

THE
MIDDLESEX LAW
ASSOCIATION

Snail



Winter Issue

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President's Message



Contributed by:

Karen Hulan / Beckett Personal Injury Lawyers and MLA Board President

Lawyers in our region are addressing access to justice issues.

FOLA Plenary

MLA Executive Director, Tracy Fawdry, and I attended the Federation of Ontario Law Association's conference in November. Updates were provided by the Attorney General, Law Society, LawPRO, LiRN and others. I cannot adequately summarize, in what is supposed to be a brief President message, all of the presentations and so I encourage you to visit the FOLA Plenary [website](#) for powerpoint slides and videos. Tracy highlights some of the conversations we had with other Associations at page 20 of this Winter Issue.

The Family Law Committee's report largely focussed on the need for consistency with technology in all levels of court and jurisdictions. Many family lawyers practice in multiple jurisdictions and are therefore dealing with different filing processes and rules concerning virtual attendances. The committee recommends the following FOLA [video](#) for instruction on using Caselines.

The Real Estate Committee participated in the federal government's consultation process about legislation passed in June that would prohibit sales of residential properties to non-Canadians. The legislation will come into effect in January. FOLA urged the government to at least pause and consider the implications of the legislation including the impact on real estate lawyers. The Committee also reported on new changes being implemented regarding condominium law. FOLA forwards real estate updates to the MLA which are distributed as part of our weekly email blasts. Look for your updates there.

A Legal Aid Committee report was provided which highlighted an issue of particular importance to clients who have Legal Aid Ontario Certificates and to the lawyers they retain. Sarnia lawyer and FOLA LAO Chair, Terry Brandon, indicated that neither tariffs nor hourly rates for certificate work have increased for several years even though the cost of practicing and the amount of administrative demands have increased. It is becoming more difficult for lawyers to accept legal aid certificates and more litigants are representing themselves in all areas of law. To find out more about FOLA's advocacy on this matter, you can read Terry's report [here](#). She would like to hear about your experience and suggestions.

Paralegal Membership in the MLA

As you will see from Alysia Christiaen's article "The Clock is Ticking – Not-for-Profit Corporation Compliance with the ONCA" at page 16, MLA bylaws require amendment to comply with the new *Ontario Not-For-Profit Corporations Act*.

This task is underway and draft bylaws will be circulated to the membership prior to the Annual General Meeting in February. They will be voted on at the meeting.

Throughout the year we have learned about paralegal professionals' access to Practice Resource Centres in Ontario. Paralegal professionals (P1 licensees) have been licenced by the Law Society since 2007 but in London they do not have access to our Practice Resource Centre (courthouse library). Paralegals do not pay a library levy as lawyers do. Some associations have addressed this by simply charging paralegals a fee to access PRCs. We conducted a poll of the membership in April of this year and the majority of responses were in favour of adopting the same approach in London.

Throughout the year we have also learned about paralegal membership in other law associations. Several associations, such as Carleton and Waterloo, and even associations much smaller than our own, include both lawyer and paralegal licensees. Lawyer and paralegal representatives of associations attended the recent FOLA plenary. We polled our membership and again, the results were largely in favour of extending membership to P1 licensees.

I am proud to say that the MLA Board of Trustees passed motions to draft bylaws which extend MLA membership and one designated seat on the Board of Trustees to Law Society licenced paralegals. Lawyers would continue to occupy executive positions. The draft bylaws will incorporate these proposed changes. This reflects the results of consultation with membership and is consistent with the direction other associations in Ontario have taken. Our action also aligns with the Law Society's mandate to promote competency of licensees. Similarly, one of the core purposes of the MLA is to provide professional development to members. Provision of continuing professional development to all licensees improves the quality of legal services offered to the community.

Finally, appointments not keeping pace with judicial vacancies is a part of the backlog problem but there are also issues of inadequate technology, court resources, and funds to retain and train court house staff who are under increasing demands. I raised this issue with the Attorney General at the FOLA Plenary. We are told that change is coming and to stay tuned.

In the spirit of this holiday season, I would like to end this message with a note of thanks for that which we have received. There has been some

remarkable change that most of us would not have even contemplated a few years ago. One example is that courtrooms were renovated. The MLA has organized a tour of retrofitted courtrooms. It is scheduled for December 15 at 5PM. We will meet at the Practice Resource Centre to begin a tour led by Court Operations and to learn about technology updates at the court. Many thanks to Darcy Lampkin, Catherine Bates and their team for making this event possible. Thanks also to MLA member, Jim Virtue, who has kindly agreed to review appropriate courtroom etiquette. The tour will be followed by a winter social in the Practice Resource Centre. We look forward to seeing you on the 15th.

Best wishes to you and your families during the holiday season and in the New Year.

Karen Hulan
PRESIDENT



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Practice Resource Centre News



Contributed by:
Cynthia Simpson and Shabira Tamachi
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Donation

We would like to thank MLA member Alf Mamo for once again donating a copy of the latest edition of his book, the *Annual Review of Family Law 2021-2022*. The 8-page preface by Alf is a must read for all family lawyers on its own! The compendium provides updates on children's law, child and spousal support, family property and domestic contracts. It is also available through Westlaw's FamilySource, which all MLA members have free access to on the computers in the Practice Resource Centre.

New Resources Alert!

Libraries are no strangers to change and innovation, and the MLA Practice Resource Centre is no exception. Our two contracts with Thomson Reuters (TR) recently came up for renewal, which gave us the opportunity to review our options and see if there was a better way to provide information to our members. We automatically get online access through TR's ProView platform for any active looseleaf titles we carry, but the platform is not as functional or intuitive as similar access on Westlaw. We also reviewed the borrowing history for our current TR titles and, even pre-pandemic, these expensive looseleaf binders weren't circulating enough to justify the cost and time it takes to maintain them. Thomson Reuters recently created e-version practice area bundles of its looseleaf resources, with access through Westlaw. We were able to switch quite a few of our existing print titles to the Westlaw version and, in the process, gained access to significantly more titles for the same cost as the print/Proview titles we had. This does

mean that we have cancelled our print subscriptions to significant portions of our real property, family, estates, employment, and part of our litigation area in favour of online access only through the computers in our practice resource centre. You will find a desktop icon for Westlaw on all our user computers. Simply click the Texts and Annotations link in the Commentary section on the home page for Westlaw to see the full list of titles available there and which ones we have either direct access to through Westlaw or seamless connection to our ProView version for titles that we still maintain in print. Of course, you can also always [email us](mailto:library@middlaw.on.ca) to send you information from our resources too.

New Books

Archibald et al. **Ontario Superior Court Practice, 2023 ed.**, LexisNexis, 2022

Downard, Peter A. **Law of libel in Canada, 5th ed.**, LexisNexis, 2022

Harrington & Skinner. **Ontario planning legislation & commentary, 2022 ed.**, Lexis Nexis, 2022

LSO. **23rd employment law summit, 2022**

LSO. **5th motor vehicle litigation summit, 2022**

LSO. **25th estates and trusts summit --day 1 & 2, 2022**

LSO. **Six-minute debtor-creditor and insolvency lawyer 2022, 2022**

McInnes, Mitchell. **Canadian law of unjust enrichment and restitution, 2nd ed.**, LexisNexis, 2022

McLaren, Richard. **2022-2023**

annotated Ontario Personal Property Security Act, Thomson Reuters, 2022

McLeod & Mamo. **Annual review of family law 2021-2022**, Thomson Reuters, 2022

n/a. **Martin's Ontario criminal practice 2023**, Thomson Reuters, 2022

Payne, Julian. **Child support guidelines in Canada, 2022**, Irwin Law, 2022

Rudin, Jonathan. **Indigenous People and the criminal justice system: a practitioner's handbook, 2nd ed.**, Emond, 2022

Salhany, Roger. **Practical guide to evidence and proof in criminal cases, 9th ed.**, Emond, 2022

Schneider, Richard. **Annotated Ontario mental health statutes --5th ed.**, Irwin Law, 2022

Segal & Libman. **2022 Annotated Ontario Provincial Offences Act**, Thomson Reuters, 2022

Steinberg, et al. **Ontario family law practice 2023 -2 vol.**, LexisNexis, 2022

Wortzman, Susan. **E-discovery and information governance in Canada, 4th ed.**, LexisNexis, 2022

Missing Books

Auerback, Stephen. **Annotated Municipal Act, Volume 3**, Carswell

Bourgeois, Donald J. **Charities and not-for-profit administration and governance handbook, 2nd** LexisNexis, 2009

Brown, Daniel. **Prosecuting and defending sexual offence cases, 2nd ed.**, Emond, 2020.

Bullen, Edward et al. **Bullen & Leake &**



Jacob's precedents of pleadings, 14th ed., Volume 1, Sweet & Maxwell, 2001

Bullen, Edward et al. **Bullen & Leake & Jacob's Canadian precedents of pleadings, 3rd ed., Volume 3**, Thomson Reuters, 2017

Fridman, G.H.L. **Law of contract in Canada, 5th ed.**, Thomson Carswell, 2006

Fuerst, Michelle. **The Trial of Sexual Offence Cases, 2nd ed.**, Thomson Reuters, 2018

Harris, David. **Law on disability issues in the workplace**, Emond Publications, 2017.

Hull, Ian M. **Macdonell, Sheard and Hull on probate practice, 5th ed.** Thomson Reuters, 2016

LSO. **Accommodating age in the workplace**, 2015

LSO. **Duty to accommodate in the workplace**, 2016

LSO. **Six-minute administrative lawyer 2018**.

MacFarlane, Bruce A., **Cannabis law**, Thomson Reuters, 2018

OBA. **Constructive trusts and resulting trusts 2007: bringing order to chaos**.

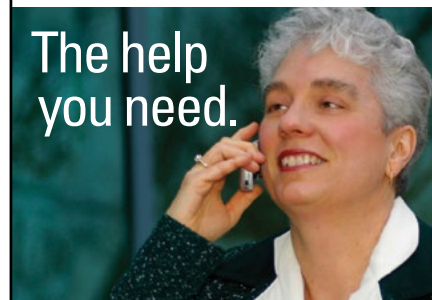
Oosterhoff, Albert H. **Oosterhoff on wills, 8th ed.**, Thomson Reuters, 2016

Osborne, Philip H. **Law of torts, 5th ed.**, Irwin Law, 2015

Steinberg, et al. **Ontario Family Law Practice, 2022 edition, 2 vol.**, Lexis Nexis, 2022

Stewart, Hamish. **Sexual Offences in Canadian Law**, Thomson Reuters

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Want to contribute to the next issue?

**DEADLINE IS NOON
ON JANUARY 25**

We encourage submissions in the range of 200-500 words, with a maximum limit of 1,000 words for news and opinions, and a limit of 2,000 words for articles on law and legal issues.

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, or practice tips

Contact Tracy Fawdry

EXECUTIVE DIRECTOR

tracy@middlaw.on.ca



AI art generator copyright controversy



Contributed by:

David Canton / Harrison Pensa LLP

Printed with permission from Harrison Pensa Technology & Privacy Law Blog of November 9th, 2022.

AI art generator tools are becoming readily available; Dall-E and Stable Diffusion, for example. Microsoft is even [adding it to its Office suite](#). So, coming to a PowerPoint near you.

These artificial intelligence apps generate art based on a text-to-image model. If you type “woman flying a bicycle” into Dall-E, it will generate that image. The image is generated based on images the tool has learned from.

But you can also type in “car on a cake in the style of Van Gogh”. It will then generate images that [look like it was created by](#) that artist.

AI ART GENERATOR CONTROVERSY

AI generated art is [controversial](#) for many reasons.

On the legal side, there are potential copyright issues depending on what images were used to start with and

what instructions were given. Some art communities and image sites have banned AI generated art either because of the copyright risk or deference to artists and photographers.

Shutterstock was one of those. But [Shutterstock announced](#) it will sell AI generated images that learned from images in Shutterstock archives. They will compensate those artists, but one artist describes it as a “sewer water leak into the drinking supply”.

WHO OWNS AI GENERATED ART?

Authorship can be an issue. Courts have been reluctant to recognize authorship and ownership claims not based on human efforts, such as AI generated authorship of patents, and monkey selfies. How much human effort is needed to reflect human authorship and ownership?

DISRUPTIVE TECH

It is common for new tech to rile up those who fear it will replace them or existing business models, similar to

how the camera concerned artists and videotape concerned movie makers. Those didn’t hurt the existing players. On the other hand, the development of the car put a quick end to those in the horse and buggy trade.

So which one is AI generated art? Will it put artists out of work? To what extent does it infringe on artists’ rights?

[Shelly Palmer](#) says: “AI will absolutely replace millions of commercial artists, and it will do so in the most damaging way.”

WORK IN PROGRESS

Anyone who has tried to create an image using one of these tools knows they are rather crude. Getting the images often shown as examples is not easy and can take time and effort to get right. That will probably change, similar to how digital cameras evolved from a curiosity to replacing film in a short time.

Having AI generated images based on the style of an existing artist is a tough one. Many artists are known for

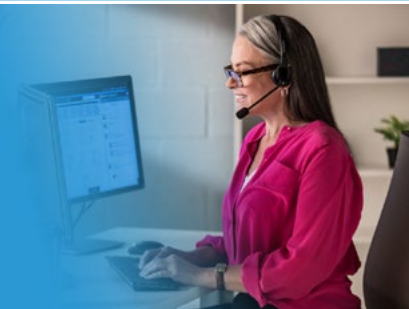
their particular style, and the paintings they create are recognizable as theirs. Understandably, they are not thrilled with the ability of anyone to generate AI based art that looks like theirs – for free. A suggestion has been made that AI tools should not be able to do that for living artists.

It may take some time to sort all this out, but that is small solace to anyone concerned that it will negatively affect their livelihood.

[David Canton](#) is a business lawyer and trade-mark agent with a practice focusing on technology issues and technology companies. Connect with David on [Twitter](#) and [LinkedIn](#).

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The Drainage Act: 188 years of compelled cooperation



Contributed by:

John D. Goudy / Scott Petrie LLP Law Firm

Ontario's first drainage legislation was enacted in 1834 – “An Act to regulate Line Fences and Watercourses”.

Back then, Ontario was Upper Canada. Toronto happened to be incorporated as a City in 1834 and had a population of about 9,300. Rural Ontario was still very much the Upper Canada of Susanna Moodie's “Roughing it in the Bush” or CTV's “The Campbells” (does anyone remember that show from the 1980s?). Land patents were granted to settlers with conditions that they clear a certain portion of their lot for cultivation, erect buildings, clear the municipal road allowance, etc.

The development of land, whether for agricultural use or otherwise, has always required the management of surface water. It's also always been true that water flows downhill; surface water from higher properties flows to lower properties. At Common Law, an owner generally has no obligation to accept surface water that drains from a neighbour's property. Subject to prescriptive rights or agreements between owners, and outside of natural watercourses, a downstream landowner is entitled to block surface flows from an upstream landowner. In that respect, the Common Law was often an impediment to the clearing and development of land.

The drainage legislation enacted in 1834 was the first step taken by the Legislature to overcome the Common Law in the area of surface water drainage by compelling participation in collective drainage systems. Section 16 of the 1834 Act stated the purpose of the legislation as follows: “... in all

cases when it shall be the joint interest of parties resident within this Province to open a Ditch, or Water Course, for the purpose of letting off surplus water from swamps or sunken miry lands in order to enable the owners or occupiers of such swampy or sunken land to cultivate or improve the same, it shall be the duty of such several parties to open a just and fair share of such Ditch or Water Course in proportion to the several interests that such parties may have in the same”.

While non-participating landowners couldn't be compelled to pay the costs of collective drains, landowners who wished to participate in a drainage system now had a mechanism to allow them to carry out work at their own expense on their neighbours' lands “without molestation”. Eventually, legislation was passed making all landowners within a drainage area liable for their proportionate share of the costs of a collective drainage system. In addition, responsibility for the creation and maintenance of collective drains was given to municipalities (giving rise to the term “municipal drain”). This remains the law in Ontario today under the *Drainage Act*.

Municipal drains are created by “petition” made to the local municipality. Petitions may be made by the majority of the number of landowners in a drainage catchment area, by any one owner who owns at least 60% of the land within the area, by the municipal engineer or road superintendent where a municipal drain is required for a road, or by the “Director” appointed by the Province in the case of drains required for agricultural purposes. Where the municipality accepts the petition, it appoints a drainage engineer, and that

engineer must prepare a report for the proposed drain. The report includes the design and specifications of the drain as well as a table of assessments in which each participating landowner's respective share of the costs of the drain is assigned.

Subject to various appeal rights, all landowners within the area that drains into the municipal drain who are assessed for costs must pay those costs to the municipality. Also, those landowners must allow access to their lands for whatever components of the “drainage works” are required on their lands. These components may include an open ditch, an underground drain tile or pipe, a culvert, etc. Although the fee simple ownership of the land remains with the landowner – the *Drainage Act* does not involve a taking of ownership – land may be physically occupied by the municipal drain and the Act prohibits interference with a municipal drain. Landowners whose land is required for the actual physical components of the drain are awarded “allowances” in the engineer's report – compensation that is offset against the cost assessed to the landowner. In this sense, the *Drainage Act* operates like an expropriation statute.

Perhaps there were Libertarians around in 1834 bemoaning the new drainage legislation. Perhaps there are Libertarians around today bemoaning the *Drainage Act* as government interference in the property rights of individuals. Socialist systems of surface water drainage. However, most people probably never give any thought to the philosophy or politics of municipal drains. Most people are just happy to find an outlet.





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- Understand the requirements of The Bench when it comes to PUD cases
 - Be able to prepare financial and management plans that will satisfy these requirements, in particular the SDA
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CPD Summaries

18th Annual Wills, Estates & Trusts Conference

November 10, 2022, 9:00am-12:00pm, Zoom

- Board Trustee: Erin Rankin Nash
- Co-Chairs: Lou-Anne Farrell, Justin Newman, Ian Wright
- Speakers: Kerry Rizzo, Lou-Anne Farrell, Dawn Phillips-Brown, Erin Naylor
- Accreditation: 45 minutes Professionalism; 2 hours of Substantive

This yearly conference continued in its popularity for the 2022 18th annual event. The conference Co-Chairs planned a diverse agenda reflective of updates in practice and case law. They also reinforced best practices in collaborative work with investment advisors, filing experts, and offered an open forum to understanding post-pandemic impact on lawyers working in Wills, Estates, and Trusts. This full morning session will soon be available at [CPDOnline](#) as two different sessions with accreditation clearly outlined.

Navigating Governance Challenges in Closely Held Companies



Summary Article Submitted by: Jennifer Hawn

November 2, 2022, 1:00-2:00 p.m., Zoom

- Board Trustee/Chair: Jennifer Hawn
- Speakers: Susan Kushneryk, Eric Morgan
- Accreditation: 45 minutes of Professionalism; 15 minutes of Substantive

On November 2, 2022 the Corporate/Commercial Committee of the MLA was pleased to welcome Susan Kushneryk and Eric Morgan of Kushneryk Morgan LLP to talk about the challenges associated with governance in closely held companies.

As lawyers, we understand that the seemingly small details can have a big impact on outcomes. To business owners, especially business owners who are also friends and/or family, the technical legal issues involved in running a business may appear intimidating, unnecessarily expensive and/or a threat to the underlying relationships. During this CPD, Susan and Eric explained that it is our job to correct that misconception, and to help our clients understand that creating a strong, clear governance structure can actually preserve those underlying relationships and significantly contribute to the overall operations of the business.

In their presentation, Susan and Eric highlighted the importance of taking the time to go over the basics of corporate law with clients. For example, explaining the different roles and legal obligations of shareholders vs. directors is crucial in closely held companies, because those legal duties can be easily overshadowed by existing relationship dynamics.

Susan and Eric also provided guidance on the various roles lawyers can have in the process of creating that governing structure, and how lawyers need to set their own boundaries with respect to the scope of their retainer. First and foremost, the lawyer needs to clearly define for the various stakeholders in a business who they represent and what that means. This will enable the lawyer to avoid conflicts of interest and maintain appropriate confidentiality.

Susan and Eric's presentation also included applicable and even remarkable case studies. In particular, the *Libfeld vs. Libfeld* 2021 ONSC 4670, should be used as a great cautionary tale for all family members who want to go into business. This case involved a family-run billion-dollar real estate development company, which had been in operation since 1951, but had no shareholder or partnership agreement.

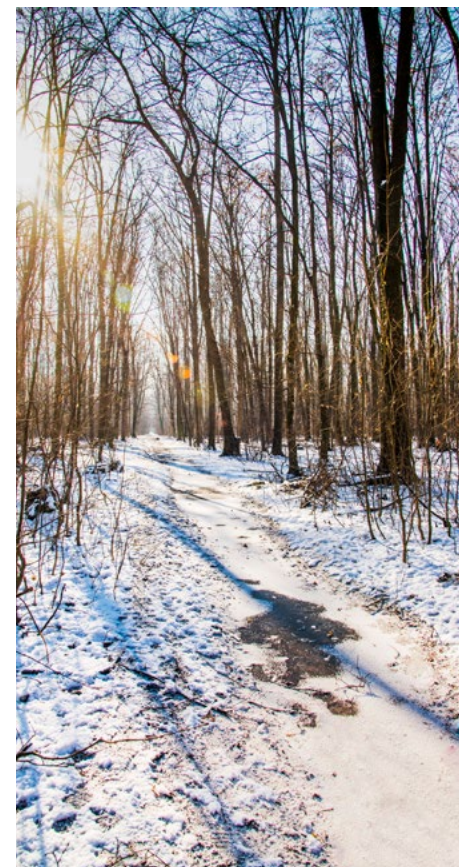
Following a dispute, the business ended up being wound up and sold under the supervision of a Court-appointed sales officer.

Overall, it was an informative and helpful CPD, to remind us that setting boundaries, whether it be with clients or in the operation of a business, can prevent a lot of confusion and potential conflict in the future.

Catastrophic Impairments: Pediatric Traumatic Brain Injuries

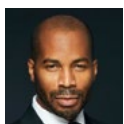
November 16, 2022, 1:00-3:00pm, Zoom

- Board Trustee: Tinashe Madzingo
- Committee: Evelyn ten Cate, Tinashe Madzingo
- Speakers: Evelyn ten Cate, Andrew Leroy Rudder, Kirsten Smith
- Accreditation: 30 minutes Professionalism; 1.5 hours Substantive



Catastrophic Impairment Law: Pediatric Traumatic Brain Injuries

Major change in the automatic catastrophic impairment designation landscape



Contributed by:

Andrew L. Rudder, BA, LL.B, J.D. / Rudder Law Professional Corporation

The amendment of Statutory Accident Benefits Schedule 34/10 (*Schedule*) on June 1st, 2016, ushered in significant changes, especially as it relates to obtaining a catastrophic impairment (CAT) designation as a result of a traumatic brain injury (TBI). The changes brought about the removal of the Glasgow Coma Scale (GCS) test as a means to obtain an automatic CAT designation with a GCS score of nine or less. The reason was primarily because of the confounding factors (i.e. tracheal intubation, intoxication, being too young to understand verbal cues, et cetera) inhibiting the ability to measure the three parameters of the GCS – eye opening, motor response and verbal response –, which called into question the validity of the confounded lowered GCS score as an indicator of brain impairment.

The 2016 amendments to the *Schedule* also brought about a significant shift in how brain injured children are treated under the *Schedule*. Following the 2016 amendments, separate provisions in the *Schedule* were created specifically for children, granting them the possibility of obtaining an automatic CAT designation, if the required criteria of the *Schedule* are met. The 2016 amendments also added objective scientific and evidence-based criteria to determine who would qualify for a CAT TBI, such as the Kings Outcome Scale for Childhood Head Injury.

The separate provisions for children are set out in s. 3.1(1)5 of the *Schedule* and contains five disjunctive subparagraphs, which are applicable

at different times. The first and second subparagraphs 5i and 5ii are applicable at “hospitalization” when the child is admitted as an in-patient. The third paragraph 5iii is applicable at “one month” post-MVA. The fourth subparagraph 5iv is applicable at “six months” post-MVA. Lastly, the fifth subparagraph 5v is applicable at “nine months” post-MVA.

In 2018, my teenage client was involved in a MVA in Brantford, Ont., where she sustained a severe TBI, and multiple fractures to her spine, shoulder and elbow. She was admitted as an in-patient at Brantford General Hospital (BGH). She required immediate surgery on her spine, shoulder and elbow, so BGH sent her to Hamilton Health Sciences, where she was admitted as an in-patient at Hamilton General Hospital (HGH), which is a Level 1 trauma centre (L1-TC). HGH used recognized brain diagnostic technology to assess her, which showed positive findings of an acute subarachnoid hemorrhage in her interpeduncular and suprasellar cisterns. She was transferred to the 6 South Surgical Trauma Centre at the HGH so orthopedic surgeons could perform surgery on her spine, rather than transferring her to the Regional Rehabilitation Centre in regard to her TBI.

In order for my client to be granted the automatic CAT designation she'd have to satisfy three criteria under clause 5(i) of s. 3.1(1) of the *Schedule*:
1. In-patient admission to a public hospital in a guideline. 2. Positive

findings of “intracranial pathology” that is a result of the MVA. 3. The use of “medically recognized brain diagnostic technology.” My client was initially denied an automatic CAT designation because the insurer concluded that she satisfied the last two criteria, but not the first. Why? The guideline referenced in the first criteria was the old Superintendent's Guideline No. 01/16 (Guideline). It had a list of the 12 public hospitals for which in-patient admittance was one criterion for determining whether an insured child has a TBI. The HGH, a L1-TC, wasn't on that list, so the insurer denied her a CAT designation.

I persuaded the insurer to grant my client a CAT designation, which increased her policy limits from \$65,000 to \$1 million. I did so by digging deep into arcane legalities to demonstrate that after taking a modern approach to statutory interpretation, interpreting s. 3.1(1)5i to mean that my client should be denied a CAT designation, because she didn't meet the first criterion since she was admitted as an in-patient to a L1-TC that was not on the list of 12 public hospitals in the old Guideline, would lead to absurd, inequitable and illogical consequences, and inconsistent outcomes in the CAT designation process, which are unfair, unreliable, inaccurate, inconsistent and unpredictable, and have discriminatory ramifications based on geography. I demonstrated that when the words of s. 3.1(1)5i are examined in the entire context of the historical evolution of the CAT definition

from the filing of Bill 59 on Nov. 1, 1996, to the filing of Ontario Regulation 251/15 on August 26, 2015, and we use a broad and generous approach to statutory interpretation à la the contra proferentem rule and s. 64(1) of the *Legislation Act*, which is appropriate within the context of remedial and benefits-conferring legislation such as the *Insurance Act* and the *Schedule*, the adverse consequences or effects following the aforementioned negative interpretation of s. 3.1(1)5i are incompatible with both the main objective of insurance law and the purpose of insurance contracts, the scheme of the *Insurance Act* and the *Schedule*, and the intention of the Ontario legislature.

In doing so, I discovered a provincial bureaucratic and legal glitch, so

obscure that no one even knew it existed, which had the adverse effect of geographical discrimination. I vowed to change the Guideline. I met with representatives of the Financial Services Regulatory Authority of Ontario (FSRAO) and made recommendations. They adopted one of them. Rather than updating the list of 12 public hospitals to mention all of the current LI-TCs or Lead Trauma Hospitals (LTHs), FSRAO instead chose to deem any public hospital designated by Critical Care Services Ontario (CCSO), in partnership with the Ontario Ministry of Health, as LTHs. They've done so in order to "maintain consistency and continuity where there has been an administrative change with respect to a designated public hospital."

So, FSRAO replaced the old Guideline with "Guideline on Public Hospitals and Determination of Catastrophic Impairment", which interprets clause 5i of section 3.1(1), as it applies to "a public hospital named in a Guideline". Now all LI-TCs, including the HGH, is included in the public hospital list.

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Thursday, December 15th from 5:00 – 7:30 p.m.

Members can register for both or for the tour and social separately.

Courthouse Tour is 5:00 – 6:00 p.m.

It will begin promptly at 5:00 from the Practice Resource Centre/Library.

This tour will be accredited for 1 hour of CPD professionalism content. Courthouse staff will provide a tour of courthouse spaces, demonstration of technology changes/retrofits, and take questions. There will also be a portion on courtroom etiquette and protocol led by MLA member and Siskinds Senior Partner, Jim Virtue.

The 5:30 p.m. Social will include a drink ticket and some wonderful appetizers/treats to enjoy as you connect with colleagues.

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We look forward
to welcoming our
members back
into the Practice
Resource Centre/
Library for this
event!

The Alarming State of the Judiciary in Middlesex and Southwest Region and How You Must Help



Contributed by:
Barbara Legate / Legate Injury Lawyers

For anyone practicing before the courts in this jurisdiction, one thing is very clear: our judiciary are overworked and doing yeoman's duty to keep the wheels of justice from falling off.

It is evident that the pace they are working at is unsustainable. Civil litigation has all but ground to a halt and family litigation is in crisis.

While we can blame the pandemic for some of this, that is not the whole story. A small group of lawyers who were concerned about this before the pandemic are now reaching out to you for your help. We cannot collectively sit on our hands and moan. The state of affairs we and in particular, our clients, are putting up with, must be brought to the attention of those who can address it.

That means we need you to:

1. Contact any Member of Legislative Assembly (MLA) you may have sway with (or not) and ensure that MP understands the issue and what needs to be done.
2. Contact any MLA you may have sway with (or not) and ensure that MLA understands the issue and what needs to be done.
3. Renew your application to be appointed if already made. Don't let it expire.

How did we get here?

The Jordan decision from the SCC was a nuclear bomb dropped on criminal litigation. At the time it came down, London and Region was in an enviable position with current trial dates. At that time, we gave two appointments to Brampton which was in desperate need.

Fast forward to 2018-19. Vacancies on our bench were chronically slow to be filled. The backlog of civil cases was growing to exceed 850 with no sign of slowing down. Further demands on criminal process was chewing up judicial time. Family law, in the words of one judge, would take as much time as you could throw at it. Our group brought this to the attention of our local members and action appeared to have been taken. The two outstanding vacancies were filled. We do not claim it was just as a result of our efforts, but we do claim that it didn't hurt and likely helped.

Then came the pandemic and all reading this know what happened. We are now in dire straights. As of January, there will be 5.5 vacancies and few applicants to fill them. We are told that there are plenty of applicants in the Toronto area, but the same cannot be said of this Region. The good news is that a total of 2 additional positions will be coming our way, but they do need to be filled.

The addition of judges to a region is a multi-step, multi-lateral matter. The Chief Justice makes an ask, the

Province has to say yes, then it goes to the Federal level to also say yes and put that into the budget. New positions mean infrastructure (offices, court rooms) and staff. The province pays for that.

Make sure the members of Parliament and the Legislature know about this and speak to those who can act: Minister Downey (Ontario), and Minister Lametti (Federal). Minister Lametti met with me in the summer. He promises to stay engaged and advised of the approval of the first of what are two new positions. Minister Downey has not responded to any of our attempts at contact.

With two additional judges, we will be back to the compliment we once had, pre-Jordan. Our Region has grown since then, with drug and crime problems, and family disputes along with that growth. We are now a center for Class Actions. Highways, new business, large student populations, and regional hospitals and medical centers all contribute stress on the courts, our judiciary and court staff.

Please act now.

Note: The 'group of lawyers' referred to includes: David Williams (HP) Jim Virtue and Rasha El Tawil (Siskinds), Doug Wallace, Bill Woodward, Judith Hull, John Nicholson, Carolyn Brandow, Doug Ferguson and Yola Ventresca.

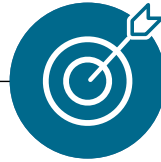
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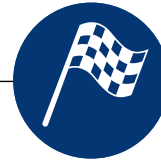
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The Clock is Ticking – Not-for-Profit Corporation Compliance with the ONCA



Contributed by:

Alysia M. Christiaen / Partner, Lerner's LLP

Almost 11 years after receiving royal assent, Ontario's Not-for-Profit Corporations Act, 2010 (ONCA) finally came into force on October 19, 2021.

To put this into some context, NASA built and launched two rovers to Mars during that time. The ONCA has replaced Ontario's Corporations Act (OCA) and generally applies automatically to all new and existing not-for-profit corporations. Existing Ontario not-for-profit corporations (NPC) will have until October 18, 2024, to comply with the ONCA.

Set out below are steps NPCs need to take to transition from the OCA to the ONCA:

Step 1: Gather your important documents

The NPC will need to review its governing documents to determine if they will need to be changed to comply with the ONCA. These include the articles of incorporation (formally known as letters patent), by-laws, and any amendments made to the articles and by-laws. Consider whether they actually reflect the current governance process.

Step 2: Understand the law and update the articles of incorporation & by-laws

There are a number of differences between the OCA and ONCA. Below are the key changes NPCs should be considering when completing their review of the articles and by-laws:

Commercial Purpose

Under the ONCA, NPCs are now allowed to have an ancillary commercial purpose. The articles must

be amended to state the commercial purpose and that it is meant only to support the NPC's purpose.

Directors

The ONCA requires a minimum of three directors for NPCs. However, articles can be amended to allow for a range of directors or a fixed number. Directors can have a maximum four-year term, but there is no limit on the maximum number of terms.

Directors no longer have the ability to vote by proxy at board meetings. If a director is not present at a meeting, they will be deemed to have consented to a resolution or an action that was taken unless they provide notice of their dissent within seven days of becoming aware of it.

Public Benefit Corporations

The ONCA has introduced a new category of NPCs called public benefit corporations. An NPC is considered a public benefit corporation if it is a charity or if it has received more than \$10,000 in the last financial year from public sources. Public sources include financial contributions from the government or a government agency and gifts or donations from people that are not members, directors, officers, or employees of the NPC. Public benefit corporations have special rules about when they review and report their finances and what can be done with their assets should they choose to dissolve.

If an NPC meets the criteria of a public benefit corporation, then no more than 1/3 of its directors can be employees of the NPC or its affiliates.

Financial Review

The ONCA has introduced some flexibility to the financial review obligations for NPCs. A "review

engagement" has been introduced. A review engagement is still performed by an accountant, but is less extensive than an audit and, as a result, is generally less expensive. The ONCA sets out rules for the type of financial review that is to be conducted by a NPC, based on Gross Annual Revenue (GAV):

Non-Public Benefit Corporation

- If GAV is \$500,000 or less, waive both review engagement and audit*
- If GAV is more than \$500,000, review engagement instead of an audit*

Public Benefit Corporation:

- If GAV is \$100,000 or less, waive both review engagement and audit*
- If GAV is more than \$100,000 but less than \$500,000, review engagement instead of an audit*
- If GAV is \$500,000 or more, audit

**Requires an extraordinary resolution, which is approved by at least 80% of the member votes cast*

Member Rights

Members have been granted considerable rights under ONCA. Provided specific criteria are met, they can requisition a members' meeting, submit proposals to amend by-laws or require a matter to be discussed at member meetings, submit proposals to nominate directors, access corporate records, such as the membership list, and have broad remedy powers (e.g., dissent and appraisal remedy, derivative action, compliance and restraining orders, court-ordered wind-up, and liquidation). NPCs will need to consider whether there should be more than one class of members, i.e., a voting and a non-voting class.

Step 3: Update and file changes to your articles and by-laws

In this final step, the NPC will the articles/letters patent and by-laws to make the transition to the ONCA official. There are some changes that can only be made to the articles of incorporation, such as the NPC's purpose, the number of directors, membership classes and voting rights, and dissolution clauses. Articles of Amendment will need to be filed in order to bring these changes into effect.

Conclusion

The ONCA represents an important step in modernizing Ontario's not-for-profit corporation law. NPCs should review their governance and membership structure with a view to ensuring compliance with the ONCA, but also determine how the corporation's governance and

management structure may be improved or adjusted given the changes under the ONCA.

NPCs should start the review of their articles and by-laws soon to ensure a smooth transition to the ONCA – we are already a year into the three-year transition window, and changes to articles and by-laws need to be approved by the members.

[Alysia Christiaen](#) is a corporate lawyer, with experience assisting not-for-profit corporations. Connect with Alysia via [Twitter](#) or [LinkedIn](#). [Greg Woodward](#) is currently completing his final year of law school at Western University. This article originally appeared as a blog posted to the Lerner's [LERNx](#)



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Trauma-Informed Lawyering for Corporate/Commercial Legal Practices



Contributed by:

Samantha Gordon / Associate Lawyer, Scott Petrie LLP, Law Firm

I first learned about trauma-informed lawyering when I came across Myrna McCallum's podcast "[The Trauma-Informed Lawyer](#)".

Myrna McCallum is a Métis lawyer from Treaty Six territory in northern Saskatchewan, and her work is a primary reason that the concept of trauma-informed lawyering has permeated conversations in legal communities across Canada and internationally.

In the article entitled "[The Pedagogy of Trauma-Informed Lawyering](#)" by law professors Sarah Katz and Deeya Haldar, trauma-informed lawyering is described as occurring "when the practitioner puts the realities

of the client's trauma experiences at the forefront in engaging with the client, and adjusts the practice approach informed by the individual client's trauma experience." A trauma-informed practice is also intended to benefit lawyers through "employing modes of self-care to counterbalance the effect the client's trauma experience may have on the practitioner."

Initially, it may seem that a trauma-informed approach is only applicable to areas of law where individuals' trauma

is at the heart of the legal matter, such as family, criminal or immigration law. Most can readily understand how recounting details of one's experiences with domestic violence or the child welfare system, for example, can be triggering and re-traumatizing. However, it is less evident how trauma-informed lawyering can be applied to a corporate/commercial practice.

While it may be more pertinent to

family or criminal practices, applying a trauma-informed approach to your corporate/commercial practice can be highly beneficial and may be necessary in certain situations. Trauma can arise at any stage of the legal process, not just when the facts of the legal matter explicitly concern traumatic events. Trauma may also be an underlying factor in a case. For

example, an individual bankrupt may have found themselves bankrupt as a result of their struggles with mental illness or after leaving an abusive relationship. A shareholder's dispute might involve two former spouses going through a traumatic divorce. For some, even contacting and meeting with a lawyer or entering a boardroom or courtroom can evoke a traumatic response. Being trauma-informed means being aware of potentially traumatic or triggering situations and taking steps to avoid, minimize and accommodate the individuals involved.

"Being trauma-informed means being aware of potentially traumatic or triggering situations and taking steps to avoid, minimize and accommodate the individuals involved."

Additional Resources and Readings:

Myrna McCallum's website:
www.myrnamccallum.co

Trauma-Informed Legal Advocacy (TILA) Project:
www.nationalcenterdvtraumamh.org/trainingta/trauma-informed-legal-advocacy-tila-project/

www.cbc.ca/news/canada/north/trauma-informed-justice-1.4815979
www.lawtimesnews.com/resources/legal-education/trauma-informed-approach-necessary-in-every-legal-practice-area-says-myrna-mccallum/355698

www.cbc.ca/news/canada/north/trauma-informed-justice-1.4815979

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According to lawyer Helgi Maki, the founder of the [Trauma-Informed Law project](#), in addition to benefiting the mental health and wellbeing of clients, "using trauma-informed legal practices can help improve client satisfaction, support lawyer well-being, increase access to justice and even improve legal outcomes."

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Member Updates

Our 2022-2023 members' directory, generously sponsored by Davis Martindale LLP, has been published and copies are available for pickup from the MLA Practice Resource Centre during normal office hours. You can always access the up-to-date membership details through our [online members' directory](#).

Michelle Farquhar – has opened a solo practice at 66 Fullarton St., London N6A 1K1, ph: 519-204-2580, direct ph: 519-694-1942, fax: 519-204-5402, michelle@mfarquharlaw.com

Judith Hull – has joined MD Lawyers, ph: 519-672-1953 ext. 5214, jhull@md-lawyers.ca

Stephanie Marentette – is now practicing at McCague Borlack LLP, direct ph: 226-781-2134, smarentette@mccagueborlack.com



Congratulations to Kristi Sargeant-Kerr on her LCCI Designation!



Scott Petrie LLP congratulates the Firm's Partner Kristi Sargeant-Kerr on being awarded the Designation of Leader from the Canadian Condominium Institute (LCCI). This Designation is awarded in recognition of professionals who contribute knowledge and expertise to the Institute and to the condominium industry. Kristi works extensively in the development, management and administration of condominium corporations and regularly contributes articles and presents at seminars with respect to Condominium Law. She serves on the Board of the London and Area Chapter of the Canadian Condominium Institute (CCI) and is an appointee to the Advisory Committee of the Condominium Management Regulatory Authority of Ontario (CMAO).

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Polishuk, Camman and Steele is pleased to announce that it will become Spero Law as of December 13, 2022:



Our new website will be sperolaw.ca. Our mailing address, phone and fax numbers remain the same.

We thank our clients and colleagues for [their](#) ongoing support!

Will Notices

Daphne Elsie Jarvis

Anyone knowing of a Last Will and Testament for Daphne Elsie Jarvis, born January 17, 1944 and died September 27, 2022 of London, Ontario, please contact Helen Anne Jarvis (sister) at +44 61 905 3953 (UK), email: helenjarvis@btconnect.com.

She wrote a first Will circa 1983, which has been located by her common law husband. However, she advised other family members that she had written a new Will approximately 10 years ago. We are searching for this second Will.

Deborah Lee Krasnicki

Anyone knowing of a Last Will and Testament for Deborah Lee Krasnicki, born December 16, 1955 and died January 5, 2021 of London, ON, Ontario, please contact Ashley Podolinsky at 519-672-5666 ext. 7273: Ashley. podolinsky@mckenzielake.com.

Elizabeth Lloy McColl and John McColl

Anyone knowing of a Last Will and Testament for Elizabeth Lloy McColl, who died October 6, 2022, and John McColl, who died Nov 3, 2022 both of St. Thomas, Ontario, please contact Sue Carlyle at 519-432-0632 x 222, email: scarlyle@cplaw.com.

James Arthur Patten

Anyone knowing of a Last Will and Testament for James Arthur Patten, born August 11, 1961, and died June 26, 2022, of London, Ontario, please contact Leanne Kuchynski at Siskinds LLP at 519-660-7757, email leanne.kuchynski@siskinds.com.

Alexander Watson Ramsay

Anyone having knowledge of a Last Will and Testament for Alexander Watson Ramsay, born January 3, 1930, who died on November 30, 2021, please contact Frederick A. Mueller at 519-673-1300 or fred_mueller@rogers.com.

Debra Maria Swan

Anyone knowing of a Last Will and Testament for Debra Maria Swan, born August 4, 1965 and died July 20, 2022 of Tara, Ontario, (previously resided in Wingham, Brussels and Goderich, Ontario) please contact Patti Chambers at 705-324-9273 ext.1239, email: patti@wardlegal.ca.



 the MIDDLESEX
LAW ASSOCIATION

Winter Issue Middlesex Law Association Newsletter

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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:

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519-660-7712

rasha.el-tawil@siskinds.com

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519-914-3358

jnicholson@cohenhighley.com

Hilary Jenkins

519-672-5666 x7301

hilary.jenkins@mckenzielake.com

Call for MLA Board of Trustee Candidates 2023-2025 (Two Year Term)

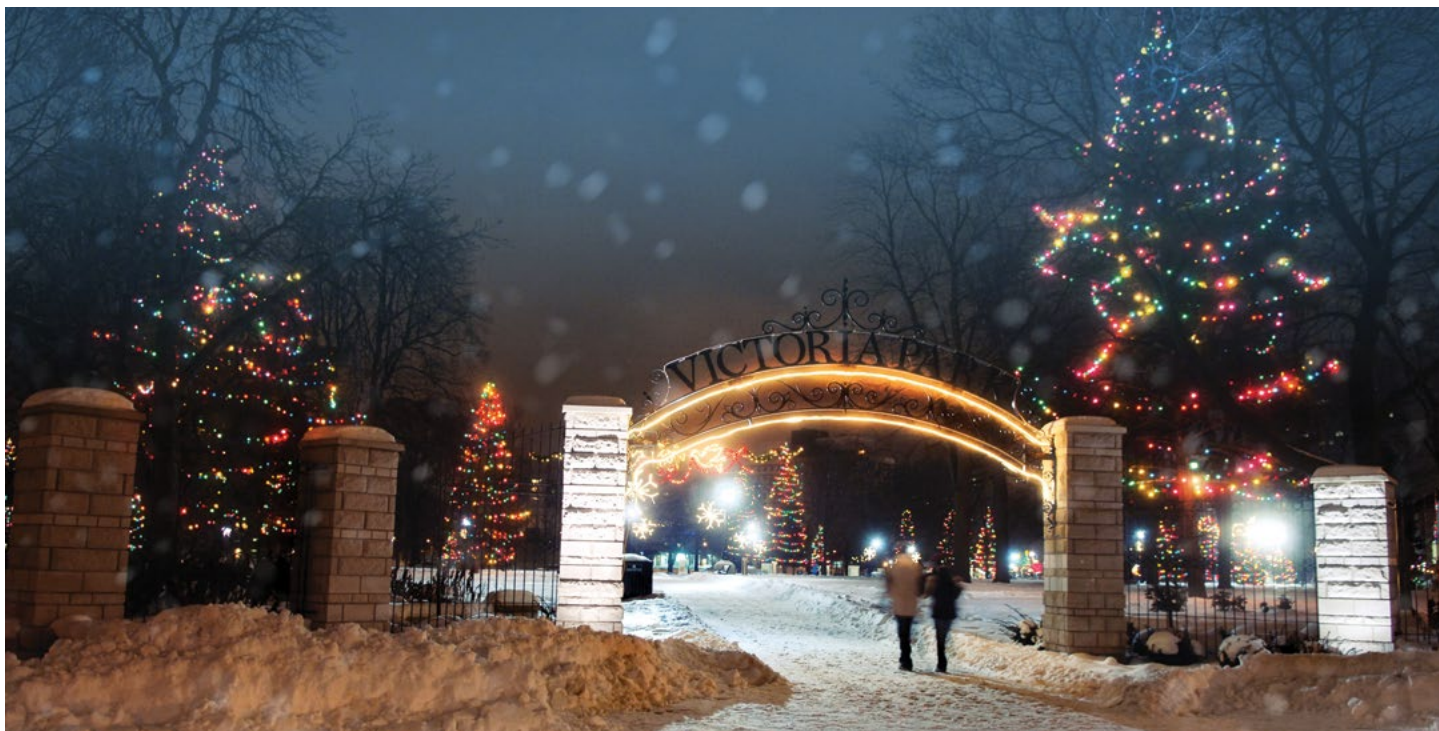
The Middlesex Law Association is seeking nominations for its Board of Trustees.

Nominations are open and will remain open until January 27th, 2023.

Results of the election will be provided at the Annual General Meeting in February. In addition to the required Trustee governance responsibilities outlined in the MLA by-laws, each Board Trustee is assigned to one practice area Subcommittee and works with members at large to plan continuing professional development programs, social events and articles for the MLA newsletter, the Snail. They are supported in this work by Tracy Fawdry, the MLA's Executive Director, who would assist in securing a venue, marketing the event, securing sponsorship, receiving RSVPs and payment. Currently the practice area Subcommittees include Criminal; Family; Real Estate; Corporate/Commercial; In-house; Personal Injury; Wills, Estates and Trusts; EDI/Professionalism; and Small Firms/Sole Practitioners.

NOMINATION FORM

If you would like to learn more about the role of an MLA Board Trustee, please reach out to any of the current Trustees listed at the back page of this newsletter.



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