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Snail



November Issue

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President's Report

By: Erin Rankin Nash / Ferguson Patterson Law

It has been a busy fall and thank you to all of our members for adapting to our new normal.

The following memo from **Justice Grace** is an updated version and replaces that which was issued on September 2, 2020. ([Civil and Criminal Operations in London](#)). Many of our "court" appearances are now held via teleconference and Zoom. As of September 8th all claims and applications are filed online. As of October 8th applications for **Certificate of Estate Trustees** can be filed on line. Steps are continuously being taken to ensure that matters can move forward. Minutes from the October Bench and Bar meeting will be posted on the MLA website shortly.

We are pleased to welcome **Justice Michael Barry Joseph Carnegie** to the OCJ in London. Justice Carnegie comes from Woodstock and has an extensive background in criminal law.

The **MLA Library/Resource Centre** was re-opened on September 28th. There have been issues with people visiting the library not following the rules. These rules are in place to ensure the safety of our employees and the safety of all people using the library. If you go into the library ensure that you comply with the following:

- 1) You must wear a mask covering both your nose and mouth at all times while in the library.
- 2) You must sign in each day you are in the library.
- 3) If you use the computers then you must wipe the computers down after every use.
- 4) There is no eating or drinking in the

library with the exception of the Mayer Lerner Lounge.

- 5) The text collection is only accessible by staff and requests for items must be placed with them for retrieval.

The MLA homepage also has valuable resources and links that can assist you with the ever-changing landscape of your legal practice. The MLA has started putting court dockets up on our website. There is a link on the opening page of the website. The MLA is providing this as a service but we are not responsible for maintaining dockets or assisting with access to Zoom. Inquiries about the dockets need to be directed to one of the lawyers for the matter or to the courthouse. It was brought to our attention that each of the courthouses in our southwest region has different ways of handling things. By the beginning of November we hope to have links with important information about courthouses in the southwest region and how things are done at each of the courthouses.

We are fortunate in London to have a judiciary, bar and courthouse staff that are dedicated and committed to getting through these difficult times in the best way we can. If any of our members are having issues it is important that you let your MLA Trustees know so that we can work to solve the problems. **Jennifer Wall and Rasha El-Tawil** are your **MLA Bench and Bar** representatives and are the perfect first contacts for any questions you might have about practice related matters.

The MLA has assembled a local civil bar task force to look at issues that existed prior to COVID, issues that occurred as a result of COVID and issues that have not been resolved in the steps taken to

date. Requests for submissions will be sent out to our members during the first two weeks of November. You can submit comments and or suggestions to info@middlaw.ca We look forward to frank input from our members so we can work to develop local solutions.

This year **Remembrance Day** will have a significant awareness for many. Until 2020, the understanding of what our parents, grandparents and great grandparents went through in the World Wars was only what had been learned from stories and through books. Now, as a result of COVID there is a deeper understanding, of the isolation, mental turmoil, financial strain and concern for family members that those who went through World Wars encountered. Our gratitude for those who risked their lives is more profound this year.

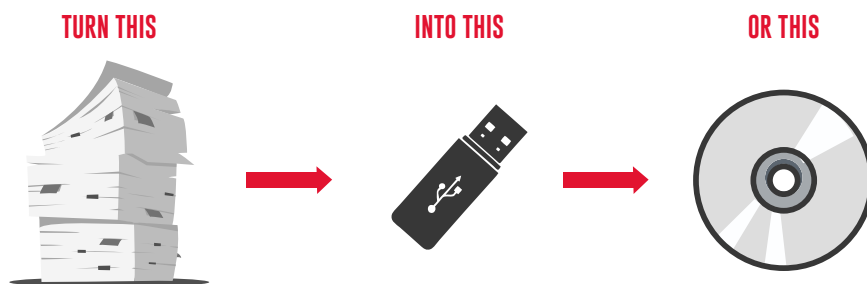
As we enter what we have been told will be a dark and distanced winter, we need to make sure that we take care of our own health, and that we try to ensure that those we interact with are coping with the effects of the prolonged isolation. With the start of the flu season many people will be working from home as they will be told not to go to work with any symptoms. This will only add to the strain that everyone is feeling. There are many resources available but we need to ensure that people self-identify or help others to get the resources they need.

Wishing you moments of calm as you continue to navigate these unprecedented times.

Erin Rankin Nash
PRESIDENT

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Library News



Contributed by:

Cynthia Simpson and Shabira Tamachi

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Researching From Home

Since most courts are virtual right now, you may have no reason to come to the courthouse but still need access to legal information to research your matters.

We are splitting our time working on-site again so one of us is always here to assist you if you do want to come research print materials. We are currently working on-site from 9am to 4pm with a lunch break. Our collection is only accessible via staff assistance, so you may want to consider what you need before you come to the library and then call or email in advance to make sure we are available. You can search the catalogue through [AdvoCAT](#).

However, you have access to a wealth of legal information at your virtual fingertips. **Lexis Nexis** has just reinstated the free remote access to **Lexis Advance Quicklaw Comprehensive**, which is a more expansive package than our in-house subscription. The **Law Society's CPD Programs** are all searchable full-text through **AccessCLE**, and all Ontario lawyers are eligible to subscribe to **HeinOnline** at no cost. Get all the details on your virtual resources below!

Lexis Advance Quicklaw

We are pleased to share the good news that the **Remote Desktop Access to Quicklaw** program for lawyers has been reinstated. This is the same program that had been running earlier this year but was discontinued in September. As some there are still some issues with library access for lawyers throughout the province, **Lexis Nexis** restarted the program.

Any existing IDs for lawyers should now be reactivated, and new participants can once again self-register [using this code](#).

AccessCLE

This is the **Law Society of Ontario's** portal to all its continuing professional development papers that have been published since 2004. You may have checked the [library catalogue](#) and found an **LSO CPD** chapter that looks perfect but there's no need to be at the library to get a copy. **The Law Society** has made all LSO CPD papers available immediately for printing or downloading.

The benefit of [AccessCLE](#) over the catalogue is that it searches the contents of the chapters, not just the titles themselves. So, a search for the phrase "intrusion upon seclusion" in the catalogue only nets 11 hits because there are 11 chapters with those words in the title. However, in [AccessCLE](#) there are currently 56 hits to chapters whose contents contain the phrase. The results display in reverse chronological order and can be downloaded or printed using the PDF icon link in the record.

HeinOnline

Do you need to see some Ontario legislation from the 1930's or an old English case report out of **The English Reports**? Or maybe you need to see an article from **The Advocate's Quarterly** or **The Canadian Journal of Family Law**. That's right, you can get all those things from your office, wherever that office is. **The Law Society of Ontario** has contracted for the provision of [HeinOnline](#) free of charge to all members directly from their offices. The LSO needs to confirm that you are a member in good standing, so you do need to contact them for the login information by emailing refstaff@lso.ca. The service gives you access to a wide variety of **US, Canadian**

and **International law journals, Canada's Supreme Court Reports** and the full reprint of the aforementioned English Reports case reporter series. There's even an iPhone/iPad app so you can access it from your portable device. Contact the Law Society's Great Library today to get your login information.

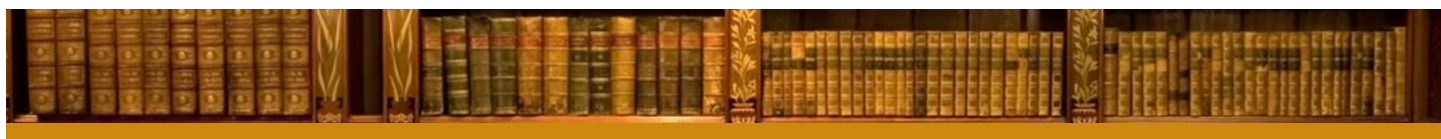
CanLII

[CanLII](#) is funded through a portion of your Law Society fees and you certainly get what you pay for with this ever-expanding service. Its goal is to make Canadian law accessible for free on the Internet and this has grown to include not just primary legislation and case law, but secondary resources too. There is an advanced search function for searching across databases, and the program highlights search terms within the retrieved documents. All decisions are provided in both html and pdf format and all documents are clearly identified using neutral citations.

[CanLII's](#) extensive commentary includes books, articles and journals, to name a few, plus the excellent CPD papers from the **County of Carleton Law Association**, all searchable through the service's search engine.

Oh Where, Oh Where Have our Lovely Books Gone?

Well, to be fair, we know where they are because our members have been diligently signing things out during the pandemic (and yes, many of our items have been out since before the pandemic hit in March). So, this is a gentle reminder that we are back working in the library weekdays from 9am-4pm and would like all those books back, thank you very much. We will start a proper book recall



soon but would really appreciate it if you would simply bring back the items to cut down on the work involved with creating a call list for overdue books. As you can imagine, after suspending mail from our publishers for 6 months, we are dealing with an avalanche of processing now that loose-leaf releases and new books are arriving. And about those new books...

New Books

We've got new books in the library finally! Here's the list to date with more on their way which we will highlight in next month's article.

Allen, John. **Handling provincial offence cases in Ontario 2020**, Thomson Reuters

Blatt, Arlene. **Legal research: step by step --5th ed.**, Emond

Coughlan, Stephen. **Criminal procedure 4th ed.**, Irwin Law

Doumani and Foran. **Ontario Planning Legislation & Commentary, 2020 Edition**, Lexis Nexis

Durcan, Rebecca. **Prosecuting and defending professional regulation cases**, Emond

Feldman, Giselle, ed. **Practitioner's Ontario taxes annotated --2019 Fall ed.**, Thomson Reuters

Gold, Alan D. **Defending drinking, drugs and driving cases 2020**, Thomson Reuters

Gold, Alan D. **Practitioner's Ontario criminal practice 2020**, LexisNexis

HLA. **15th annual current issues in commercial litigation seminar**.

HLA. **18th annual estates & trusts seminar**.

Houlden, L.W. **2020 Annotated Bankruptcy & Insolvency Act**, Thomson Reuters

Kiselbach, Daniel. **2020 Annotated Customs Act**, Thomson Reuters

LSO. **Six-minute commercial leasing lawyer 2020**.

LSO. **Family law refresher 2020**.

MacDonald, James. **2020 annotated Ontario Family Law Act**, Thomson Reuters

Macklem & Bristow. **Construction**

builders' and mechanics' liens in Canada --8th ed., Thomson Reuters

McCamus, John D. **Law of contracts --3rd ed.**, Irwin Law

McKeown, John. **Brand management in Canadian law --5th ed.**, Thomson Reuters

McLeod & Mamo. **Annual review of family law 2018-2019**, Thomson Reuters

MLA-CPD. **Fourteenth annual wills, estates and trusts conference**.

MLA-CPD. **15th annual business breakfast: New developments in corporate law**.

MLA-CPD. **Thirteenth annual personal injury conference**.

n/a. **Canadian Income Tax Act with regulations, annotated 109th ed. 2020 Spring**, Wolters Kluwer

n/a. **Canadian Income Tax Act with regulations, annotated 110th ed. 2020 Autumn**, Wolters Kluwer

n/a. **Martin's related criminal statutes 2020-2021**, Thomson Reuters

n/a. **Martin's Ontario criminal practice 2021**, Thomson Reuters

Nicholls, Christopher. **Mergers, acquisitions and other changes of corporate control 3rd ed.**, Irwin Law

Olivo, Laurence. **Civil litigation --4th ed.**, Emond

Osborne, Philip. **Law of torts -- 6th ed.**, Irwin Law

Paciocco, David. **Law of evidence--8th ed.**, Irwin Law

Saunders, Rennie, Garton. **Federal Courts Practice 2020**, Thomson Reuters

Segal, Murray D. **2020 Annotated Ontario Highway Traffic Act**, Thomson Reuters

Siegel D. Brahm. **Consolidated Ontario family law statutes and regs 2020-2021**, Thomson Reuters

von Tigerstrom, Barbara. **Information & privacy law in Canada**, Irwin Law

Watt & Fuerst. **2021 Annotated Tremeeear's Criminal Code**, Thomson Reuters

Watt, David. **Watt's manual of criminal evidence 2020**, Thomson Reuters

Witkin, Jill. **Prosecuting and defending sexual offences cases - 2nd ed.**, Emond

Zuker, Justice Marvin. **Children's law**

handbook --4th ed., Thomson Reuters

Zuker, Justice Marvin. **Ontario Small Claims Court practice 2021**, Thomson Reuters

Missing Books

Wills & Estates lawyers in particular!

Please look for that distinctive red and white Property of Middlesex Law Association sticker on the spine of any books that might be kicking around your office/back seat/family room sofa right now!

Wills & Estates missing books:

Allen, John. **Estate planning handbook --4th ed.**

Hull, Ian. **Challenging the validity of wills --2nd ed.**

Hull, Ian. **Macdonell, Sheard and Hull on probate practice --5th ed.** (2016)

Oosterhoff, Albert H. **Oosterhoff on wills --8th edition** (2016)

Rintoul, Margaret. **Practitioner's guide to estate practice in Ontario --4th ed.**

Other Missing Books:

Bolton, Michael. **Defending drug cases --4th ed.** (2016)

Bourgeois, Donald J. **Charities and not for-profit administration and governance handbook --2nd ed.**

Fuerst, Justice Michelle. **Ontario courtroom procedure -- 4th ed.**

Goodis, David. **2012 annotated Ontario Freedom of Information & Protection Act**

Lavender, Stephen. **2015 annotated Ontario Human Rights Code**

Johnston, David. **Canadian securities regulation --3rd ed.**

MacDonald, James. **2015 annotated Divorce Act**.

MacFarlane, Q.C., Bruce A. **Cannabis law**.

OBA. **Business agreements: practice and precedents**.

n/a. **The Annotated 2015 Tremeeear's Criminal Code**.

Shearer, Gillian. **Law and practice of workplace investigations**.

Opting Out of Clearview AI in Canada



Contributed by:

David Canton / Harrison Pensa LLP

Clearview AI's business model is to scrape images of people from wherever they can on the web then sell facial recognition services – mostly to police – based on that database.

Some police forces in Canada used their services but [investigations by the Canadian Privacy Commissioner](#) and other public outcries resulted in Clearview AI pulling out of the Canadian market.

Readers of our [Tech Law Weekly](#) newsletter watched this unfold.

You may have put your picture on your social media profile or your business website – but [did you agree](#) to it being harvested into a massive database so you could be identified and tracked everywhere? Put another way, did you agree to be in a 24/7 police lineup?

Faced with pressure from various international sources, Clearview AI started responding to requests to disclose what information they have about you. It wasn't clear though whether in Canada they would if asked take the next step and delete your information. So I decided to see what would happen.

On June 11, 2020, I sent this email to Clearview AI:

Please provide me with copies of whatever personal information you have

about me. A headshot is attached. You have permission to use the attached only to facilitate this request, and not to save, use, or share it for any other purpose.

Clearview responded later that day with:

Hello,

You are receiving this email as a response to your request for data access. Attached is a .PDF file that contains any search results relevant to you that are generated by Clearview search, based on the image that you provided us. The images you shared to facilitate this request have been deleted.

You can click here to learn more about how Clearview collects the images that appear as search results, and how those images are used and shared.

*Regards,
Clearview Privacy Team*

The pdf attached to the email had 11 headshots of me, along with links to their sources. Sources included my bios on Twitter, the Harrison Pensa website and my blog, images from lawyer rating sites, a newspaper article, and other people's LinkedIn pages.

I responded on June 16 with:

Thank you for providing that.

You do not have my permission to use or share those images or any information related to them in any way. I opt-out from such use and sharing.

I also request that you delete all images of

me, and all information relating to them.

Three months later, on September 16, I received this response from Clearview:

Hello,

You are receiving this email as a response to your request for data opt-out or deletion. We have processed your request successfully. Any images of you that we were able to find, based on the image you shared with us to facilitate your request, have been deleted from Clearview's search results and permanently de-identified. The image/s you shared with us to facilitate your request have been deleted.

Click here to read Clearview's Privacy Policy.

*Regards,
Clearview Privacy Team*

While Clearview AI may have stopped Canadian sales, that doesn't necessarily mean they have deleted or stopped using images of Canadians or that they have stopped collecting them.

It will be interesting to see the results of the Privacy Commissioner's Investigation, which should get answers to those details, and to see how cooperative they are with whatever recommendations the Privacy Commissioner makes.

Then layer on top of that whether any PIPEDA reforms or the anticipated new Ontario privacy law might affect the Clearview AI collection and use model.



Questions & Comments

If you have any issues or concerns regarding the Middlesex court facilities, operations, judiciary, etc., let them be known! Send all concerns to the current MLA Bench & Bar representatives:

Jennifer Wall 519.679.9660
jwall@harrisonpensa.com

Rasha El-Tawil 519.660.7712
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Post-COVID Jury Trial at London Superior Court



Contributed by:
Don Crawford, Q.C.

The criminal jury trial that I did for the first degree murder charge for Melissa George started on September 8th, 2020.

I am told this is the first criminal jury trial to happen in the Province of Ontario, and probably even in Canada, during the pandemic.

In over 50 years at the Bar and the high number of murder cases I have done, this one was very different. The public was not allowed in the courtroom. Those people who wanted to attend the trial were in

a second courtroom that was joined by Zoom, so they could see what was going on. In the trial courtroom there were four jurors in the jury box and the rest of the panel was scattered throughout the main audience of the courtroom. Plexiglas partitions were used liberally throughout the areas in question, including the registrar's table, the reporter's table and obviously counsel tables as well as the judge's bench. Counsel and the judge were unmasked while they were in their respective parts of the courtroom.

It was a very strange feeling in the courtroom at all times throughout the

three weeks of trial. The jury acquitted my client of first degree murder but convicted her of second degree. The matter has been adjourned to December 4, 2020 for a Gladue Report and sentencing.

It was also noted that anybody coming and going in the court and courthouse areas were all masked. Many of the offices were closed with the staff working from home both by Zoom and by telephone.

Quite an experience!



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Becker v. Toronto: Coulda, Woulda, Shoulda



Contributed by:
Jacob Damstra / Lerner LLP

Justice Zarnett's recent decision at the Court of Appeal for Ontario in *Becker v. Toronto (City)*^[1] takes me back to the old Celine Dion love song, *Coulda Woulda Shoulda*.

While the context is different, the advice remains the same: in litigation, like in love, you can't succeed on appeal saying "coulda, woulda, shoulda, but I didn't do that."^[2]

In *Becker v. Toronto (City)*, the City of Toronto defended a personal injury action under the *Occupiers Liability Act, R.S.O. 1990, c. O.2*, at trial on the basis that it had installed a type of safety glass required by the 1990 Ontario *Building Code*, O. Reg. 413/90, which was in force at the time of the accident. The trial judge found that the City had not done so and breached its duty of care. On appeal, the City argued that the trial judge erred by not considering whether the City met its duty by undertaking reasonable efforts to have the appropriate glass installed regardless of what glass was actually installed.

In accordance with the general rule that appellants may not raise a point on appeal that was not pleaded, or was not argued in the trial court, Zarnett J.A. roundly rejected this argument. He characterized the City's position on appeal to be "that it should be entitled to the benefit of any defence the evidence and law could support, regardless of the theory it expressly articulated to the trial judge, and regardless of the way its submissions framed the

questions the trial judge was to decide."^[3]

Justice Zarnett explained:

Strong authority contradicts the City's argument that a position is advanced, and remains on the table, so long as it was pleaded and not formally abandoned, without regard to how the case was put at trial. Although the authorities arise in the context of attempts to raise a new issue on appeal, in my view they apply even more forcefully to an attempt to argue that a trial judge failed to consider an issue that was not raised before her.^[4]

Even if the alternative defence had been pleaded, it was not articulated or pursued at trial, and unfairness would have resulted to the plaintiff/respondent for the trial judge to have decided the case on that theory,^[5] regardless of whether the City had expressly abandoned that position or theory.^[6]

Becker is consistent with and builds on appellate jurisprudence which considers it unfair to allow an appellant to spring a new argument on the other side on appeal in circumstances where the respondent(s) may have led evidence at trial if they knew the matter was in issue.^[7] Justice Zarnett goes further, holding that even if there is some evidence in the record that "coulda" supported a claim or defence, and trial counsel "shoulda" pursued the theory at trial (and perhaps "woulda" had they known the primary argument would fail), "it would be unfair to permit the [appellant] to resurrect an argument virtually abandoned at trial on which relevant evidence was not fully adduced".^[8]

Justice Zarnett reiterated the Court of

Appeal's earlier caution to would-be appellants: "you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it."^[9] Or, if you prefer Celine: "...don't you miss out on the way; don't find a reason to say; coulda woulda shoulda; but I didn't do that."

Either way, the lesson is the same: strategic choices at trial whether to advance alternative arguments or not should be made carefully, for there is no second kick at the can on appeal.

[The original blog was posted here.](#)

^[1] *Becker v. Toronto (City)*, 2020 ONCA 607.

^[2] <https://www.azlyrics.com/lyrics/celinedion/couldawouldashoulda.html>

^[3] *Becker* at para. 34.

^[4] *Becker* at para. 36.

^[5] *Becker* at paras. 35-38, citing *Union Building Corporation of Canada v. Markham Woodmills Development Inc.*, 2018 ONCA 401 at paras. 13, 15 and *Shaver Hospital for Chest Diseases v. Slesar* (1979), 27 O.R. (3d) 383 (C.A.).

^[6] *Becker* at para. 41, citing *Cotic v. Gray*, [1983] 2 S.C.R. 2.

^[7] *K.M. v. H.M.*, [1992] S.C.J. No. 85, 142 N.R. 321 at 367; *R. v. Brown*, [1993] 2 S.C.R. 918 at 923; *Kaiman Estate v. Graham Estate* (2009), 245 O.A.C. 130 (C.A.) at paras. 23-24.

^[8] *Becker* at para. 37.

^[9] *Becker* at para. 39, quoting *Pedwell v. Pelham (Town)* (2003), 174 O.A.C. 147 (C.A.) at para. 50.

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News from our friends at CPDOnline.ca!



Contributed by:
Paula Puddy, MLA CPD Director

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Continuing Professional Development Programs & Events 2020

The MLA's 15th Annual Straight from the Bench Conference

- Monday, November 2
Tuesday, November 3
9:00am to 12:30pm
- Online via Zoom
- Keynote: **Chief Justice Geoffrey Morawetz**
- Presenters: **Regional Senior Justice Thomas, The Honourable Mr. Justice Grace, The Honourable Madam Justice Tranquilli, Guy Pratte, Michel Castillo, James Zegers, Erika Chamberlain, Deirdre Pike, Barb Legate, and more!**
- Topics: EDI, Update on the Courts for Civil Litigators, Advocacy Tips from the Bench, Defamation in the Internet Age, Criminal Law Update, Misfeasance in a Public Office, Best Practices for Remote Hearings, and more!
- Chairs: **The Honourable Madam Justice Leitch, Anne Marie Frauts, Elizabeth Harding, Dara Lambe, Evelyn ten Cate, and Dagmara Wozniak**
- CPD Accredited!

The MLA's Annual Wills, Estates & Trusts Conference

- Wednesday, November 4, 2020,
8:45am to 11:45am
- Online via Zoom
- Chairs: **Lou-Anne Farrell, Dan McNamara, Justin Newman, Ian Wright**
- Topics: TBA

The MLA's Equality, Diversity & Inclusion Seminar

- Friday, November 20, 2020, 12:30pm to 2:00pm
- Online via Zoom
- Topic: **Creating 2SLGBTQ+ Positive Space**
- Speaker: **Deirdre Pike**, Senior Social Planner for the Social Planning and Research Council of Hamilton
- CPD Accredited!

The MLA's Quick & Dirty Personal Injury Update

- Wednesday, December 2, 2020, 1:00pm to 3:30pm
- Online via Zoom
- Presenters: **The Honourable Madam Justice Kelly Tranquilli, Jonathan de Vries, John Makins, Professor Stephen Pitel, and more!**
- Topics: **Written Advocacy: Tips & Strategies, Striking a Jury Notice, Tort Law Update and more!**
- Chairs: **Alysia Christiaen, Kerry Figliomeni, Lucy Lee**

To register for our fall programs, fill out a registration form (go to www.middlaw.on.ca and click on CPD & Events).



– 15TH ANNUAL – Straight from the Bench Conference

Monday, November 2, 2020 from 9:00am to 4:00pm

Top 5 reasons to attend:

1. There will be lots of JUDGES!

This conference is truly a “Straight from the Bench experience” with four members of the bench participating!

We just confirmed **Chief Justice Geoffrey Morawetz’s** participation in our conference for a keynote address. We are also delighted to hear from the **Honourable Madam Justice Kelly Tranquilli**, the **Honourable Mr. Justice Grace**, and **Regional Senior Justice Thomas**.

2. We have excellent topics and PRESENTERS!

- A Special Address from **Chief Justice Geoffrey Morawetz**
- 2SLGBTQ+ Positive Space by **Deirdre Pike of Social Planning and Research Council of Hamilton**
- Advocacy Tips from the Bench with **The Honourable Madam Justice Kelly C. Tranquilli**
- Southwest Regional Update 2020 by **Regional Senior Justice Bruce G. Thomas**
- Update for Civil Litigators with **The Honourable Mr. Justice A. Duncan Grace**
- Misfeasance in a Public Office – Public Authority Liability by **Erika Chamberlain of Western Law**
- Defamation in the Internet Age by **Michel Castillo of Castillo Law Chambers**
- Pandemic Case Comments by **TBA**
- Best Practices for Remote Hearings

by **Barbara Legate of Legate Personal Injury Lawyers LLP**

- Criminal Law Update by **James Zegers of Zegers Law PC**

3. Get both EDI and PROFESSIONALISM HOURS!

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Professionalism content, **1.5 hours** of Professionalism hours and is **4.0** Substantive hours.

Thanks to **Deirdre Park**, you will learn a lot more about Equality, Diversity and Inclusion (EDI) and earn 60 minutes towards your accreditation. You must have 3 hours by the end of 2020!

4. Receive up-to-date information on PANDEMIC cases.

Stay up-to-date with the latest pandemic cases impacting the courts, virtual hearings and discoveries.

5. Win a DOOR PRIZE from our generous sponsors!

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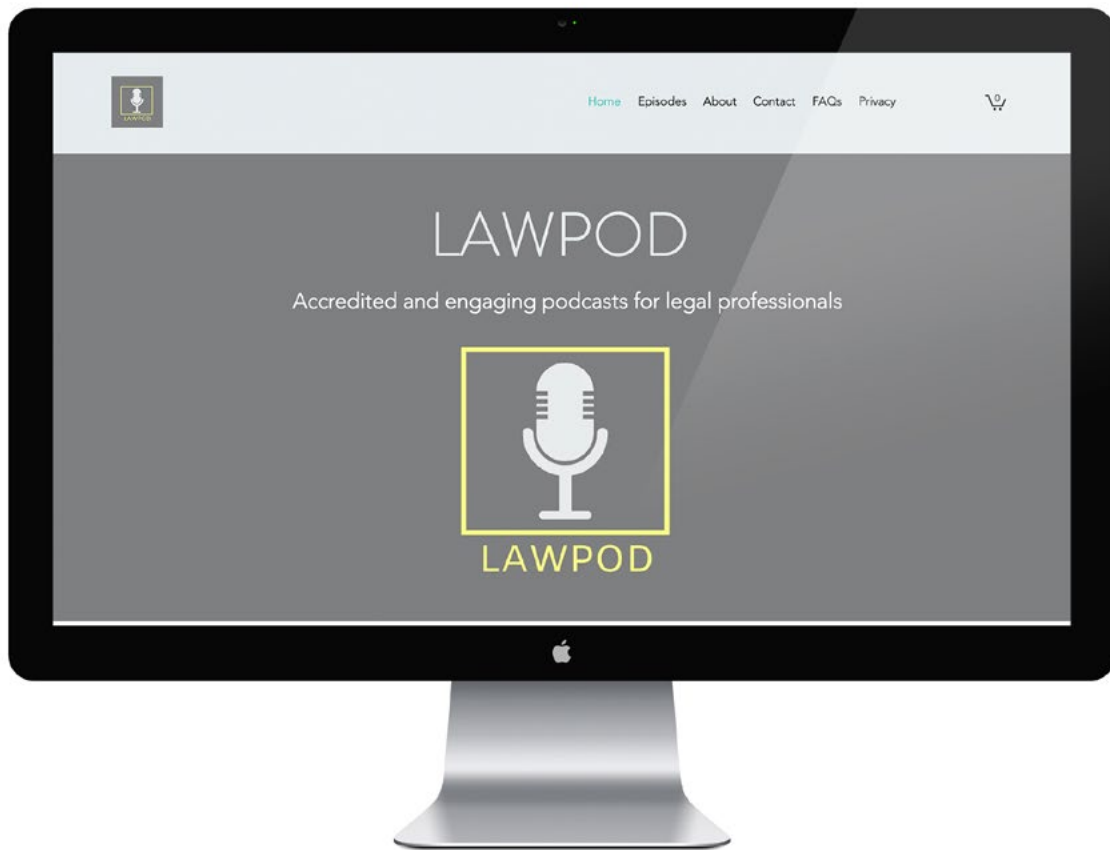
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Thank you for supporting our MLA CPD programs and “see” you soon!



LAWPOD is a New Legal Podcast Series

LAWPOD offers CPD credits that can be accessed anywhere and at a very low cost.

The release of **LAWPOD** in 2020 was especially timely. Lawyers need accessible and interesting content from the comfort of their own home. All of the episodes are accredited by the LSO for Professionalism Hours and many episodes qualify for the 3 hours of Equality, Diversity and Inclusion (EDI) that must be completed by the end of 2020.

LAWPOD offers a diverse range of topics including: **Gerald Chan** (moving the dial on diversity and inclusion), **Doron Gold** (mental health in the legal profession), **Michael Bryant** (journey and work for civil liberties), **Fernando Garcia** and **Judy**

Naiberg (best practices for working with in-house counsel), **Noah Waisberg** and **Carla Swansburg** (legal technology), and **Annamaria Enenajor** (equity in the criminal justice system) and more.

As a member of the Middlesex Law Association, you will receive 20% off the \$19.95 charge per episode by using the code "Discount20".

We look forward to sharing these amazing episodes. Please send any questions or comments to lawpod.ca/contact

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Time to Eliminate Most Civil Juries



Contributed by:

Mary-Anne Strong / Beckett Personal Injury Lawyers

Recently, Ontario's Attorney General, the Honourable Doug Downey, notified Ontario lawyers that his office is considering eliminating juries for most civil matters.

This notice to the profession has been hotly debated in the legal community, but this issue should be important to every citizen in Ontario who one day may rely on our justice system.

Civil litigation involves many types of disputes but a large portion of those disputes arise from injury claims and mainly involve insurance companies. Claimants are often unable to work and in desperate need of healthcare not funded by OHIP. Some have no choice but to rely on social assistance as they wait for their case to come to trial, with the hope of obtaining compensation for their injuries, lost income, and medical needs. The longer they wait, the longer they rely on the public system.

Timely access to our court system is important to help ease financial burdens for injured members of the public and our social systems. Timely access to justice and efficient trials with just results should be our goal.

As a personal injury lawyer I have watched my clients' wait times for trial dates grow. Personal injury matters take years to work through the system. When parties are ready for a trial date, year long waits or more are not unusual. The delay in accessing justice is only growing worse due to the necessary Covid -19 restrictions.

In Canada, there is no constitutional right to a jury trial in civil matters. Ontario is one of the last Canadian jurisdictions to

grant parties the right to choose jury trials for most civil matters. In most provinces, civil trials proceed by Judge alone. Even in Ontario, civil juries were eliminated for matters where a claimant seeks \$200,000 or less. The distinction between claims worth \$200,000 or \$200,000 plus one dollar seems arbitrary.

The reality is that civil jury cases require far more time than judge-alone trials, they are costly, and demand greater resources from our judicial system. Lawyers spend extra time preparing and presenting evidence for a jury trial. Coordinating the logistics of a jury itself takes time. The court must find a block of weeks, or months, in order to allow a jury trial to proceed in a smooth, uninterrupted fashion. Opening and closing statements take longer, and have to be carefully worded. Numerous interruptions occur throughout jury trials as the jury is excused from the courtroom so that the lawyers can address points of law with the Judge, or determine how evidence will be dealt with in front of the jury. Judges need to clarify legal concepts in their final instructions to the jury. At the end of the trial the Judge reviews all the evidence that was heard for weeks with the jury. Jury cases simply require more time and are consequently more difficult to fit into a system with limited resources.

Long and costly trials are not the only problems with our civil jury system. In motor vehicle cases, the law is complex. Juries are asked to quantify losses for claimants and yet they are not told about several laws and deductibles under the Insurance Act, which will reduce those awards after they have made their final decision. Afterwards, the Judge will apply laws, so at times, the original verdict by the jury looks very different in the end. Claimants are even prevented from telling

the jury that there will be an insurance company that pays the award at the end of the trial.

Finally, we should also consider the burden of jury duty on the individual. For many people this is an unwelcome obligation. It often interferes with employment, parenting, business operations, schooling and other important aspects of daily life. Jurors are paid nothing for their first 10 days of service and a mere \$40 a day up to day 49, and \$100 a day at 50 days of service. They are not compensated for their lost wages or extra expenses like childcare. Employers are not required to pay their employees while they serve on a jury. Until recently, counselling was not provided for jurors who suffered trauma by viewing and hearing evidence in disturbing trials. It remains unknown how we will safely conduct jury trials during the pandemic and, at what cost.

Eliminating juries for most civil matters will: eliminate personal and financial burdens on jurors; free up court time; allow timely access to justice; and result in substantial cost savings for the judicial system, social systems, and for claimants seeking justice.

Civil juries may be important to retain in some cases. Exceptions could include cases that trigger public interest and engage community values. This is similar to other jurisdictions. This could include cases like defamation, sexual abuse litigation, negligence in healthcare, as well as cases in which awards of punitive damages are at issue.

Ontario has an opportunity to improve our civil justice system and dramatically reduce juries in our civil courts. As a community, we should embrace this change.

[This blog was originally posted here.](#)



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ADVOCACY - Encountering the Proverbial Fly in the Ointment



Contributed by:
Dan Mailer / Cram & Associates

*“The best laid schemes o’ mice
an’ men gang aft a-gley”*

Robbie Burns

1786 Scottish proverb

TRANSLATION: *“The best laid plans of mice and men often go awry.”*

I was thinking about this Scottish proverb recently as I watched the American Vice-Presidential debate on October 7, 2020. Current Vice President Mike Pence was delivering what many felt was a superior and superb debate performance against his rival when unbeknownst to him, a common house fly landed on his head and decided to hunker down for the better part of approximately two minutes. During those two minutes, the intense preparation of Mike Pence and his team and the quality of his verbal delivery and the substance of what was being said, were all subsumed by the presence of a lowly house fly. It was almost impossible for the debate viewers to focus on anything but the fly that had found a safe and secure haven on Mike Pence’s well-manicured, white hair.

Good and bad fortune plays itself out in the affairs of humans on a daily basis. For example, there have been multiple

studies on the impact of climate and extreme weather, on military operations often times leading to their otherwise inexplicable success or failure.

In our training as lawyers and paralegals the value of preparation is always emphasized. Success is 90% preparation and 10% perspiration we are told and for the most part that is true. “Chance favours the prepared mind,” Louis Pasteur famously said.

Any experienced advocate will tell you that preparation is not the entire story. It is true that success on a motion, application, pleading, oral arguments or a trial requires dedicated and detailed preparation. The challenge for all of us barristers is those unforeseen, unpredictable events that often raise their heads on a fairly frequent basis, sometimes to devastating effect. At a trial, for example, these surprises can come from one of many sources; the Judge, the Jury, your opponent, your client, a well prepared witness, a crumbling expert witness, a new document, etc. In those times when these surprises occur, you have to take a moment to rebalance, recoup, re-evaluate and find your inner anchor. In those times strength can come from focussing

on the rightness of your cause and a basic belief that ultimately, despite what has happened, the truth will win out. Good advocacy requires inner fortitude, perseverance, persistence and a belief in the rightness of your cause.

They say that litigation and advocacy is not for the faint of heart and we know that the practice of our profession is not always easy. But it is worth remembering that during those difficult times, unless the misfortune is completely overwhelming, it’s important to keep your nose to the grind stone and to forge ahead in confidence even when you may feel your legs getting weak.

Being a bold advocate requires having tough skin, an agility and nimbleness that sometimes requires us to dance on the head of a pin and an ability to roll with the punches. Litigation and advocacy always present challenges but persevering despite the odds will serve you well.

It remains to be seen how the distracting fly on the head of Mike Pence will play out in the context of the bigger election picture, but certainly it was a most unfortunate event for Mike Pence and a fortunate event for his lucky opponent.



Kimberley Gagan appointed as Director of Clinics and Practical Skills

Western Law is pleased to announce that Kimberley Gagan has joined the Faculty as Director of Clinics and Practical Skills.

"I'm very pleased to be taking on the role of Director of Clinics and Practical Skills at Western Law. It is great to be returning to London, which is my hometown, and to be joining such a prestigious faculty," said Gagan. "I firmly believe that clinical and experiential learning is the cornerstone of a premier legal education."

Gagan, a practicing lawyer for over 20 years, joins Western Law from the Faculty of Law at Lakehead University in Thunder Bay, where she worked as the Director of Community Legal Services.

Before taking on her Director role, she developed and launched Lakehead's Student Legal Aid Clinic Program and was an Adjunct Professor in the provision of Clinic courses at Lakehead.

"When choosing a law school, students often look for a program with integrated skills-based learning opportunities. Similarly, employers seek out students who have participated in clinical programs and skills-based exercises. Western has a fantastic array of clinical programs already in place, and I look forward to enhancing and expanding these experiences for students."


The role of Director of Clinics and Practical Skills is a new one at Western

Law, said Dean Erika Chamberlain, and is meant to provide strategic leadership for a wide range of experiential and skills-based learning opportunities:.

"I am delighted Kim is taking on this new role, as she brings a wealth of experience in the integration of practical skills into the broader law school curriculum," Chamberlain said.

Gagan received her Hons. BA in English & Philosophy from the University of Western Ontario (Huron College) in 1992. After that, she obtained her law degree (LLB) from Queen's University in 1995. She can be reached at kgagan@uwo.ca.

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Help for Parents in Conflict over COVID-19 Safety Plans



Contributed by:

Kimberly Harris, Ph.D., C. Psych / London Family Court Clinic

As we move forward through the different phases of the COVID-19 pandemic, parents are continually grappling with new information and making decisions about the safest arrangements for their children.

Decision-making for separated parents during COVID-19 is especially difficult.

Parents may have differences in their interpretation of public health guidelines. They may have concerns about their children's adherence to COVID-19 protocols during shared parenting time and struggle to adhere to their parenting time arrangements. There may be crises related to reports about COVID-19 in a classroom, raising concerns about whether to send children to school or have them learn at home. Anxieties may rise during flu season or during the second wave of the pandemic. There may be concerns about the long-term health implications of COVID-19 for their

children as well as their children's contact with vulnerable family members. Parents may also disagree about the extent to which children's underlying medical conditions may present additional risks and safety decisions.

London Family Court Clinic (LFCC) and London Health Sciences Centre (LHSC) have partnered to offer Shared Decision Making to families in the community, where previously it was available only to hospital patients. This expansion was made possible through funding by the Government of Canada's Emergency Community Support Fund and Community Foundations of Canada. **It is currently free of charge to families.**

The Shared Decision Making (SDM) community initiative builds on special expertise found in children's mental health centres that focus on children caught in parental conflict (LFCC) and the SDM program at the Children's Hospital (LHSC). Shared Decision Making is an innovative, short-term, patient-centred care program delivered as a clinical service. It is based on choice, option awareness, and decision talk. SDM is a

structured approach to making health related decisions that has the benefit of drawing in the range of medical expertise available at the hospital. For more specific information about how it works, tools and resources, as well as Decision Examples, an interactive webinar for parents and caregivers is being held on November 18, 2020 at 7pm. [To register, visit here.](#)

In the last 5 years, there has been an exponential rise in research on SDM and it has been implemented in many hospitals across Canada. The research has shown that the SDM model increases health knowledge in clients, results in more accurate risk perceptions, and reduces decisional conflict. Clients have reported high levels of decisional satisfaction following participation in SDM.

If the restrictions of COVID-19 have presented issues or conflicts for your clients, you are encouraged to reach out to LFCC's services team (services@lfcc.on.ca) to determine their eligibility for the Shared Decision Making program.



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Want to contribute to the next issue? **Deadline is November 25, 2020**

The Snail welcomes articles from MLA members. in Word format, along with photos, headshot and headline. For clarity and readability, we encourage submissions in the range of 200–500 words, with a maximum limit of 1000 words for news and opinions, and a limit of 2000 words for articles on law and legal issues. At the request of the contributor, any submissions shortened in this way can also be published with a link to the full article to be obtained directly from the author.

Potential topics for submissions include:

News, the promotion of an upcoming event, a review of a past event
Recognition of someone in the legal community

Opinion and letters to the editor
Discussion of a legal issue & case reviews
Practice tips

Send your submissions to Karen Hulan:

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Member Updates

Send your updates to library@middlaw.on.ca

New directory alert! You have already been notified about the availability of the 2020-2021 MLA Members' Directory, so please make sure to send someone to the library to pick up your firm's copies. The changes below are to the new 2020-2021 directory.

Laura Glithero – her last name is now Gurr and her email has changed to gurr@cohenhighhey.com

Micheal R. Bronsveld – new call practicing with Lakin Afolabi and his email is mike@lakinafolabilaw.com

Kelli McPhail – new call practicing at Vallillee Law and her email is kelli.m@valaw.ca

Keith Finley – is now practicing at Camarra Law and his email is kfinley@camarralaw.ca

Nicole MacDonald – her last name is now Rogers and her email has changed to nicole.rogers@aviva.com

Jennifer Hawn – is now practicing at Polishuk, Camman & Steele and her email is jhawn@pcslawyers.com

Will Notices

Douglas Vernon Woods

Anyone having knowledge of a Will of the late Douglas Vernon Woods of the City of London in the County of Middlesex, Province of Ontario, who died on April 15, 2020, is requested to contact: Sue Noorloos of McKenzie Lake Lawyers LLP 140 Fullarton Street, Suite 1800 London, ON N6A 5P2 noorloos@mckenzielake.com t. 519-672-5666 x 7356 f. 519-672-2674

Steven Cyrel Van Colen

Anyone having knowledge of a Will for the late Steven Cyrel Van Colen who passed away on October 16, 2020 at the age of 54, is requested to contact: David Pentz Professional Corporation 651 Talbot St., St. Thomas, ON N5P 1C9, email: davidpentz@bellnet.ca, ph: (519) 637-3838.

Mark Wayne Vanhie

Anyone having knowledge of a Will of the late Mark Wayne Vanhie of London, ON, born March 24th, 1961 and died on May 22, 2018, is requested to contact Thomas J. Davis at Valin Partners LLP, ph: (715) 474-1220 or email: tdavis@valinpartners.net.

Judith Anne Penny

Anyone having knowledge of a Will of the late Judith Anne Penny, formerly of London, born on April 15, 1953, is asked to contact Wallace B. Lang, Barrister & Solicitor, 5290 Nauvoo Road, Watford, ON, N0M 2S0, ph: 519-876-2742, email: lang2@execulink.com.

John Ted Anusiewicz

Anyone having knowledge of a Will of the late John Ted Anusiewicz, who resided in Strathroy and Burlington, ON, born September 29, 1969 and died on April 18, 2020, is requested to contact Catherine at Francis De Sena Law Office, ph: 519-336-9999 or catherine@desenalaw.com.



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Contact

Karen- 519-671-4935 or karen@kglivestock.ca
John- 519-474-4806 or grahammediations@outlook.com



November 2020 Middlesex Law Association Newsletter

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