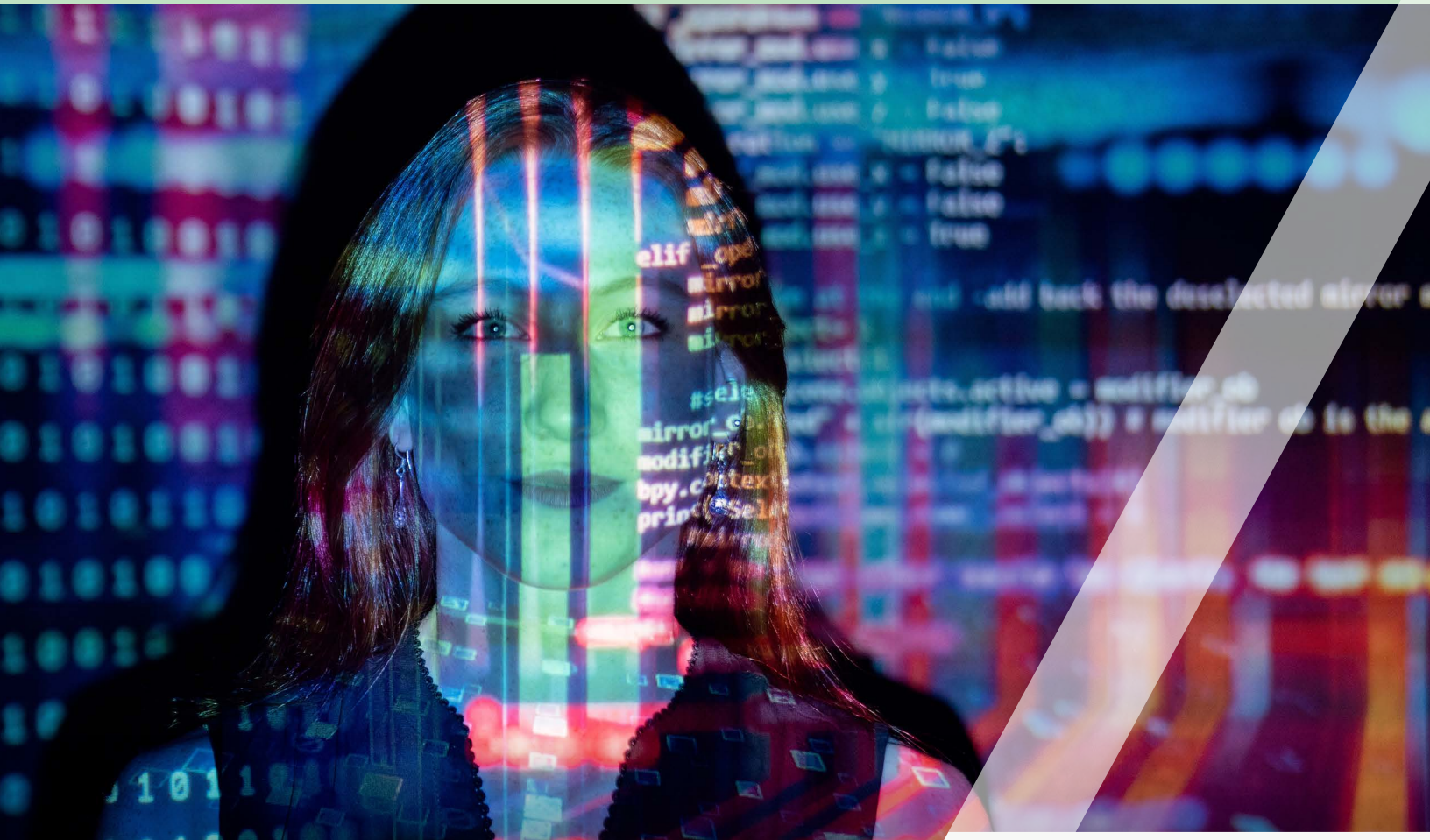
JUNE 2023 | YOUR TRUSTED MIDDLESEX COUNTY NEWS SOURCE ON ALL TOPICS LEGAL | VOL 53 | ISSUE 5

THE MIDDLESEX LAW ASSOCIATION Snail



The Transformative Impact of AI

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the MIDDLESEX LAW ASSOCIATION

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June 2023 Issue

Thank you to all the contributors and advertisers for supporting this month's edition of the Snail.

Want to contribute to the next issue?

The deadline is noon on **June 25, 2023**

Send submissions to Tracy Fawdry: tracy@middlaw.on.ca

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President's Message

Contributed by:
Jake Aitcheson / Lerners LLP and MLA Board President

During the summer between my first and second year of law school, I worked at Community Legal Services (CLS) at Western. For those unfamiliar with CLS's operation, law students are provided with a variety of carriage files to manage under the supervision of a practicing lawyer. The experience is invaluable as students are given the opportunity to work with real people to help solve real world problems. For me, this was my first exposure to the law and my first opportunity to "practice". A few days into the summer, I was asked to attend "A Court". Not knowing what that was, I prepared as if I were attending a 3 week jury trial. Despite my preparedness, when I attended the courthouse that morning, I was the most anxious person in the building – except maybe my client, who was likely looking at me wondering if it was too late to represent himself. When the matter was called, I stood up before the presiding Justice of the Peace and introduced myself as I had observed others do earlier that morning. "A-I-T-C-H-E-S-O-N, first initial J." I was then asked, "Where are you from?" by Her Worship, to which I answered, without hesitation, "Brantford, Ontario". Her Worship and all the courthouse staff in the room looked up in unison with large smiles on their faces making every effort to contain their laughter. Thankfully, I quickly realized Her Worship was not making small chit-chat with me, and I corrected my answer to "Community Legal Services". Fortunately, I didn't catch the eye of my client in that moment, who certainly had realized he'd be better off without me. The rest of the appearance went off without a hitch.

I share this story not only to make you laugh/cringe, but also to say that, with the arrival of June, we'll see a lot of new faces around the courthouse and in the legal community as we welcome a group of newly minted lawyers who will be called to the bar later this month. I encourage all of you to make an effort to engage with our new lawyers as mentorship is critical to development in this profession. And as many of you know, mentorship is not just teaching the x's and o's of practice, but also how to be a professional, how to deal with the stress that this profession cultivates, how to cope with seemingly devastating defeats... and how to laugh off embarrassing moments. I know that every lawyer has a story of inexperience that they can share and I encourage you all to do so with the young lawyers in your orbit. There is nothing more comforting than knowing that the legal titans in the community are just people too, who make silly errors and mistakes.

Speaking of new starts, I want to once again welcome our two new Superior Court judges, the Honourable Madam Justice Martha Cook and the Honourable Mr. Justice Joseph Perfetto, to the bench. Their swearing in ceremony was held on May 24th. On behalf of the Middlesex Law Association and its members, I'd like to extend our congratulations once again to Justice Cook and Justice Perfetto. We look forward to working with you both on the issues that confront our legal system and we eagerly anticipate the great contributions you will make to our courts.

Finally, the Middlesex Law Association is actively recruiting members to contribute their expertise and voice to the Practice Area Committees (PAC). The PACs include: Criminal; Family; Real Estate; Corporate/Commercial; Personal Injury; Wills, Estates and Trusts; EDI/Professionalism; and In-House/Small Firms. Each PAC is responsible for organizing informative, creative, and engaging CPD and social programming. If you are interested in volunteering within one or more of the PACs, please reach out to me directly at jaitcheson@lerners.ca or call me at 519.640.6396 and I will put you in touch with the Chair of the applicable PAC.

Jake Aitcheson
President

Practice Resource Centre News


Contributed by:
Cynthia Simpson and Shabira Tamachi
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New Articling/LPP Students

We would like to welcome the articling and LPP students who have started the 2023-2024 term and invite each of you to reach out to us for help if you haven't already. Students enjoy full library privileges and most Association privileges during their work term. There is no charge to register with the MLA and it guarantees you will receive all our communications while you are working for our members. We send out a weekly email every Wednesday, so if you haven't already gotten one of those, we may not know you are working in Middlesex County. Please email or call so we can get your names and email addresses in our system. We are always available to give you a tour of the practice resource centre, explain our services and resources, and show you what is available both in print and online. Finally, we aren't reporting back to your superior so please ask us for help if you can't find something or don't know where to start your search. Let us help you look brilliant!

Missing Martin's 2023 Annual Criminal Codes

We have three (3) copies of the most recent *Martin's Annual Criminal Code* that have gone AWOL from the MLA library, and we would ask all our criminal lawyers to please check their offices/back seats/briefcases/gym bags to see if they have inadvertently taken one in error without signing it out from the library. Thanks!

Continuing Professional Development – Library Style

Although not a requirement for us by any licencing body, library staff are lifelong learners working in an ever-changing profession, so conference attendance is vital to help us keep abreast of changes and innovations in the field. Both of us attended the Canadian Association of Law Libraries (CALL/ACBD) conference in Hamilton where several sessions covered the recent developments in AI technology and its impact on law librarianship in particular. Teresa Scassa spoke on "Regulating AI in Canada: Bill C-27 and the AI and Data Act", Colin Lachance, Mark Doble, Brenda Lauritzen and Shaunna Mireau held a panel discussion on "ChatGPT Applications in Law", and Benjamin Alarie and Abdi Aidid closed out our conference discussing "The Legal Singularity: How Artificial Intelligence Can Make Law Radically Better." These are in addition to sessions on library-specific innovations, research skills, Wikidata, land acknowledgements, and inclusive descriptions, to name just a few. Of course, some of the best knowledge sharing happens outside of the formal conference session, and it is always good to converse with colleagues from across Canada, the US, and Great Britain.

In July, Cynthia will be attending the American Association of Law Libraries (AALL) Annual Meeting in Boston along with several other staff members from across the Ontario courthouse libraries system. This is the first time that the MLA has had a representative at this annual conference, but other colleagues have found that many innovations in our field emerge out of the US simply due to the larger population and size of its supporting library system.

New Books

LSO. **Family law refresher 2023**.

LSO. **Eight-minute commercial leasing lawyer 2023**.

LSO. **Six-minute administrative law and practice 2023**.

LSO. **Wills and estates refresher 2023**.

n/a. **Martin's related criminal statutes 2023-2024**, Thomson Reuters, 2023.

Missing Books

Auerback, Stephen. **Annotated Municipal Act, Volume 3**, Thomson Reuters

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

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 Reuters, 2006.

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

Knight, Patricia. **Small Claims Court: procedure and practice, 5th ed.**, Emond Law, 2021 - **NEW**

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

Marseille, Claude, ed. **The law of objections in Canada: a handbook**, LexisNexis, 2019

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.

A Message from Your Newly Elected Benchers

On May 25th we attended our first Convocation and are now officially Benchers of the Law Society of Ontario from the South West Region, which includes our own Middlesex Law Association. We are excited to meet the challenges ahead, serving the public interest and adhering to the highest standards of civility and professionalism.

We are most grateful for your support and encouragement. We will communicate regularly with the Association to keep members abreast of important developments during the course of our term as Benchers.

Please feel free to contact us if you have any questions or concerns and if there are regulatory matters that you wish to bring to our attention.

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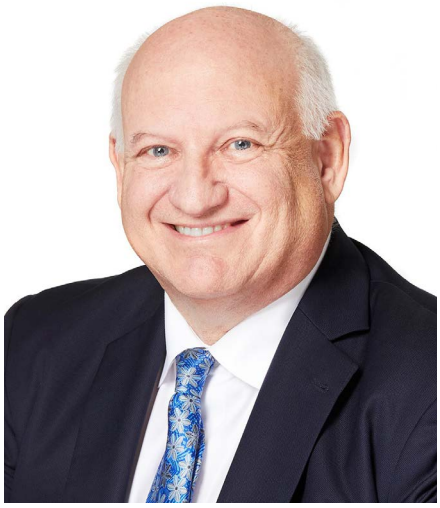

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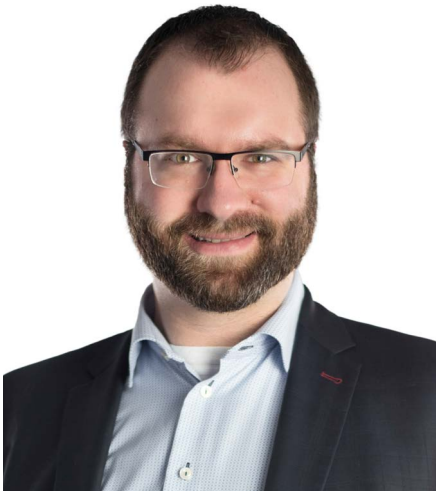

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Who Decides When Parents Cannot Agree?

Contributed by:
Lydia Horton / Student, McKenzie Lake Lawyers LLP

In *JN v CG*, the Ontario Court of Appeal decided a parenting order on COVID-19 vaccinations for the children of the marriage.[1] It focused its entire decision on *what* the decision might be, rather than *who* would be the one to make it. The decision focused little on the attributes of the parents themselves, their decision-making process, or their relationship with their children. It displaced this analysis with a presumption that the parent whose decision aligns with the government recommendation is the parent who is best suited to decide.

Background

In February, the Court of Appeal released its decision in *JN v CG*.[2] The children lived with the mother, who enjoyed sole decision making responsibility over all matters except COVID-19 vaccinations. The father brought a motion asking for sole decision-making responsibility over COVID-19 vaccinations, relying on government recommendations and documents. The mother argued that there was doubt about the vaccine's safety and efficacy for the children (aged 10 and 12 at the time), and that because the children themselves did not want to be vaccinated, they should hold off until more is known. The mother's evidence was mostly internet sources. The motion judge denied the Father's request.

The Court of Appeal's Decision

The Court of Appeal reversed the motion judge's decision. A lot of the decision was dedicated to addressing the motion judge's handling of evidence. The Court of Appeal gave more weight than to the father's government source documents, and afforded absolutely no weight to the mother's internet downloads. Importantly, for decision-making disputes in the future, the Court introduced an assumption into the best interest's analysis.

Courts can admit and rely on government-published recommendations on COVID-19 vaccinations when assessing the best interests of the child.[3] Government reports from the internet are admissible for the truth of their contents because of the public exception to hearsay per section 25 of the *Ontario Evidence Act*. There is now an onus on a party opposing a government approved medication "to show why the child should not receive [the] medication."[4]

This decision is about access to justice. This new rule relieves parties of the burden of calling on government representatives or scientists to assess whether medications or treatments are in the best interests of the children.[5] However, relieving this burden was not free. Starting the best interest's analysis with a presumption in favor of government recommendations detracts from the "individual justice to which every child is entitled to."[6]

"As Mnookin pointed out over 30 years ago, "[d]eciding what is best for a child poses a question no less ultimate than the purpose and values of life itself.""

According to the British Columbia Court of Appeal, when it comes to presumptions about a child's best interests "there simply can be none."[7] This is because all children are unique, and their interests vary. As Mnookin pointed out over 30 years ago, "[d]eciding what is best for a child poses a question no less ultimate than the purpose and values of life itself."[8]

[1] 2023 ONCA 77.
[2] *Ibid*.
[3] *Ibid* at para 28
[4] *Ibid* at para 45.
[5] *Ibid* at para 26.
[6] *Robinson v Filyk*, 1996 BCCA 733 at para 22.
[7] *Ibid* at para 28.
[8] Robert Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975), 39:3 Law and Contemporary Problems 226 at 260.

"In general, parents are best positioned to know the interests of their children. When parents cannot agree amongst themselves, courts will rely primarily on the advice from the state. The Court in *JN v CG* could have taken a different approach by focusing on the parents themselves, their history of decision-making, and their relationship to the children. Instead, the Court based its judgment on what the parents said their decision would be, and which of these aligned most closely with government recommendations. Indeed, the Court did not order that the children would be vaccinated. Rather, it left this in the hands of the father based purely on the fact that he aligned with government recommendations, despite the fact that he may not actually follow them. The Court awarded sole-decision making responsibility to the father, trusting that he would carry out this authority, "in a measured way and with a view to the children's best interests."[9]

What does this mean for parenting orders going forward?

Regarding judicial notice, the Court said that while it is generally true that judicial notice cannot be taken of expert opinion evidence, this guidance "is inappropriate in this case, where the 'expert opinion' in question is the approval of medical treatment by Health Canada, the national body tasked with determining that treatment's safety and effectiveness."[10] In these situations, the expert opinion evidence is presumed to be correct, as the court stated, "where one party seeks to have a child treated by a Health Canada-approved medication, the onus is on the objecting party to show why the child should not receive that medication."[11]

Justice that is only accessible by way of expert witness is expensive, and inaccessible to most family law litigants. This judgment shows a compromise of individualized justice for general access to a just and efficient system.

[9] *JN v CG*, 2023 ONCA 77 at para 48.
[10] *Ibid* at para 43.
[11] *Ibid* at para 45.

Domestic Contracts and Reconciliation

Contributed by:
Aaron Ender / Lawyer - McKenzie Lake Lawyers LLP

Whether before, during or after long-term relationships, spouses may wish to enter into a domestic contract to protect their rights and clarify their obligations upon a potential separation. Spouses often seek assistance from lawyers to draft Marriage Contracts, Cohabitation Agreements and Separation Agreements.

Despite the terms of a domestic contract following a separation, some spouses will attempt to reconcile and resume life as a couple. It is important for any party considering a domestic contract to be aware of the implications of reconciliation on the terms of the contract.

Separation Agreements:

Separation Agreements are generally void upon reconciliation.[1]

However, Separation Agreements may remain in force following reconciliation in light of a specific term in the agreement that overrides this presumption.[2] For example, many Separation Agreements provide that the Agreement will remain in force if the parties attempt to reconcile unsuccessfully for a period of 90 days or less.

In addition, the Court may infer from a clause in the Agreement that the parties intended for certain completed transactions to remain in place in the event of reconciliation.[3] For example, a specific release of all rights to a particular property can be viewed as evidence that the parties considered the disposition of the property to be final and binding, regardless of any reconciliation in the future.[4]

In Emery v Emery, the parties signed a Separation Agreement following the breakdown of their relationship.

The parties agreed in the Separation Agreement that "in lieu of the Wife receiving the net proceeds of sale of the matrimonial home...the Wife hereby releases any claim she may have against the pensions or retirement savings plans of the Husband".[5]

The Court held that this clause "clearly set out the parties' intention" for the wife to release her interest in the husband's pension and retirement savings plans, even following the period of reconciliation. There was no evidence demonstrating that the parties' intentions changed following reconciliation. As such, the provisions regarding the pension remained valid.[6]

The parties had also agreed in the Separation Agreement that the husband would pay child support and that neither party owed the other party spousal support.

Regarding these provisions, the Court noted that child support payments discontinued upon reconciliation. Family finances were handled in the same manner as before the first separation and the husband continued to be the primary income provider. Expenses were incurred and paid as a family unit. The wife and children returned to being dependant on the husband. As such, the parties' intentions were clear that the agreement regarding support was terminated upon reconciliation.[7]

Marriage Contracts and Cohabitation Agreements:

Couples may chose to enter into a Cohabitation Agreement or Marriage Contract to determine how they will deal with issues like the division of property and spousal support in the event of a separation. These agreements are domestic contracts intended to provide couples with clarity on what their respective financial consequences are if they separated.

When a couple with a marriage contract or cohabitation agreement separates and subsequently reconciles, what impact will the reconciliation have on their Cohabitation Agreement or Marriage Contract?

This was the question that the Ontario Court of Appeal dealt with in Krebs

[1] Sydor v Sydor, 2003 CanLII 17626 (ON CA) at para 22.
[2] *Ibid.*
[3] *Ibid*
[4] *Ibid* at para 24.
[5] 2008 CanLII 8605 (ON SC) at para 49.
[6] *Ibid* at paras 49, 63-64.
[7] *Ibid* at para 73-76.

v Cote.[8] The parties had an "on-and-off-again" relationship with numerous separations and reconciliations. The parties entered into a Cohabitation Agreement during a period of reconciliation that provided that Mr. Krebs would pay Ms. Cote $5,000.00 and she would move out of his home in the event of a separation. The parties did separate before reconciling again and marrying. The parties separated on a final basis in January of 2019.

After the separation, Ms. Cote brought a Motion for an Order that the Cohabitation Agreement was invalid and not binding on the parties. The Motions Judge concluded that the Cohabitation Agreement was of no force and effect. Mr. Krebs appealed the decision to the Ontario Court of Appeal.

The Appellate Court found that the common law exception that reconciliation would render a Separation Agreement null and void did not extend to Cohabitation Agreements. The Court encouraged parties to enter into Agreements that define their rights and obligations. When parties to a Cohabitation Agreement reconcile, they return to the same state they were in when the Agreement was entered into.

The Court found that the applicability of a Cohabitation Agreement following periods of separation and reconciliation will depend on the intention of the parties and the interpretation of the Agreement.

Conclusion:

Domestic contracts are intended to promote certainty and finality; however, unclear domestic contracts can have the opposite effect.

Parties in family law matters may be distraught to discover that their good faith attempt to reconcile has voided their hard-fought Separation Agreement. An unclear Cohabitation Agreement or Marriage Contract may also be scrutinized in the face of multiple separations and reconciliations. Special care must be taken to ensure that domestic contracts clearly set out the parties' intentions regarding potential reconciliation.

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[8] 2021 ONCA 467 (CanLII).

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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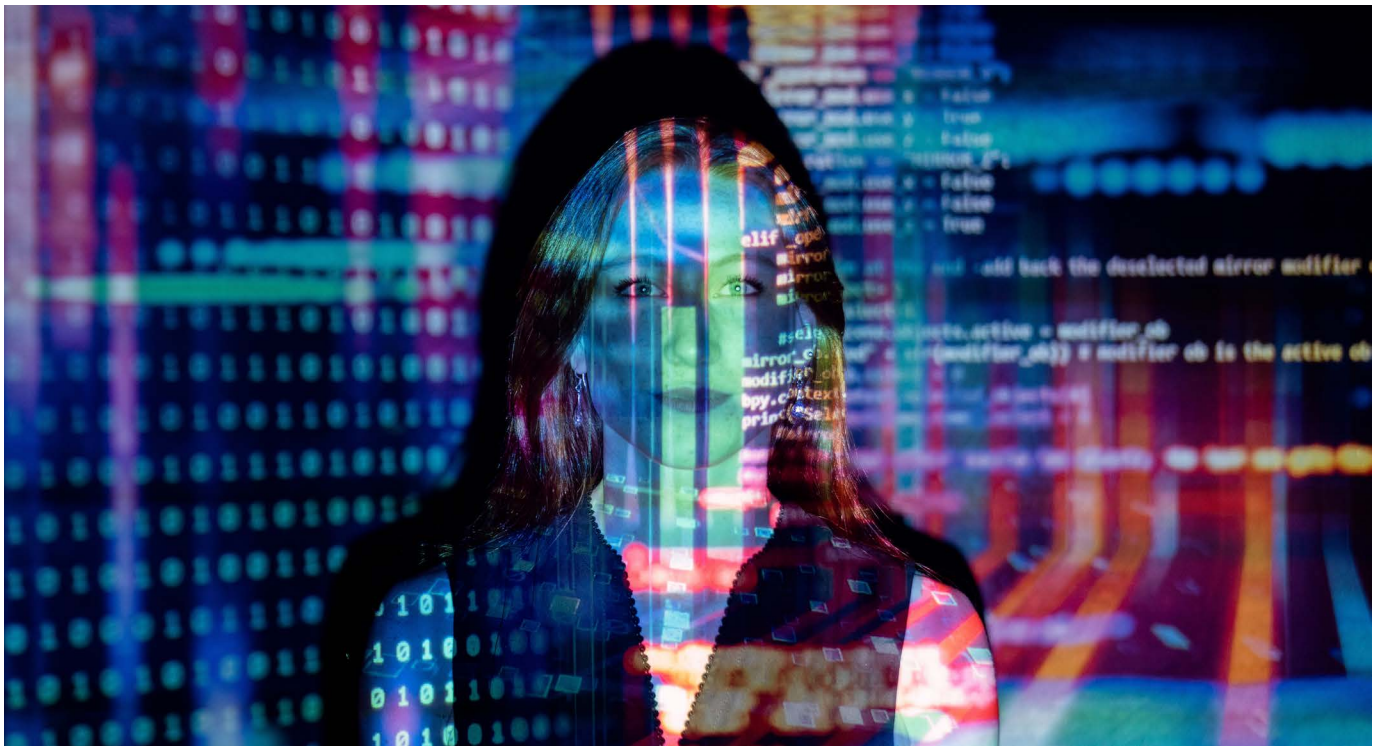
The Transformative Impact of AI:

Exploring Legal Implications and Opportunities under Canada's Artificial Intelligence and Data Act (AIDA)



Contributed by:
John B. Brennan (He/him/his)
Lawyer / Founder at JBrennan Law

Artificial Intelligence (AI) is transforming economies worldwide, playing a vital role in various sectors such as healthcare, food production, energy consumption, and more. In Canada, researchers and businesses are leading this transformation. Recognizing the profound impact that AI systems can have, especially on marginalized communities, the Canadian government has proposed the Artificial Intelligence and Data Act (AIDA) as part of the Digital Charter Implementation Act, 2022.[1]

The AIDA is a significant step toward the responsible design, development, and deployment of AI systems. The stated goal of the legislation is to ensure the safety and non-discrimination of AI systems in Canada, and to hold businesses accountable for how they develop and use these new technologies. The pioneering legislation places Canada at the forefront of nations addressing the legal and ethical challenges posed by AI.

In the United States, AI-related litigation has already blossomed, and it provides valuable insight into the types of disputes that may arise in Canada under the AIDA. A review of only a few notable US cases reveals that there is an emerging constellation of disputes around data privacy, breach of contract, and the role of AI in decision-making processes.

For instance, the Clearview AI case[2] involved allegations that the company scraped over 3 billion facial

[1] Government of Canada. "Artificial Intelligence and Data Act." Innovation, Science and Economic Development Canada. Accessed May 24, 2023. https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act.

[2] American Civil Liberties Union. "ACLU v. Clearview AI." Accessed May 24, 2023. https://www.aclu.org/cases/aclu-v-clearview-ai. See also *Mutnick v. Clearview AI Inc.*, 2020 U.S. Dist. LEXIS 109864 (N.D. Ill. 2020).

images from the internet, extracted biometric identifiers, and created a searchable database. This database was reportedly sold to law enforcement, government agencies, and private entities without complying with the *Biometric Information Privacy Act* (BIPA). Provincial privacy protection authorities, in collaboration with the Office of the Privacy Commissioner of Canada, have, in response to the case, issued binding orders to Clearview, requiring compliance with recommendations resulting from a joint investigation into these privacy violations. The orders mandate the cessation of facial recognition services, the discontinuation of data collection without consent, and the deletion of unlawfully obtained images and biometric data in three Canadian provinces.[3]

In the world of contract law, the of case of *Delphi Auto, PLC v. Absmeier*[4] may be illustrative of what is to come. In that case the plaintiff employer accused the defendant former employee of breaching contractual obligations by leaving their employment and accepting a job with Samsung in the same line of business. As the director of the plaintiff's Silicon Valley labs, the defendant managed engineers and programmers working on autonomous driving projects. With a confidentiality and non-interference agreement in place, the court found that the plaintiff had a strong chance of proving a breach of contract and granted a preliminary injunction with modifications. Notably, the non-compete provision was limited to the field of autonomous vehicle technology for one year due to its specialized nature and international scope. This case emphasizes the importance of contractual obligations in the AI industry and the legal implications of violating non-compete provisions.

Finally in *Bryant v. Compass Grp. USA, Inc.*,[5] a plaintiff brought suit against her employer who required her to scan her fingerprint into a vending machine system owned by the defendant. The court found that the defendant violated Illinois' *Biometric Information Privacy Act (BIPA)* by failing to disclose the retention schedule and guidelines for destroying biometric data and failing to obtain the plaintiff's written consent. The court concluded that the plaintiff had standing for claims related to violation of BIPA's informed consent provisions but lacked standing for claims related to the public duty of data retention. This decision differed from other federal district court rulings and, had the case not resulted in a multi million-dollar settlement, would have been a clear candidate for the first major AI related case to reach the US Supreme Court.[6]

Given the AIDA's emphasis on safe and non-discriminatory AI systems, issues of data privacy and biometric information, as exemplified in the US cases, could become increasingly relevant in Canada. This will, no doubt, lead to an increase in legal disputes around the interpretation and application of the AIDA, especially in the early stages of its implementation.

Despite challenges and anxieties over the dramatic impact of AI on the profession, the new AI informed legal landscape also offers opportunities. The growing need for legal expertise in AI law opens new avenues for legal practitioners. Firms can seize these opportunities by developing expertise in AI and data regulation and becoming adept at navigating the complexities of the AIDA. In addition, the AIDA's focus on accountability and transparency may lead to increased demand for legal services related to compliance, risk management, and dispute resolution.

"The growing need for legal expertise in AI law opens new avenues for legal practitioners. Firms can seize these opportunities by developing expertise in AI and data regulation and becoming adept at navigating the complexities of the AIDA."

- Jane Smith

It is almost impossible to keep pace with the rapidly changing AI landscape in any space, the legal industry not excluded. In my view, as AI regulation continues to evolve, legal practitioners should all consider:

1. Expanding Expertise in AI Law: Develop an understanding of the AIDA and its implications and attempt to remain abreast of the latest developments in AI and data regulation, both domestically and internationally.

2. Develop Compliance Strategies: Focus on assisting businesses in developing comprehensive

[3] Office of the Privacy Commissioner of Canada, "Provincial privacy authorities order Clearview AI to follow recommendations resulting from joint investigation" (December 14, 2021), online: Office of the Privacy Commissioner of Canada https://www.priv.gc.ca/en/opc-news/news-and-announcements/2021/an_211214/.
[4] *Delphi Auto, PLC v. Absmeier*, 167 F. Supp. 3d 868 (E.D. Mich. 2016), online: Casetext https://casetext.com/case/delphi-automotive-plc-v-absmeier.
[5] *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617 (7th Cir. 2020), online: Casetext https://casetext.com/case/bryant-v-compass-grp-usa-3.
[6] Bryan, Kristin. "Multi-Million Dollar Settlement Reached in BIPA Litigation That Went up to Seventh Circuit," PrivacyWorld (blog), November 18, 2021, accessed May 24, 2023, https://www.privacyworld.blog/2021/11/multi-million-dollar-settlement-reached-in-bipa-litigation-that-went-up-to-seventh-circuit/.

compliance strategies to ensure that they meet the requirements of the AIDA once enacted. This includes understanding how AI systems are designed, developed, and deployed, and ensuring that these processes are transparent, accountable, and non-discriminatory.

3. Engage in Policy Advocacy: Legal practitioners can play a crucial role in shaping AI policy by engaging with policymakers and contributing to the ongoing discourse around AI regulation. This could involve providing legal insights on proposed regulations, advocating for the rights of marginalized communities, or promoting the responsible use of AI.

4. Prepare for Litigation: Given the potential for increased AI-related litigation, legal practitioners should be prepared to represent clients in disputes arising from the application of the AIDA. This could involve disputes around data privacy, breach of contract, or the role of AI in decision-making processes.

5. Promote Ethical AI Practices: Lawyers can work with businesses to promote ethical AI practices. This could involve advising on the ethical implications of AI systems, helping to develop ethical guidelines for AI use, or advocating for the responsible use of AI in decision-making processes.

The AIDA represents a significant step towards the responsible use of AI in Canada. While it presents challenges, it also offers opportunities for legal practitioners to expand their expertise, develop new compliance strategies, engage in policy advocacy, prepare for litigation, and promote ethical AI practices. As AI continues to transform economies worldwide, the role of legal practitioners in navigating this new legal landscape will be more important than ever.

In respect of AI generally, in my view, AI's presence in the legal landscape is as inevitable as the rising sun, casting its transformative light on our profession. In the words of F. Scott Fitzgerald's 'The Great Gatsby,' just as Jay Gatsby's destiny was inextricably intertwined with the shimmering green light across the bay, the advent of AI has become an ever-present beacon, guiding our path forward, whether we choose to embrace its power or shy away from its brilliance.

Cannabis and Constitutionality:

Why *R v Malmo-Levine; R v Caine* is still an Excellent Decision 20 Years Later

Contributed by:
Garrett Van Louwe / Summer Student, McKenzie Lake Lawyers LLP

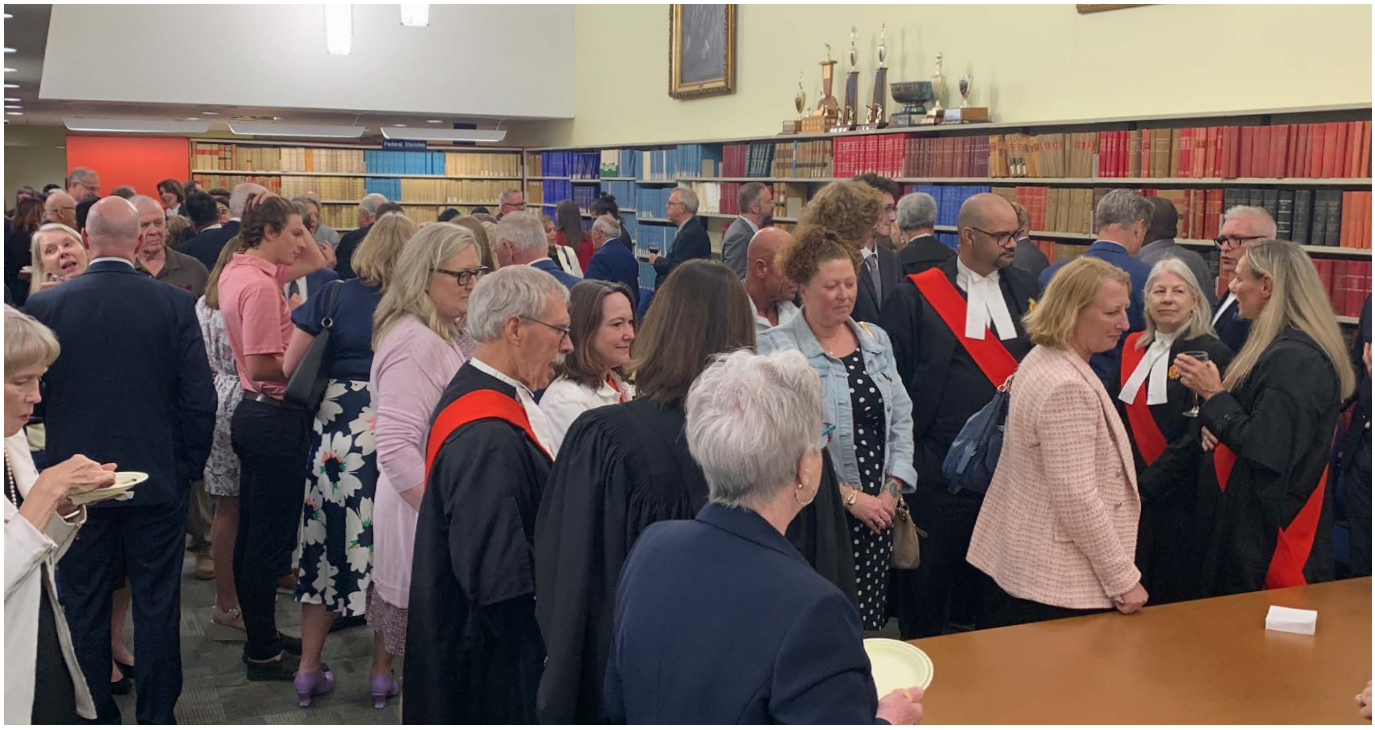
As a young person in the legal profession, reading *R v. Malmo-Levine; R v. Caine* is a fascinating experience. On the one hand, the case feels like a relic of a bygone era. In a world where cannabis stores line the streets of most major urban centres in Canada, convicting someone for personal cannabis possession is as anachronistic as blasphemy or witchcraft offenses. On the other hand, the status quo that birthed *R v. Malmo-Levine; R v. Caine* is far from distant. Just five years ago, cannabis was regulated primarily through criminal prohibitions on its possession and sale. Just fifteen years ago, cannabis legalization was a pie-in-the-sky policy proposal that was only seriously considered by libertarians and progressive academics. Despite this sudden cultural and legal shift regarding its subject matter, *R v. Malmo-Levine; R v. Caine* stands the test of time and continues to be a well-written treatise on the relationship between the *Charter of Rights and Freedoms* and the state's ability to legislate cannabis.

In *R v. Malmo-Levine; R v. Caine*, the Supreme Court of Canada confronted the issue of whether prohibitions against the personal possession of cannabis were unconstitutional under section 7 of the *Charter*. Namely, the respondents argued that section 7 embedded the "harm principle" (which holds that legitimate use of the criminal law power requires that the illegal action cause some tangible harm to another person) as a principle of fundamental justice and criminal legislation that did not follow the harm principle was, therefore, unconstitutional. In the alternative, it was instead claimed that prohibitions with potential imprisonment for cannabis users was grossly disproportionate to the severity of harm caused by cannabis possession and, therefore, unconstitutional under section 12's guarantee against cruel and unreasonable punishment. In response, the Supreme Court rejected that the harm principle is a principal of fundamental justice because there is no social consensus that the harm principle is indispensable to criminal justice and the harm principle is not manageable as a standard for section 7 claims. Likewise, the Court found that preventing harm arising from the negative health risks of consuming cannabis and protecting groups that are particularly vulnerable to cannabis was enough to not make the criminalization of cannabis unconstitutional on its face. While the Court conceded that incarceration may be disproportionate for some cannabis offenses, the absence of any mandatory minimums and sentencing guidelines ensured that cannabis sentences were generally proportionate and, as such, these regulations were not so punitive as to be disproportionate.

R v. Malmo-Levine; R v. Caine's primary strength as a 2003 decision being read in 2023 is its focus on reasonable disagreement and legislative deference. Throughout their decision, the Supreme Court notes multiple times that they are commenting solely on the federal government's constitutional authority to legislate cannabis and not whether criminalization is an effective policy for the regulation of cannabis in Canada. When stating the ultimate ruling of

the case, the Court even qualifies their judgment with "[e]qually, it is open to Parliament to decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy". It is not difficult to imagine a timeline where the Supreme Court instead placed the bulk of their analysis on determining the true harm of cannabis, entrenching now-outdated studies and data as foundational law on the availability of cannabis in Canada. Similarly, with hindsight, it is clear that exercising judicial restraint when commenting on cannabis policy and allowing the law to change via statutory amendments to the Criminal Code rather than judicial review was the correct decision to make. Following *R v. Malmo-Levine; R v. Caine*, many Canadians' perspectives shifted on cannabis, going from the belief that cannabis posed a large enough danger to society to justify total prohibition of the substance to instead acquiring a "live-and-live" attitude based around solely regulating the negative externalities of cannabis use. By remaining out of the substance of cannabis debate, the Court created the opportunity for Parliament to amend the cannabis policy to reflect this shift instead of delegating a "winner" and permanently entrenching their interests into law in spite of Canadian society's contemporary or future opinions regarding cannabis. Furthermore, the general chaos that unfolded at the provincial level following the legalization of cannabis provides another reason that the Supreme Court of Canada made the proper decision politically. In implementing schemes to distribute cannabis in their jurisdictions, some of the various provincial governments' plans had faults that later needed to be amended. For example, the process for applying for Retail Store Authorization to run a recreational cannabis store in Ontario requires registering the store's address. However, there was no method to see other pending applications, resulting in numerous people applying to open cannabis stores in the same general location and, with it, an overabundance of cannabis stores for this beforementioned location. If a "controlled burn" approach to legalization designed to give the provinces time to get their ducks in a row was this turbulent, how chaotic would overnight legalization via judicial fiat have been? As such, leaving Parliament as the ultimate decision-maker in cannabis policy prevented outdated data from being indivisibly integrated into the law, allowed policy to shift with public perception, and provided a superior method of developing a regulated market for cannabis at the provincial level.

Swearing-in Ceremony of Justices Martha A. Cook and Joseph Perfetto



Contributed by:
Jake Aitcheson / Lerners LLP &
Jennifer Wall / Harrison Pensa LLP

For the first time since the pandemic, London's courthouse hosted a judicial swearing-in ceremony to honour and congratulate two newly minted Superior Court judges, the Honourable Madam Justice Martha Cook and the Honourable Mr. Justice Joseph Perfetto. While both justices were formally sworn in in March 2023 and have been sitting since then, the swearing in ceremony on May 24th provided an opportunity for family, friends and colleagues to celebrate their well-deserved appointments.

Chief Justice Morawetz and Regional Senior Justice Thomas presided over the special sitting of the court where Justices Cook and Perfetto were sworn in before a large audience of members of the judiciary, members of the bar, and their family and friends. Justices Cook and Perfetto repeated their oaths in the ceremony, and representatives of the Federal and Ontario governments, the Law Society, and the Middlesex and Elgin Law Associations welcomed them. Susan Toth on behalf of Justice Cook, and Justice Garson on behalf of Justice Perfetto spoke movingly about our new judges, followed by speeches by Justices Cook and Perfetto.

Both of our new judges were recognized for their achievements and for their commitment to the administration of justice. The ceremony was also an opportunity to give a large round of applause to Justice Sah, Justice Nicholson, Justice Moore, and Justice Hassan, who were appointed during the pandemic and were not able to have ceremonies of their own.

Following the ceremony, the MLA hosted a reception - the first large event hosted at the Practice Resource Centre since 2020.

That Which Does Not Annoy, Impresses

Contributed by:
Jennifer Wall / Partner, Harrison Pensa

The season of our summer students and articling students joining law offices and beginning their careers is always an exciting time. This year is particularly special because, for the first time in years, our students will be able to regularly attend court in person. While I certainly don't miss the days of being the most junior lawyer in the courtroom and waiting hours for my motion to be called, I do think back very fondly on how much I learned from watching senior counsel while I waited, and I value the relationships I built while waiting in the hallways of the family court.

Even now that we are back to court in person, the days of the jam-packed in-person family court speak-to list or civil motions court are over and our students and junior counsel won't have the same opportunity to learn by watching as they wait (and wait, and wait, and wait…) for their turn. Because of that, I hope that we will all make a point of bringing our students along to court appearances where we can, especially where they will have a chance to see the impact of their research or drafting, and that we will think about how we can transmit some of the knowledge that we just absorbed while we waited.

One of the resources that tends to be passed around to our students at Harrison Pensa is Justice Quinn's incredibly entertaining 2012 article: "A judge's view: things lawyers do that annoy judges; things they do that impress judges". Early on in my career

"I hope that we will all make a point of bringing our students along to court appearances where we can, especially where they will have a chance to see the impact of their research or drafting, and that we will think about how we can transmit some of the knowledge that we just absorbed while we waited."

I was lucky enough to hear Justice Quinn give his forty-item list of things lawyers do that annoy judges, which included such gems as "dump truck advocacy", poorly organized settlement conference briefs, and "counsel emulating the slept-in look". While I hurt from laughing when Justice Quinn was finished, I think that his list of annoyances is now more valuable than ever because simple things like which counsel table to sit at to show you're representing the applicant, how to excuse yourself from a courtroom, and when and how to bow to the court are the things that we're going to forget to tell a young lawyer or student heading off to court on their own for the first time.

Thirty-nine pages into his forty-page paper, Justice Quinn lists his single tactic for impressing the court: "that which does not annoy, impresses". While Justice Quinn does have a point about the power of failing to annoy, Regional Senior Justice Edwards was kind enough to give more concrete guidance in the form of an itemized list of "twelve ways to win a motion" in the recent decision of *Lepp v. The Regional Municipality of York,* 2022 ONSC 6978.

Giving our students written resources like Justice Quinn's article or Justice Edwards' decision in *Lepp* may not replicate the experience that more senior counsel gained by watching and learning, but it's a valuable first step to building the foundation of professionalism and collegiality that they will need throughout their careers. So, to bring along the next generation of lawyers, let's give them a reading assignment (tell them that the footnotes are some of the best parts of Justice Quinn's paper), have them tag along to court, or bring them along to lunch with another lawyer or with a client. I think that we can strive to be more than non-annoying. But not annoying the judges is a good first step.

Reflecting on *A Man for All Seasons* – The Movie & the Patron Saint

Contributed by:
Paul M. Bundgard / Senior Counsel,
The Canada Life Assurance Company

I am sure many of us remember the 1966 Oscar-winning film A Man for All Seasons – if not from when it first came out, then from seeing it not that many years later. It was based on Robert Bolt's play of the same name. I recall studying that play at Westminster High School, here in London, a 'few' years ago. And not long afterwards seeing the film.

It recently occurred to me that, not far from now, the film will mark its 60th anniversary.

Even today, that 1966 film remains highly regarded. Glenn Close has described it as her favourite movie, and has lauded Paul Scofield, who played the leading role in it (winning the Oscar for best actor), as one of the greats of his profession.

She is not alone in her assessments.

The play and the film had some part, I am sure, in influencing my decision to study the law, and in eventually becoming a lawyer.

For those readers who may not know, the play and film are on the life, and death, of Sir Thomas More, later St. Thomas More -- a lawyer, judge, husband and father, son of the Church, and the one-time Lord Chancellor of England under King Henry VIII. Sir Thomas was convicted of treason and then beheaded, for not recognizing King Henry's efforts to supplant the Pope as head of the church in England. The break with Rome was on account of the Pope's refusal to declare invalid Henry's marriage to Catherine of Aragon, thwarting Henry's settled aim to remarry, in the hope of obtaining a male heir. Sir Thomas would not yield to royal and familial pressure to support the king. He believed the king was wrong, and that by the law of God and man, as properly understood, the King could not do what he purported to do. If Thomas were to have yielded, it would have been, for him, against his conscience and the tenets of his Faith. For integrity's sake, he would not yield.

In large measure thanks to both the play and the movie, Sir Thomas has become – quite apart from his status as a Catholic saint and martyr – a 'secular saint and martyr', viewed as upholding the dignity of the individual and the inviolability of the individual's conscience, vis-à-vis what can be the overbearing, and at times even tyrannical, power of the state. There is some irony in this, considering Sir Thomas' views on heretics and what he considered, apparently, as acceptable punishment for those who refused to recant. Those were darker aspects of the Thomas story that neither the play nor the film addressed. Thomas was not without his flaws. Even serious flaws, especially by today's lights.

That said, there is much to admire about Sir Thomas (more to admire than not), whether or not one holds Thomas' faith (interestingly, and in a nod to interdenominational reconciliation, he is now listed in the Church of England's liturgical calendar as worthy of honour).

I encourage you, if you haven't already, to read about St. Thomas, and to read his own writings such as Utopia and what he wrote while in the Tower awaiting execution. As Stephen Colbert has said, Sir Thomas had 'backbone'. He was willing to stand up to authority, in reliance upon his legal rights, for what he believed to be true. Even at the risk of his life. Each of us lawyers, today, should ask ourselves whether or not we have the courage, the backbone, to stand up for what is right and true, when the risk today is not likely to be loss of life, but rather the possible loss of, or a diminution of, public esteem, or esteem among one's peers. What are our flaws, perhaps serious flaws, that soul-searching might reveal, if we are honest with ourselves?

As lawyers, we are busy people. And can often be too caught up in busy-ness. It is important to set time aside to reflect where we are at, and where we are going. As individuals, and as professionals.

On Thursday, June 22, the Feast of St. Thomas More in the Catholic Church, there will be a special Mass, beginning at 12 noon, at St. Peter's Cathedral, London, to mark the feast day. All are welcome to attend, and in a special way those for whom St. Thomas is a patron saint: judges, lawyers, and those in public office. If you plan to attend, and are interested in a lunch to follow (lunch plans are still tentative), please let me, as one of the organizers, know by e-mail: pmbundgard@gmail.com. Yet whether one attends or not, perhaps time that day could be found to reflect, as earlier recommended: where do we stand, each one of us, on the justice issues of today? For what are we prepared to actually stand up, and be counted? To sacrifice, and pay a price?

‘Robot lawyer’ accused of practicing law

Contributed by:
David Canton / Lawyer and Trademark Agent, Harrison Pensa LLP

A business in the United States called DoNotPay is facing a class action lawsuit in California accusing it of practicing law without a licence.

DoNotPay, which calls itself “the world’s first robot lawyer”, was founded in 2015 to fight parking tickets, but has expanded its services since then. Its website says:

“DoNotPay utilizes artificial intelligence to help consumers fight against large corporations and solve their problems like beating parking tickets, appealing bank fees, and suing robocallers.

The complaint in Jonathan Faridian v DoNotPay, Inc. says:

“Unfortunately for its customers, DoNotPay is not actually a robot, a lawyer, nor a law firm. DoNotPay does not have a law degree, is not barred in any jurisdiction, and is not supervised by any lawyer.

DoNotPay is merely a website with a repository of — unfortunately, substandard — legal documents that at best fills in a legal ad lib based on information input by customers.

This is precisely why the practice of law is regulated in every state in the nation. Individuals seeking legal services most often do not fully understand the law or the implications of the legal documents or processes that they are looking to DoNotPay for help with.”

Legal advice vs. practicing law

While the test varies by jurisdiction, the essence is whether the service is practicing law without a licence. There is a somewhat fuzzy line between merely providing general legal information or legal precedent documents, and giving legal advice.

There are many online services that provide legal documents. They usually make it clear that they are merely providing precedent documents to use, and are not advising how to use them in a particular instance. While they say users should consult a lawyer to provide advice relating to the user’s situation, that language is generally given with a wink and a nod. Everyone knows that the vast majority of users won’t consult a lawyer.

The DoNotPay terms of use includes this:

“DoNotPay provides a platform for legal information and self-help. The information provided by DoNotPay along with the content on our website related to legal matters (“Legal Information”) is provided for your private use and does not constitute advice. We do not review any information you provide us for legal accuracy or sufficiency, draw legal conclusions, provide opinions about your selection of forms, or apply the law to the facts of your situation. If you need advice for a specific problem, you should consult with a licensed attorney. As DoNotPay is not a law firm, please note that any communications between you and DoNotPay may not be protected under the attorney-client privilege doctrine.”

AI compared to unlicensed humans

A question here is whether DoNotPay’s use of artificial intelligence pushes this service beyond the mere provision of forms and general information and into the realm of legal advice. And whether the result would be any different if unlicensed humans provided the services instead of AI.

Courts and regulators have consistently refused to accept AI as an author or creator of anything from a patent and copyright perspective. How does that perspective factor into a situation where AI is accused of giving legal advice? In this situation, it would make more sense to look at what DoNotPay is doing, rather than focus on whether humans or AI are doing it.

David Canton is a technology and AI lawyer at Harrison Pensa with a practice focusing on technology, privacy law, technology companies and intellectual property. Connect with David on LinkedIn, Twitter and Mastodon.

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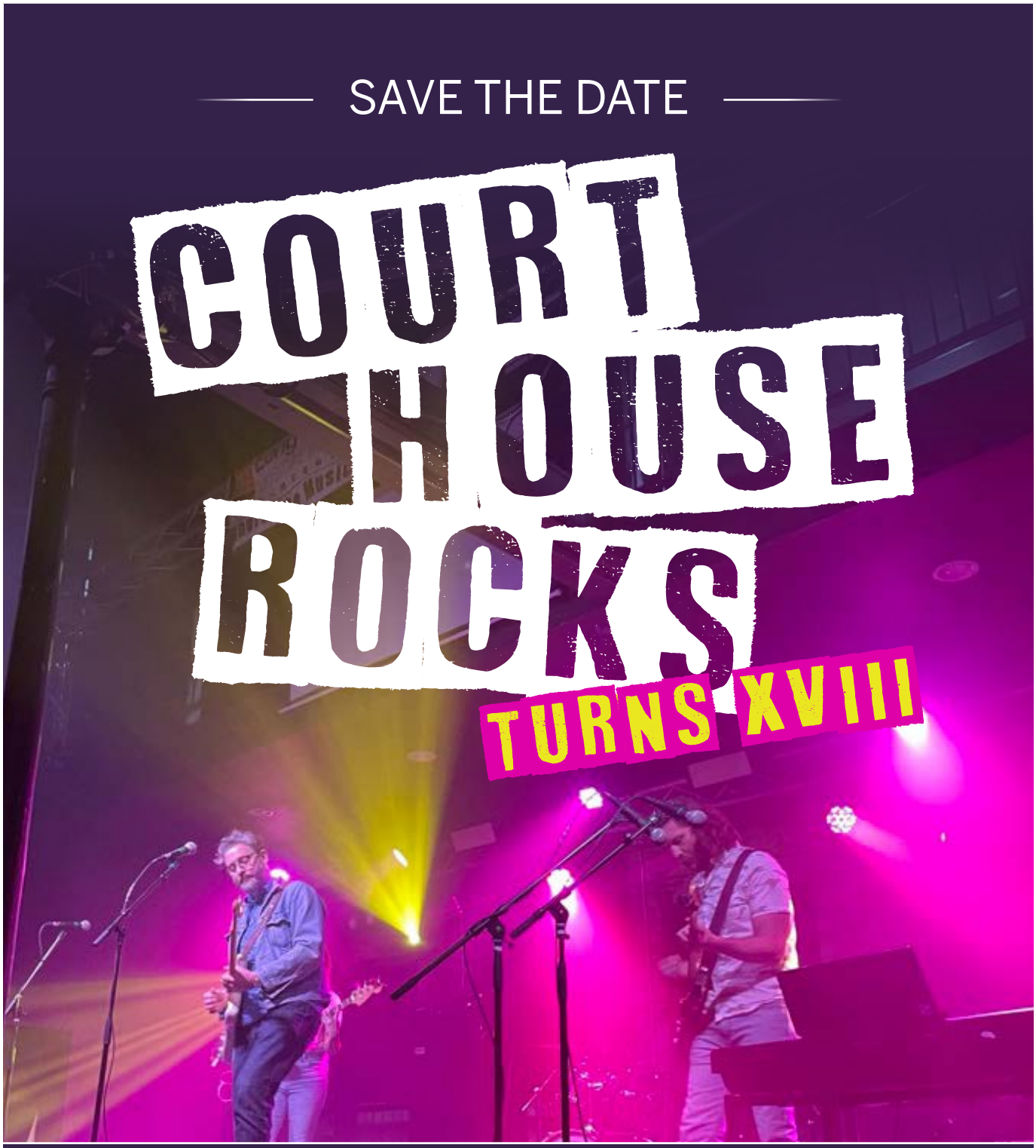

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or David J. Kirwin
dkirwin@lawhouse.ca

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We still have copies of the 2022-2023 members' directory, generously sponsored by Davis Martindale LLP, 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. Please let us know if you move.

Justin Amaral – is now with the National Police Federation, 800-220 Laurier Ave W., Ottawa K1P 5Z9, ph: 613-696-8629, jamaral@npf-fpn.com

Carl Busque – is now at Legal Aid Ontario Duty Counsel Office, 80 Dundas St., London N6A 6A3, direct ph: 226-577-8035, busquec@lao.on.ca

SMG Law – the firm has moved to 209-1 Commissioners Rd E., London N6C 5Z3

Wendy Trieu – has re-opened Trieu Family Law, 430-495 Richmond St., London N6A 5A9, ph: 519-433-0009, wendy@trieufamilylaw.ca

Will Notices

Herbert Jarvis Caughell

Anyone knowing of a Last Will and Testament for Herbert Jarvis Caughell, born February 27, 1934 and died August 22, 1999 of Fingal, Ontario, please contact Simpson Law Group at 519-633-5500, email: alison@simpsonlawgroup.ca or leanna@simpsonlawgroup.ca.

Richard James Culbert

Anyone knowing of a Last Will and Testament of Richard James Culbert of London, Ontario, born May 18, 1971 and died May 21, 2023, please contact Michelle Lauber from Jeff Conway Law, phone: 519-474-7500, michelle@jeffconwaylaw.com.

Molly Margaret Fancy

Anyone knowing of a Last Will and Testament for Molly Margaret Fancy, born October 10th, 1946, day, year and died on or about May 11th, 2023, of London, Ontario, please contact Brandon Roach at 519-438-6077, email: brandon@pvadamslaw.ca.

Maria Fasching

Anyone knowing of a Last Will and Testament for Maria Fasching, born October 9, 1947 and died on or about May 28, 2019, of London, Ontario, please contact Casey Hayward, Carlyle Peterson Lawyers LLP at 519.432.0632 x 226, chayward@cplaw.com.

Mary Aileen Monroe, also known as Mary Aileen Leis

(deceased usually went by Aileen Monroe or Aileen Leis)

Anyone knowing of a Last Will and Testament for Mary Eileen Monroe, also known as Mary Aileen Leis, born 1943/05/27 and died on or about 2021/06/17 of London, Ontario, please contact Casey Hayward, Carlyle Peterson Lawyers LLP at 519.432.0632 x226, chayward@cplaw.com.

Vincent Pulitano

Anyone knowing of a Last Will and Testament for Vincent Pulitano born August 1st 1949 of London, Ontario, please contact Giovanni Pulitano at 519-673-9432, email: jpulitano@dgdunbar.com.

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