

I was called to the bar in 2020 several months after the onset of the COVID-19 pandemic. My cohort, as well as those in the years that followed, have experienced a vastly different entry into the profession. We have argued our first motions on Zoom, worked in jobs where we may only have only met our supervisor in person once, and only recently put on our robes and tabs for the first time.

Last year, I read Norman Bacal's book "Take Charge: Skills That Drive Professional Success", which has changed the way I view the practice of law and how to build a legal practice as a new lawyer.

Norman Bacal is the best-selling author who, in this 2021 book, aims to capture all of the advice he has given law students and junior lawyers alike over the years on paper. The book is divided into three parts that cover universal keys to success when providing legal services, the psychology of success including how to find your place, and the daily practice of success that demystifies the business of law.

While I recommend this book for all law students and junior lawyers, I thought I would share one nugget of wisdom that has reframed how I do what I do each day:

"It's not about how hard you work or how smart you are, it's about how the client perceives your service. It's about managing expectations."

Norman Bacal goes on to compare providing legal services to being a waiter in a restaurant. While it may seem trite for those who have worked in the restaurant industry, he grounds the example with a waiter dealing with a delay in the kitchen:

> "Imagine you place your order and then wait. Despite your signals, the waiter doesn't make eye contact and keeps disappearing to the kitchen, coming back with food for the next table, the one that arrived after you. After fifteen minutes you get up and leave. Not only are you never coming back, but you will also likely tell ten people about the bad experience.
>
> Roll back the tape. Five minutes out the waiter comes over to you and your dinner companion with two small plates and says, 'I'm so sorry, there's been a delay in the kitchen with one of your orders. It's going to be another ten minutes. Here's something on the house to tease your palates.' The reality hasn't changed, but your perception has. This story is one you're going to repeat about the service. You may even be inclined to leave a larger than average tip."

While this is a skill I am still working towards, I recognize it in the best lawyers that I work with who leave clients feeling happy in situations where their ideal outcome couldn't be a reality.

Norman Bacal is just one of many people in the legal industry that I follow on LinkedIn, and this book, along with other online blogs, will continue to be a resource that I tap into throughout my career to understand what I can do to improve my practice and what it is that makes great lawyers around me so successful. ■

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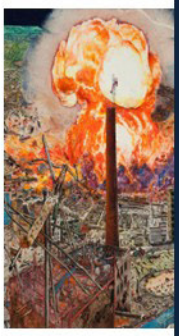
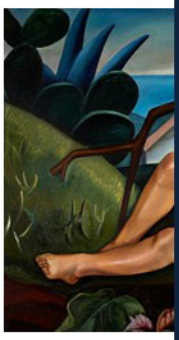
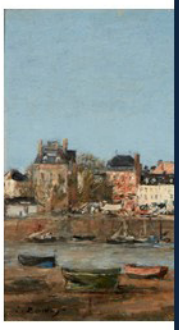
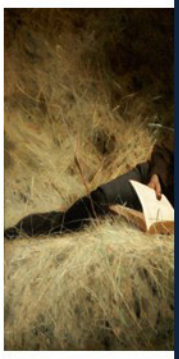


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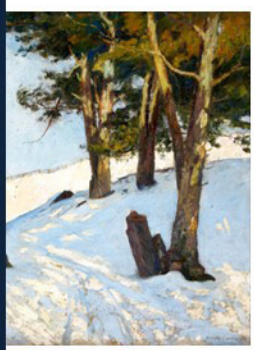

Personal Injury News

Andrew Spurgeon

Introduction

At the end of 2022, Justice Belobaba of the Superior Court of Justice released a decision in a case called Robertson v. Ontario.[1] The Robertson case involved the certification of a proposed class proceeding. In his decision, Justice Belobaba dove into issues of great interest to the personal injury bar, including the following:

- Application of the new Crown Liability and Proceedings Act;
- Analysis of the Anns – Cooper test[2] for establishing duty of care based on proximity; and
- Analysis of the legislative framework governing ministerial responsibility for long-term care ("LTC") homes in Ontario and the potential emergence of a private law duty of care from that framework.

I will briefly summarize and examine Justice Belobaba's analysis of whether the plaintiffs were able to demonstrate that a viable cause of action existed and was factually pleaded in their statement of claim on a Rule 21 basis.

At its core, the argument for certification put forth by the plaintiffs is that "thousands of elderly residents in provincially regulated [LTC] homes died from Covid-19 or sustained serious illness because of the gross negligence of the Government of Ontario."[3]

The proposed classes included the following:

- Residents of LTC homes who became ill and/or died of Covid-19;
- Visitors to LTC homes who became ill and/or died of Covid-19; and
- Family members of persons in the first two groups who in turn may have a derivative claim under the Family Law Act.

Three causes of action were alleged in the statement of claim against the Crown:

- Breach of fiduciary duty;
- Breach of section 7 of the Charter of Rights and Freedoms; and
- Negligence and/or gross negligence.

The Court accepted the definition of the Class submitted and the validity of the plaintiffs as representative of the individual Class members.

Analysis of Causes of Action Alleged

In certifying a Class Proceeding, the first hurdle that the plaintiff must overcome is whether the statement of claim discloses a reasonable cause of action, as governed by section 5(1)(a) of the Class Proceedings Act ("CLPA").[4] This section has been interpreted generously.[5] Assuming the facts pleaded are found to be true, the approach to the analysis of a claim is to determine whether it is plain and obvious that the claim is doomed to fail.[6] If the answer is no, the cause of action pleaded in the claim survives. Of the three causes of action pleaded, the Court allowed the claim to proceed on only one – negligence/gross negligence. Below is an examination of each cause of action in turn.

The Fiduciary Duty Claim

With respect to the claim for breach of fiduciary duty, the Court relied on the following criteria pursuant to the Elder Advocates case[7] in determining whether there was a reasonable prospect of success in a claim against the Crown:

a. Residents must be in a position of vulnerability to the Crown through the Minister of Long-Term Care specifically due to that relationship and not due to a pre-existing vulnerability such as age or infirmity; and

b. There exists an undertaking on the part of the Crown through the Minister to act as a fiduciary of the alleged beneficiaries, the residents, and visitors of LTC homes.

Based on the aforementioned criteria, the Court determined there was no fact pleaded in the claim or provision cited from the Long-Term Care Homes Act ("LTCHA") that supports the assertion that the residents of LTC homes are specifically vulnerable because such homes are regulated by the Crown. Rather, their vulnerability arises because residents in such homes are old and infirmed.

The Court further stated that the plaintiffs led no evidence nor made a credible argument that could cause the Court to conclude that the Crown had placed residents under its control and had a duty to act solely in the residents' best interests. Control is the distinguishing feature. Just because the Crown may choose to regulate the relationship between private actors, such as the relationship between the operator of an LTC home and a vulnerable resident, it does not mean a fiduciary relationship exists between the Crown and the vulnerable resident as a result.[8]

The Charter of Rights and Freedoms, Section 7 Claim

In their section 7 claim, the plaintiffs alleged that the unnecessary deaths of residents were caused by government delay in taking steps to protect residents through regulatory mandates of optimal prophylactic hygienic behavior and best patient care practices in LTC homes. The argument rests on the notion that such delay in regulatory action by the Crown constituted an unreasonable deprivation of the residents' rights to life and security of the person.

Based on the Divisional Courts' decision in Leroux v. Ontario[9], the section 7 cause of action was rejected because "mere inaction" or "delay" on [10]the part of the state in fashioning a regulatory response to an external threat does not in itself constitute an actionable or prohibited state deprivation of the life or security of the person.

The Negligence/Gross Negligence Claim

Under Ontario's Crown Liability and Proceedings Act (CLPA), the Crown cannot be independently liable in tort, only vicariously liable for the torts of its officers, agents and employees.[11] Moreover, the CLPA asserts that no

cause of action can arise against the Crown or its servants, agents or employees in respect of the following, if made in good faith:

- A regulatory decision;[12]
- The failure to make a regulatory decision;[13] or
- Decision in respect of a policy matter.[14]

The plaintiffs alleged that the Minister of Health, the Minister of Long-Term Care, and Chief Medical Officer of Health acted as agents of the Crown with respect to mandating the standard of care for residents of LTC homes in Ontario. Prior to and at the outset of the pandemic, the plaintiffs alleged that each of the agents of the Crown made or failed to make regulatory decisions or decisions in respect of a policy matter that were so "reckless," "woefully deficient," "extremely careless," "wholly inadequate" and such "a marked departure from any reasonable standard of care" that an inference of absence of good faith can be made in respect of the behaviour of the agents of the Crown.[15]

Justice Belobaba, in analyzing this issue, noted that "gross negligence" is not a cause of action that is separate and distinct from "negligence." Rather, the distinguishing feature is simply a matter of degree in negligence.[16] Assuming the facts and the extremity of negligence alleged were found to be true, there exists the reasonable prospect that a ministerial agent of the Crown could be held to have acted in bad faith, and ultimately found to be negligent; in turn, the Crown could potentially be held vicariously liable for the negligence of their agent.[17]

The Crown ministerial agent's duty of care to persons can arise in two ways. One way the duty arises is through the specific interactions of that agent with the plaintiff. The second way the duty may arise is from the ministerial agent's constitutive statute. The evidence before the Court did not include any personal interactions between LTC home residents and any Minister or agent of the Crown. However, the Long-Term Care Home Act (LTCHA) did set out a list of fundamental principles undergirding the Act and empowering the Minister. The first enumerated principle under section 1 of the LTCHA states the following:

> 1. The fundamental principle to be applied in the interpretation of this Act and anything required or permitted under this Act is that a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort and have their physical, psychological, social, spiritual and cultural needs adequately met.[18]

Under the LTCHA, the responsible minister is the Minister for Long-Term Care.[19] In the statement of claim, the plaintiffs pleaded that pursuant to the preamble of LTCHA, the Minister of Long-Term Care has the "responsibility to take action and duty to recognize the responsibility to take action where standards or requirements under this Act are not being met, or where the care, safety, security and rights of residents might be compromised."[20]

Taken together, the above-mentioned

statutory clauses under LTCHA arguably establish sufficient proximity to impose a duty on the Minister of Long-Term Care to "… take action without delay when the lives of LTC residents are clearly at risk and their 'care, safety, security … might be compromised.'"[21]

Conclusion

Based on the analysis outlined above, the Court concluded that the plaintiffs' claim was properly focused on the Minister of Long-Term Care only, and not the Minister of Health or Chief Medical Officer of Health. The Minister of Long-Term Care is properly a defendant, as the only cause of action that was adequately pleaded and found not doomed to fail applied solely to the Minister of Long-Term Care. Therefore, the matter was certified as a class proceeding. ■

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Endnotes

1. Robertson v. Ontario, 2022 ONSC 5127 [Robertson]
2. Anns v. Merton London Borough Council, [1978] A.C. 728 [Anns]; Cooper v. Hobart, 2001 SCC 79 [Cooper]
3. Robertson, supra note 1 at para 1.
4. Class Proceedings Act. 1992, S.O. 1992, c. 6 at s. 5(1)(a). [CPA]
5. J.B. v. Ontario (Child and Youth Services), 2020 ONCA 198 at para. 25 [J.B.]
6. Robertson supra note 1 at para. 34; Cloud v. Canada, (2004) 73 O.R. (3d) 401 (C.A.), para. 41. [Cloud]
7. Alberta v. Elder Advocates of Alberta Society, 2011 SCC 24 [Alberta]
8. Robertson supra note 1 at paras. 65-73
9. Leroux v Ontario 2021 ONSC 2269 [Leroux] Note that the decision is currently subject to appeal at the Court of Appeal for Ontario.
10. Crown Liability and Proceedings Act, 2019, S.O. 2019, c. 7, Sched. 17 at s. 8(1) [CLPA]
11. Ibid at s. 11(2)
12. Ibid at s. 11(3)
13. Ibid at s. 11(4)
14. Robertson supra note 1 at paras. 7-8
15. Drennan v. Kingston (City), (1897) 27 S.C.R. 46 at para. 33. [Drennan]
16. Robertson v. Ontario, at paras. 30 and 47 to 55
17. Long-Term Care Homes Act, 2007, S.O. 2007, c. 8 ats.1 [LTCHA]; Robertson supra note 1 at para. 49.
18. Robertson supra note 1 at para. 50
19. LTCHA supra note 17 at Preamble; Robertson supra note 1 at para. 51
20. Robertson supra note 1 at para. 52

Real Estate Law News

Mark Giavedoni

Recent Updates in Real Property Matters

The following are a few items that have been in the news recently relating to real property issues which may be of interest to local practitioners.

Prohibition on the Purchase of Residential Property by Non-Canadians Act

The Canadian government enacted the Prohibition on the Purchase of Residential Property by Non-Canadians Act ("Act"), which comes into force on January 1, 2023, to prohibit non-Canadians from directly or indirectly purchasing residential property (or property that includes residential property) in Canada. Regulations have recently been published.

A Non-Canadian (different from a non-resident) is:

(a) an individual who is not: (i) a Canadian citizen; (ii) a person registered as an Indian under the Indian Act; or (iii) a permanent resident;

(b) a corporation that has not been incorporated under the laws of Canada or a province; and,

(c) a corporation incorporated under the laws of Canada or a province that is "controlled" by foreign corporations or foreign individuals (the Regulations define 'control' as having direct or indirect ownership of shares/units representing more than 3% of the value of equity or 3% or more of the voting rights).

Residential property means any real property or immovable, other than a prescribed real property or immovable, that is situated in Canada and that is:

(a) a detached house or similar building, containing not more than three dwelling units;

(b) a part of a building that is a semi-detached house, row house unit, residential condominium unit or other similar premises that are intended to be owned separately from other units in the building; or

(c) land that does not contain any habitable dwelling, is zoned for residential or mixed use and located within census agglomerations or census metropolitan areas.

The prohibition applies to census agglomerations and census metropolitan areas, as defined by Statistics Canada's Standard Geographical Classification (SGC) 2021. This includes most urbanized areas with a population of more than 10,000 (in the case of agglomerations) and 100,000 (in the case of metropolitan areas).

The prohibition also applies to 'purchases' of real property, which is defined to be the acquisition, with or without conditions, of a legal or equitable interest or a real right in a residential property. A purchase does not, however, include:

(a) acquisition by an individual of an interest or a real right resulting from death, divorce, separation or a gift;

(b) the rental of a dwelling unit to a tenant for the purpose of its occupation by the tenant;

(c) the transfer under the terms of a trust that was created prior to January 1, 2023; or;

(d) the transfer resulting from the exercise of a security interest or secured right by a secured creditor.

The Act prohibits a non-Canadian from purchasing, directly or indirectly, any Residential Property, and makes it an offence (with a maximum fine of $10,000) for any individual, corporation, or entity to breach the Act or counsels, induces, aids or abets or attempts to counsel, induce, aid or abet in a contravention of the Act. Directors, officers, agents, senior officials, managers and supervisors of corporations or other entities can also be found liable if they aid or authorize the corporation or entity to commit or aid in the offence, regardless of whether the corporation or entity has been prosecuted or convicted.

As currently passed without regulations, the Act would prevent a non-Canadian from purchasing any property in Canada that contains 3 or fewer dwelling units. Non-residential property that has residential uses/dwelling units would fall under the prohibition, particularly in Ontario where the Planning Act would otherwise make it impossible to sever the residential from the non-residential uses.

There are, however, narrow exemptions under the Act. The Act does not apply to:

(a) temporary residents under the Immigration and Refugee Protection Act;

(b) non-Canadians who purchase residential property with a spouse or common-law partner if the spouse or common-law partner is a Canadian citizen, a person registered as an Indian under the Indian Act, or a permanent resident of Canada;

(c) foreign states purchasing for diplomatic or consular purposes; and,

(d) residential property located outside of a census agglomeration or census metropolitan area.

Agreements signed before January 1, 2023, will not be subject to the prohibition (as long as parties are committed and liable under the agreement) and any sales of residential property contravening the Act will continue to be valid and enforceable. However, if a non-Canadian is found liable under the Act, the Minister may apply to the Superior Court of the province in which the purchase occurred and order the residential property be sold. The Regulations outline the contents of an order to sell and the application of the sale proceeds, namely: firstly to the Minister's costs; secondly, to those (other than the Non-Canadian) who are entitled to receive proceeds of the sale with priorities as the Court may determine; thirdly, repayment to the Non-Canadian of an amount not greater than the purchase price paid for the property; and fourthly, any excess to the Receiver General for Canada.

This Act will have implications for lawyers who facilitate closing of transactions to non-Canadians. Although a violation of the Act does not invalidate an agreement of purchase and sale, it would suggest that a non-Canadian should be advised to dispose of the property as soon as possible to avoid an order to do so, and potentially charges against the lawyers in the process.

Know Your Client Rules

Effective January 1, 2022, the Law Society of Ontario made sweeping amendments to Bylaw 7.1 to bring the rules regarding client identification and verification in line with other law societies'' rules and requirements against money laundering and fraud. These amendments include:

1. IDENTIFICATION of the client where the lawyer is engaged by that client;

2. VERIFICATION of the client's identification, where the lawyer is engaged in respect of the receipt, payment or transfer of funds (virtually every real estate transaction);

3. SOURCE OF FUNDS inquiries about where the client's funds have come from for the purpose of the transaction;

4. MONITORING at all stages of the engagement where there are changes to the client, control of the client, or in the relationship with the client;

5. RECORD KEEPING requirements for all of the above; and,

6. WITHDRAWAL of services where the client refuses to comply or where the result of the disclosure/due diligence suggests the lawyer would be assisting in fraud or illegal conduct.

The Law Society had initially allowed for remote validation of client identification due to COVID but was set to remove this temporary measure as of January 1, 2023. The Law Society has now pushed that to January 1, 2024, but lawyers should use this additional time to ensure their processes are updated to comply with the requirements.

Client ID validation is only permitted in a few ways:

a) Government-issued photo ID: you must review a valid, original, and current government-issued photo ID (not a health card and not issued by a municipality), in the presence of the client you are verifying. This is what has been permitted to be done remotely but cannot be done remotely after December 31, 2023.

b) Credit File method: obtain the client's credit file directly from a credit bureau or third-party vendor authorized by a credit bureau; the file must have been in existence for at least 3 years. The identification information from the client must match what is stated in the credit file. Clients cannot provide you with a copy of their credit file.

c) Dual Process method: obtain any two of the following information from two different reliable sources: i) information from a reliable source that contains the individual's name and address; ii) information from a reliable source that contains the individual's name and date of birth; and iii) information that contains the individual's name and confirms they have a deposit account or credit card or their loan account with a financial institution. These documents must be originals, valid and current (not copies or electronic images).

d) Use an agent: retaining an agent to do any of the foregoing on your behalf. Many agents are implementing software to enable this more efficiently and as these agents perfect their software, more information will be available regarding compatibility with the rules.

These requirements do not necessarily dovetail with practices that have been through a pandemic and a marketplace that has tasted the efficiencies of virtual legal services; however, they are not that far removed from obligations lawyers have had for decades regarding knowing who your client is and preventing yourself from being duped by fraudsters. Read the Law Society's Q&As on the topic and attend one of the many seminars that are certain to be published over the year in anticipation of compliance with these requirements.

A Lot from the DOT

Director of Titles, Jeffrey Lem, has outlined a number of updates and changes for 2023. A few of these are identified below for your information:

1. Combined Charges are not permitted (see Bulletin 2022-07). Using multiple chargors in a single charge, each with a different interest in each PIN being charged is a combined charge. In that instance, you should be registering two separate charges.

2. Notice of Security Interest. These registrations (NOSIs for short) must have detailed 'make and model' collateral descriptions to be valid. There will be more protocols coming relating to discharge of NOSIs by the Small Claims Court.

3. Powers of Attorney. The law statements for POAs have changed and are more robust. Review them in Teraview to ensure compliance with the correct statements. Personal information set out in a POA (such as bank account numbers, SINs, etc.) will not be accepted for registration.

4. Section 71 Notices. All notices under section 71 of the Land Titles Act must have some document attached to it evidencing what the unregistered interest in the lands actually is. Historical practices of indicating Person X has an unregistered right in the property…full stop…is not going to be valid anymore.

5. Anti-Fraud Due Diligence Requirements. 2023 is expecting to see a Director's Order imposing stringent Anti-Fraud due diligence requirements for client identification. We will have to wait a bit longer to see what this actually entails.

All these things tell us that real property lawyers will be kept busy keeping on top of more statutory and regulatory changes and in the way in which we practice. Happy 2023, everyone! ■

Mark Giavedoni is a Certified Specialist (Real Property) and Partner at Gowling WLG (Canada) LLP in Hamilton whose practice focuses on all aspects of real property law.

He can be reached at: Mark.Giavedoni@gowlingwlg.com.

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Taxpayer's Management Services Not a Personal Endeavour

Amit Ummat

***Brown v. Canada* 2022 FCA 200**

Summary

The Appellant Mr. Darrell Brown ("**Mr. Brown**") appealed his reassessments to the Tax Court of Canada ("**TCC**") and lost. He appealed that decision to the Federal Court of Appeal ("**FCA**") and was successful in having the matter sent back for loss calculation purposes.

Issue

Mr. Brown was providing management services to a numbered company owned by himself and his spouse. The numbered company operated an art gallery. The TCC Judge found that, since Mr. Brown commenced the management services activity because his spouse was no longer able to manage the gallery as a result of her illness and pregnancy, it was a personal endeavor. The main issue in his appeal was whether the TCC Judge erred in finding that there was a personal element to Mr. Brown's management services activity.

Background

Mr. Brown is a lawyer, and his spouse is an artist. They opened an art gallery in Toronto. They operated the gallery through a numbered company with shares split 51/49 for Mr. Brown and his spouse, respectively.

The gallery opened in 2010 and seemed to be doing well. Mr. Brown was only minimally involved in the operation of the gallery at that point. Later that year Mrs. Brown fell ill and also became pregnant, which limited her ability to perform her gallery functions. In January of 2011, Mr. Brown became far more involved in the gallery operations. The numbered company resolved to retain Mr. Brown to provide management services to the numbered company. The compensation to be paid to him was a management fee equal to 20% of the amount by which the gallery's annual revenue exceeded $100,000. This agreement to provide services was eventually extended the following year for a five-year term.

Since the gallery did not earn over $100k in the years at issue (and posted losses some years), Mr. Brown was not paid for his services.

Mr. Brown claimed non-capital losses in 2011, 2012 and 2013. Mr. Brown was reassessed to deny the non-capital losses on the basis that his management services activity was not a source of income and that the amounts claimed as expenses were not reasonable. He appealed to the TCC.

The TCC relied on the Stewart[1] test to determine if Mr. Brown had a source of income. It is a two-part test:

i) Is the activity of the taxpayer undertaken in pursuit of profit, or is it a personal endeavour?

(ii) If it is not a personal endeavor, is the source of the income a business or property?

The TCC found there was a personal element, and that therefore there was no source of income from which Mr. Brown was able to deduct non-capital losses. The TCC found that the personal element arose when Mr. Brown took over for his ill spouse. The TCC also found that the activity was not carried on in a sufficiently commercial manner to constitute a source of business. Mr. Brown did not show that his predominant intention was to make a profit from the activity.

FCA Decision

The FCA was tasked with determining whether the TCC had erred in finding a personal element in Mr. Brown's activity. Justice Webb answered this in the affirmative. He ruled that the TCC misinterpreted the Stewart decision.

Justice Webb reframed the test as follows[2]:

- Is there a personal or hobby element to the activity in question?
- If there is a personal or hobby element to the activity in question, the next enquiry is whether "the activity is being carried out in a commercially sufficient manner to constitute a source of income" (Stewart, at para. 60).
- If there is no personal or hobby element to the activity in question, the next enquiry is whether the activity is being undertaken in pursuit of profit.

In the Court's view, the question became whether there was any personal or hobby element to the management services Mr. Brown provided. The answer was no, there was not. Mr. Brown's decision to provide management services due to his spouse's illness did not mean that there was a personal or hobby element to his services. The activity in question in this appeal was providing management services

to the corporation that was carrying on the gallery business. These management services allowed the gallery to continue to operate. There is no indication that there was any personal or hobby element to these management services. The only personal element identified by the TCC was Mr. Brown's motivation to provide these services because his spouse was unable to continue managing the gallery.

The next question was whether Mr. Brown pursued profit. The Court found that he was in fact pursuing profit. By providing the management services that allowed the gallery to continue to operate until it could generate sufficient revenue to cover all of its expenses, Mr. Brown's intent was to allow the gallery to generate revenue which, in turn, would generate the management fees payable to him, and hence, profit for his management services activity.[3]

The FCA found that the determination of the expenses Mr. Brown claimed was still an open issue and sent the matter back to the TCC to determine the amount of the non-capital losses.

Key Takeaway

It is important to note that conducting business activities with a personal intention does not convert the activity itself to a personal endeavour. Justice Webb makes interesting comments on this issue[4]:

> Many businesses are passed from one generation to the next. As noted above, the Tax Court Judge found a personal element to Mr. Brown's management services activity when he commenced that activity as a result of his spouse's inability to continue managing the gallery. Applying this logic to an intergenerational transfer of a business, whenever the next generation takes over an endeavour from their parents as a result of their parents' inability to continue the endeavor, the analysis to determine if the next generation is carrying on the activity in a sufficiently commercial manner to qualify as a source of income would be triggered. However, simply because a child takes over an endeavor from his or her parent because that parent is not able to continue conducting that endeavor should not result in a finding that there is a personal element to the endeavor that the child is now undertaking.
>
> A person's personal motivation or reason for conducting an activity cannot, in and of itself, result in there being a personal or hobby element to the activity. It is possible to find a personal reason why any person is carrying on a particular activity. For example, a person may be motivated to conduct a particular activity to generate money to fund his or her personal lifestyle or because they are personally motivated to provide better services or products than are currently available in the marketplace. ■

Amit Ummat LL.B LL.M (taxation) is the founder and principal lawyer of Ummat Tax Law. He has over 15 years of experience resolving individual and corporate income tax and GST/HST disputes.

Amit has argued over 100 appeals at various Courts in Canada and was recently certified by the Law Society of Ontario as a specialist in taxation law. For detailed practice information please visit www.ummat.ca.

Endnotes

1. Stewart v. Canada 2002 SCC 46
2. Decision, at paragraph 25.
3. Decision, at paragraph 43.
4. Decision, paragraphs 28-29.

Advocate in Moderation in Family Law Disputes

Alexandria Palazzo & David Thompson

"Exaggeration is the enemy of credibility"

The hallmarks of effective advocacy are the same regardless of the substantive area of law involved. Those hallmarks include candor, fairness, brevity, clarity, logic, reasonableness, and common sense.

Family law disputes are, by their nature, highly emotional.

The breakdown of a family unit, and disagreements between partners, obviously generates highly emotional and often volatile feelings. These situations are made worse with the existence of high conflict parents and young children, where custody and parenting time are two issues that need to be immediately addressed at the outset.

Unfortunately, it has seemingly become the norm in family law advocacy in particular to litigate disputed issues using emotion as leverage.

Our role as counsel has to be to attempt to strip or take on some of the emotional upset to position the court to make decisions that are fair, reasonable and tempered in the circumstances, rather than extreme. In the moment, it is sometimes hard to see the big picture and that every decision, inside and outside of the courtroom, greatly impact these families, and young children.

Family law pleadings, affidavits, and submissions and even correspondence between counsel need to be more tempered and matter of fact, without editorializing and without the seemingly so similar and routine tinge and barb of allegations of outrageous and vexatious conduct by the opposing party.

Our job as advocates is to attempt to de-escalate disputes, rather than using inflammatory, hyperbolic, and melodramatic language which only serves to increase the temperature of a dispute, rather than decrease it.

When counsel resort to simply parroting the client's emotional upset, we do the clients a disservice, rather than a favour. Exaggeration is the enemy of credibility. Any judge worth his or her salt easily sees through the editorialized, hyperbolic, exaggerated, and melodramatic language in affidavits and pleadings. A more tempered, moderate and reasonable narrative is much more attractive and credible to not only a judge but opposing counsel.

Client management is one of the most important, yet under-taught skills of the profession. At the first consultation with a client, we should all express the importance of transparency and provide realistic assessments of the situation being faced. There is no room for "sugar coating" or glossing over difficulties.

In many ways, a family law dispute needs to be viewed as a business transaction. It is not necessary to dwell on the past and harp on details of actions and behaviours of a former partner. It is only necessary to look at how you can be resolved going forward in the most cost-effective, expeditious and

reasonable timely manner. Using phrases such as:

"Your client refused to provide an update on how [child] was doing."

"We understand from Mr. [Name] that you abducted the children from the matrimonial home."

"My client has absolutely no idea where the child is."

"I am simply taking my client's instructions."[1]

are unnecessarily inflammatory and not settlement focused. Letters between counsel set the tone for the entire file. Employing a clinical, direct approach drives the parties to a quicker resolution, and less acrimony and upset. ■

David Thompson specializes in class action, commercial and civil litigation. His candid, street-smart advice and approachable manner set him apart from the lawyers he regularly faces across the negotiating table or in court.

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Endnotes

1 These are all real examples taken from various correspondence from out-of-town lawyers in 2022.

· Classifieds ·

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WILL SEARCH - WALTER BONNEY
Anyone having knowledge regarding the Will and Power of Attorney of Walter Edward Bonney, please contact Michael Bailey at mbailey@sfllp.ca, or 905-528-7963.

SCARFONE HAWKINS LLP

We are excited to announce that

MONIQUE SLADE

has joined Scarfone Hawkins LLP as an Associate Lawyer, and will be continuing her family/matrimonial practice as part of our growing family/matrimonial law group. Monique can be contacted at mslade@shlaw.ca, Direct Tel: 905-526-4402, www.shlaw.ca

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2023 CALENDAR OF EVENTS

Thursday, February 23
The 21st Annual Estates and Trusts Update
1:00 p.m. - 4:00 p.m.
Available via Webinar

Contact Information:
Stephanie Zordan
Tel: 905-522-1563 x221
Email: events@hamiltonlaw.on.ca

Thursday, March 2
The Solicitors' Dinner
5:30 p.m.
The Hamilton Club
Sold Out

Thursday, April 20
Professionalism Session
2:30 p.m. - 4:30 p.m.
HLA Library
A Social to follow from 4:30 p.m. - 5:00 p.m.

Contact Information:
Stephanie Zordan
Tel: 905-522-1563 x221
Email: events@hamiltonlaw.on.ca

Tuesday, May 9
Real Estate Workshop
12:00 p.m. - 2:00 p.m.
HLA Library

Contact Information:
Kubra Solmaz
Tel: 905-522-1563 x232
Email: events@hamiltonlaw.on.ca

Thursday, May 18
Success Summit for Paralegals, Law Clerks and Legal Assistants
1:00 p.m. - 4:00 p.m.
HLA Library

Contact Information:
Stephanie Zordan
Tel: 905-522-1563 x221
Email: events@hamiltonlaw.on.ca

Thursday, June 1
Annual Dinner
Drinks to be served at 5:30 p.m.
The Art Gallery of Hamilton

Contact Information:
Stephanie Zordan
Tel: 905-522-1563 x221
Email: events@hamiltonlaw.on.ca

Save the Date!

Wednesday, March 8
Family Law Lunch Bucket
1:00 p.m. - 2:00 p.m.
Location TBD

Thursday, April 13
Corporate Commercial Workshop
Available via Webinar

Thursday, May 4
The Annual General Meeting
The Hamilton Club

Thursday, May 4
Presidents Reception
The Hamilton Club

Wednesday, May 10
Family Law Lunch Bucket
Available via Webinar

Wednesday, July 12
New Lawyers' Summer Social
Location TBD

Thursday, September 28
New Lawyers' Welcome Dinner
The Hamilton Club

For more information about any additional events, email: events@hamiltonlaw.on.ca

The 21st Annual Estates and Trusts Update

Thursday February 23rd, 2023 | 1:00 p.m. - 4:00 p.m. |Hosted via Webinar

Planning Committee:

David Henderson, *Agro Zaffiro LLP* | **Andrea Hill**, *Turkstra Mazza Law* |

Catherine Olsiak, *SimpsonWigle LAW LLP* | **Alyson Sweetlove,** *George Street Law Group LLP*

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Trustee Discretion

- Presented by: **Caroline Abela**, WeirFoulds LLP

LGBTQ+ Estate Planning and Administration

Presented by: **Darren Lund,** *Miller Thomson LLP*

Family Law Aspects of Estate Planning & Administration

Presented by: **Jennifer Cooper,** *Hughes & Cooper LLP*

- Legislation update
- Update on case law and marriage contracts

US Review

Presented by: **Kevin Gluc,** *Hodgson Russ*

- Tax and planning implications
- Estate and tax planning considerations where non-residents are involved
- Non-resident beneficiaries

The Delicacy of Dealing with Death Panel

Moderated by: **David J. Henderson**, *AgroZaffiro LLP*

- A panel discussion on the clients and subject matter that making practicing Will and Estates Law different than any other area of law

Presented by: **Adam Cappelli,** *Cambridge LLP*

& **John Kranjc,** *Regency Law Group*

Indigenous Estate and Planning and Administration

Presented by: **Elizabeth Porter**, Porter Law Office

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