

THE  
MIDDLESEX LAW  
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# Snail



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## Summer 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?

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**EDITOR**  
Tracy Fawdry  
[tracy@middlaw.on.ca](mailto:tracy@middlaw.on.ca)

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# President's Message



Contributed by:  
**Jake Aitcheson / Lerner LLP and MLA Board President**

**W**e're nearly past the dog days of summer, and this means that the kids have been home for nearly 6 weeks! By this time, you've exhausted all your ideas to keep the kids occupied, and you've likely started the countdown to the first day of school. If you're looking for an escape, you're in luck! Come on by the Practice Resource Centre and explore the two tranquil Zoom booths that were recently installed. These booths have been installed in the PRC to assist our members with virtual court appearances and virtual client meetings. We acted after hearing from our members that

they were experiencing ongoing difficulties finding appropriate private and confidential spaces in the London courthouse to participate in virtual court appearances or virtual meetings. While we'll be outfitting the booths with furniture in the next few weeks, with the expectation that they will be fully operational for our members in early September, you're invited to come enjoy some peace and quiet anytime.

With September on the horizon, we're in the midst of planning the 195th Fall Opening of the Courts. This event is not just a celebration of

our colleagues, but our justice community more generally. Last year, over 200 individuals attended from all facets of our community. The Fall Opening of the Courts is scheduled for Tuesday, September 19, 2023. Please join us at Museum London to observe the procession, ceremony, and reception. Like last year, dinner will follow the reception, and will be open to all members who wish to attend, alongside the judicial members, speakers, key community members, and dignitaries in attendance.

Further, on Thursday, September 14th, the MLA will be hosting its annual Mentorship Dinner at Ivey Spencer Leadership Centre. While this event is geared towards lawyers under 3 years of call, it is open to anyone interested in hearing advice and insights from some of the most exceptional lawyers in our region. This event provides an opportunity, in a safe space, to ask experienced lawyers how they organize their practice, how they prepare for trial, how they manage difficult clients, etc. I attended this event and chaired it for a number of years, and I can say that I always took something of value away from it which I adopted into my practice. This event is truly one of the best events on the calendar each year.

Finally, I once again want to highlight that the MLA 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. This would be an ideal space for new lawyers who are looking to learn, or experienced lawyers looking to mentor others and elevate the practice more generally. If you are interested in volunteering within one or more of the PACs, please reach out to me directly at [jaitcheson@lerner.ca](mailto:jaitcheson@lerner.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**  
library@middlaw.on.ca

## CALL Conference Session Recaps

The Canadian Association of Law Libraries annual conference took place in Hamilton at the end of May and featured keynotes and breakout sessions on a wide range of topics. Here are recaps of two of the keynote sessions – one on AI legislation and the other on access to justice.

### **Teresa Scassa - *Regulating AI in Canada: Bill C-27 and the AI and Data Act***

Teresa Scassa is the Canada Research Chair in Information Law and Policy, a professor at the University of Ottawa's Faculty of Law and its School of Information Studies, and a well-known author of legal works in the areas of intellectual property, AI and privacy law. She provided a review of global artificial intelligence developments and the proposed Canadian legislation.

Artificial intelligence is going to be profoundly transformative and a major driver of the global economy. Governments around the world are developing regulations to reduce the risk of harm (democratic, social, physical, civil liberties, etc.), prohibit some tools and technologies, ensure transparency and accountability, build trust to support AI development, and to support innovation. Some countries have already created regulations but there is no global/international coordination. The EU has been an early actor in this area and other countries are following with their own legislation. Canada has introduced [Bill C-27](#), which includes the Artificial Intelligence and Data Act (AIDA) and, since 2019, has followed its [Directive on Automated Decision Making \(DADM\)](#). Teresa says that Canada's AIDA is largely left to be developed in regulations and she

is concerned that Parliament will be enacting a blank cheque. The United Kingdom is relying heavily on existing regulations and statutes from other jurisdictions, but there needs to be international action to harmonize principles, standards, and approaches. She also has concerns about what level of government will ultimately regulate as there are issues when federal and provincial parties don't work well together.

The proposed AIDA will apply across the country and across sectors and industries if there's an element of interprovincial or international trade and commerce. It currently does not apply to federal government institutions as defined under the Privacy Act (covered by DADM), CSIS, the CSE, or any federal or provincial department prescribed in regulations.

Teresa pointed out some issues with the proposed legislation and feels that the EU's AI act has much more comprehensive obligations on data quality, although Canada's AIDA does have a section on anonymized data use and management. She feels the harms defined in the DADM are better and broader than those in the proposed AIDA. In her opinion, the legislation is profoundly deficient, but a lot would have been caught if there had been a White Paper or consultation process.

Bill C-27 does require plain language descriptions about how systems are used so they can be clearly understood by the general public. However, it does not have the same independence from the government that the EU and UK have. Canada's proposed legislation gives supervisory authority to the Minister of Industry and there is a provision for an AI and Data Commissioner, but it is not completely independent from the government. Bill C-27 could be passed this fall and the Federal Government ambitiously hopes to complete the needed regulations within two years. Ultimately though, while the legislation won't be ideal, it won't be the end of the world.

### **Dr. Jennifer Leitch - *Access to Justice in Canada: Legal information and participation***

Dr. Leitch is the Executive Director of the National Self-Represented Litigant Project based out of the University of Windsor, Faculty of Law, a university professor previously at the University of Toronto, Faculty of Law and now at Trinity College, and a Senior Research Fellow with the Canadian Forum on Civil Justice. She presented some sobering information on access to justice in Canada.

It may come as no surprise to lawyers working in the court system that 40% of civil and up to 80% of family matters have self-represented litigants. Her organization, the National Self-Represented Litigant Project (NSRLP) provides advocacy and support such as generating resources and by offering an 11-week family law school. The NSRLP has seen self-represented parties from all walks of life split equally between genders: 40% have a university degree and another 20% have college degree but 50% have an income of \$50,000 or less. A large percentage started their legal process with a lawyer but then ran out of funds to continue with representation. Dr. Leitch then pointed



out that the landmark case, [Donoghue v Stevenson \[1932\] AC 562](#), featured an individual who could not afford legal representation. Ms. Donoghue was deemed a pauper and the only reason this seminal case on negligence made it to the courts is that her lawyer took the case pro bono.

The court system is built on the premise that lawyers are representing clients in court. There are three main barriers for these individuals that have them at a disadvantage from the outset:

**Procedural** – the process is not intuitive, and it is difficult to understand how it all fits together. The SRL is constantly reacting, and their adversary knows the system.

**Substantive** – it is difficult for them to find the answer to a legal question. They do not have the skills of an experienced researcher – either a lawyer, law student or librarian.

**Attitudinal** – SRLs have been perceived as vexatious, tilting at windmills, etc., so they face uphill battles because of negative perceptions by others about them in legal system.

The system needs to support access to information literacy. Misinformation gleaned from poor resources leads to SRLs thinking they have claims where they don't, and this slows down the court process. Studies show that over 50% of SRLs are starting their research at a library but, with little one-stop shopping for them, there are gaps in the process, and relevant information is missed. The language of law is also a barrier as it has its own vernacular and sometimes is indecipherable to non-lawyers.

The solution, in Dr. Leitch's opinion, is for more community-based libraries and initiatives featuring plain language resources, annotated acts, packages of commonly asked questions for different types of cases, and other resources. She made mention of the Legal Information and Resource Network (LiRN) announcement about its funding from the Law Foundation of Ontario for an Innovation Sandbox, but that is geared toward the profession and there needs to be a similar program for the public. There is much work to be done here to improve access to information and justice for self-represented litigants.

## New Books

Carthy/Millar/Cowan. **Ontario Annual Practice 2023/24 + forms**, Thomson Reuters, 2023.

Casey, James T. **Law of regulatory investigations in Canada**, LexisNexis, 2023.

Dyck, Dianne. **Disability management: theory, strategy and industry practice**, 7th ed., LexisNexis, 2023.

Gold, Alan D. **Defending drinking, drugs and driving cases 2023**, Thomson Reuters, 2023.

Houlden, L.W. et al. **2023 annotated Bankruptcy & Insolvency Act**, Thomson Reuters, 2023.

Kurtz, JoAnn et al. **Residential real estate transactions**, 6th ed., Emond, 2023.

LSO. **16th family law summit - Day one and day two**.

LSO. **Six-minute estates lawyer 2023**.

LSO. **Six-minute criminal lawyer 2023**.

LSO. **20th real estate law summit - Day One & Day Two**.

McGuinness, Kevin. **Canadian business corporations law**, 4th ed. vol. 1, LexisNexis, 2023.

Rintoul, Margaret. **Practitioner's guide to estate practice in Ontario**, 8th ed. (+ USB), LexisNexis, 2023.

Rintoul, Margaret. **Ontario estate administration**, 9th ed., LexisNexis, 2023.

Tran, Leanne. **Canadian law of consent to treatment**, 4th ed., LexisNexis, 2023.

Watt, Justice David. **Watt's manual of criminal jury instructions**, 3rd ed., 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.

Honsberger, John. **Honsberger's bankruptcy in Canada**, 5th ed., Thomson Reuters, 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

n/a. **Martin's Annual Criminal Code 2023**. - copies 1 and 5 both missing

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.

# Legal, ethical issues of AI for recruiting



Contributed by:

**David Canton / Lawyer and Trademark Agent and  
Lorraine Por / Employment Lawyer, Harrison Pensa LLP**

A recent [survey](#) of college students found that almost ½ of them are interested in using AI chatbots to write their resume and cover letter.

But almost the same percentage of human resources professionals surveyed said the use of AI on job applications would be a dealbreaker.

That's a bit of a head-scratcher. Generative AI tools like ChatGPT are notorious for making things up and providing output that is not true — often referred to as hallucinogenic output. Try it for yourself. Ask ChatGPT or another tool to write your CV and see what it serves up. When I did that on myself it sounded good — but got about one-third of it wrong.

## Job Seeker AI tools

There are many [AI-based tools](#) that job seekers can use. Surely no one would use AI to help write their resume and include false information in it. (Or at least no more than one would embellish their resumes on their own.)

So it's a mystery why so many HR professionals are so against it.

If job seekers use AI to research potential employers and get the details wrong, they do that at their own peril. Job seekers sometimes use AI tools to try to [get by the automated tools](#) employers use to compare resumes and job descriptions to reject candidates.

## HR AI tools

The bigger issue is HR professionals using AI tools to research and select people they want to employ. It would have been interesting if the survey had asked those HR professionals if they would use AI tools in the hiring process.

Using AI tools to learn about candidates can be a problem. AI tools can get similar information as a Google search, but with a significant risk that it will serve up believable nonsense.

The use of Google and social media to look at job candidates is somewhat controversial. It can serve up information that one is not supposed to consider from a legal and human rights perspective. You can find the answers to questions you are not supposed to ask.

Doing AI chat searches on candidates may make that worse. Not only are you looking at information you are not supposed to consider, but that information may be wrong and biased.

Using AI tools to decide between candidates is also a problem. There are issues around embedded bias and algorithmic transparency when using AI that could lead to legal, [human rights](#), and public relations consequences.

For example, a recent [class action suit was commenced in California](#) over alleged AI tool hiring discrimination. It is inevitable that AI tools will be used by both candidates and employers in the hiring process. The challenge is to

use them in a fair and transparent way that is consistent with employment law principles.

[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](#), [Mastodon](#) and [Bluesky Social](#).

[Lorraine Por](#) is an employment lawyer at Harrison Pensa advising employers and business owners with employment law and human rights issue.

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**“Generative AI tools like ChatGPT are notorious for making things up and providing output that is not true — often referred to as hallucinogenic output. Try it for yourself. Ask ChatGPT or another tool to write your CV and see what it serves up.”**



# Welcome Paralegal Professionals to the Middlesex Law Association



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*Nominations and voting for the new paralegal representative position on the MLA Board of Directors will take place in September 2023.*

## 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:

**Rasha El-Tawil**

519-660-7712

[rasha.el-tawil@siskinds.com](mailto:rasha.el-tawil@siskinds.com)

**Leslie Ibouily**

519-633-2638

[leslie.ibouily@eolc.clcj.ca](mailto:leslie.ibouily@eolc.clcj.ca)

**Hilary Jenkins**

519-672-5666 x7301

[hilary.jenkins@mckenzielake.com](mailto:hilary.jenkins@mckenzielake.com)

**John Nicholson**

519-914-3358

[jnicholson@cohenhighley.com](mailto:jnicholson@cohenhighley.com)

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# Interview with a City Solicitor - Barry Card



Contributed by:  
**Tara Hetherington / Articling Student,  
City Solicitor's Office, City of London**



**Barry Card**

**C**alled to the bar in 1978, Barry Card has led an accomplished and fascinating law career, leading to his appointment

as City Solicitor with the City of London in 2016. Seven years into this position, he gives us some insight on this challenging yet rewarding position and provides advice for anyone considering a legal career in the public sector.

## 1. Can you give an overview of your position and what your day-to-day on the job looks like?

My official role is "Deputy City Manager, Legal Services". The City's Senior Leadership Team is composed of a City Manager and several Deputy City Managers. The SLT performs general policy and administrative duties. The DCMs are also responsible for management of their respective service areas.

Certain powers and responsibilities have been delegated to the DCMs through the "Civic Administration" by-law. One of the duties of the DCM, Legal Services, is to perform the "City Solicitor" role.

Most days involve a mix of management and legal activities. Many days involve attendance at Council and Committee meetings. That sounds pretty routine and controlled, but the

reality is much different because we are frequently called upon to deal with complex emergent matters.

## 2. Can you give an overview of your career, and what eventually led you to work in London as the City Solicitor?

After graduating law school, I articulated with the City of Ottawa and returned as a lawyer in the litigation area, then moved to London, where I worked for the City as the solicitor responsible for "labour relations and advocacy". I continued that practice focus in the private sector (for three decades) in a variety of capacities. Much of my private sector work required travel and time away from home. Working in other venues is interesting, but personally demanding. By the time the City Solicitor position became available in 2016, I was ready for a new challenge. The DCM role offers a range of responsibilities and an opportunity for direct involvement in the municipal decision-making process. The City Solicitor function is similar to that of a "managing partner" in that it entails budget responsibilities, mentoring and business development.

## 3. Given your accomplished and varied law career, what has made working as City Solicitor unique?

In this role, you never know what to expect. It is challenging but very rewarding, intellectually stimulating, and fulfilling. I have been privileged

to work with colleagues and Council to achieve positive change in London despite the many challenges (such as Covid) that have arisen.

## 4. What do you see as the challenges and benefits of working as in-house counsel for a large organization like the City of London as opposed to in private practice?

Practicing in a law department can provide the opportunity to be involved in challenging work early in your career. While long hours may be involved, there is less pressure to attract clients and meet billable-hour targets.

Also in the public sector, the work can be interesting, and you have the satisfaction of doing something for the public good.

## 5. What advice do you have for anyone considering a switch to in-house counsel at a large public organization, or considering a career as a City Solicitor?

Spending time in the public sector can benefit your career. It's a great opportunity to learn in a variety of practice areas, and to work with experts in different areas of the organization.

For the City Solicitor position, it takes time and experience to feel comfortable in the role, and you need to be willing to regularly delve into a variety of non-legal matters. The position offers an opportunity to take on a mentorship role, cultivate a legal team of experts across a variety of practice areas (like we have at City Hall), and make a difference within the organization and the community.

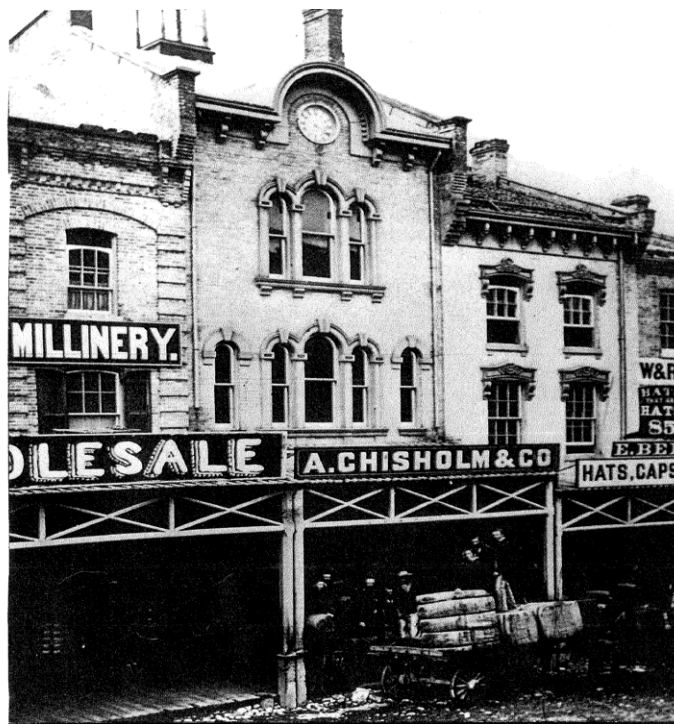




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# When the deceased just blew the formalities



Contributed by:  
**Josh Laplante / Lawyer – Cohen Highley**

With the delivery of the decision of the Honourable Justice Myers on June 6, 2023 in [\*Cruz v Public Guardian and Trustee\*, 2023 ONSC 3629](#) ("**Cruz**"), we can say that Ontario is finally a "substantial compliance" jurisdiction when it comes to the validity of wills.

*Cruz* is the first reported decision on the new section 21.1 of the [\*Succession\*](#)

[\*Law Reform Act, RSO 1990 c S.26\*](#) (the "**SLRA**"), added in 2021 by the *Accelerating Access to Justice Act, 2021*. Section 21.1 reads as follows:

## Court-ordered validity

**21.1 (1)** If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the

testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made. 2021, c. 4, Sched. 9, s. 5.

For those who die after January 1, 2022, this section serves to soften the traditional, rather harsh approach to the validity of wills. Under the *SLRA*,



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there are only three types of valid wills (i.e., "executed with the formalities"):

1. A will which is in writing, signed at its end by the testator, where the testator either makes or acknowledges such signature in the presence of two or more attesting witnesses, who then subscribe the will in the presence of the testator;
2. A will that is wholly in the testator's own handwriting and signed by the testator; or
3. A will which is in writing signed by the testator, the testator being a member of the Canadian Forces on active service or a sailor at sea or on a course of a voyage.

Justice Myers' decision in *Cruz* finally provides needed guidance on the application of section 21.1 of the *SLRA*

in Ontario. Until now, there has been no reported Ontario authority in the applicability of this section. Section 21.1 and *Cruz* follow a trend in the western provinces towards substantial compliance rather than strict compliance in relation to the formal validity of wills. For example, [Part 4, Division 5 of British Columbia's Wills, Estates and Succession Act, SBC 2009, c 13](#) provides both the jurisdiction and the test for the Court to cure deficiencies in a will.

*Cruz* dealt with a testator who prepared his own will that clearly expressed his testamentary intentions, but the testator failed to have the document witnessed. Under the old regime, this will would have been fully invalid, and the estate would have been distributed on an intestacy (or a prior will of the testator if one could be located). However, Justice Myers had

no difficulty in determining that the intentions of the testator were clear on a balance of probabilities – the document purported to be a will, was signed in the testator's hand, but as Justice Myers ruled at paragraph 9 of the decision, "The deceased just blew the formalities."

It is worth noting that Justice Myers referenced the caselaw from the western provinces in *Cruz*. In those cases, "clear and convincing proof" is required in order to cure deficiencies in a will. However, Justice Myers made a clear, first ruling in Ontario that the balance of probabilities is the appropriate burden of proof as to whether a Court may cure such a deficiency.

It will be interesting to see in future the impact of section 21.1 of the *SLRA* on other areas of estates law. For example,



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in a will challenge, when a propounder of a will can prove due execution with the formalities, the propounder is aided by the presumptions of knowledge and approval and capacity (*Dujardin v Dujardin*, 2018 ONCA 597 at paras 43-44). But -- what happens if the will being propounded was not executed with the formalities, but instead was cured by section 21.1 by the Court? Is the onus then on the

propounder to prove each requirement as if suspicious circumstances had been established?

Section 21.1 and *Cruz* are important steps in bringing Ontario law into alignment with current trends throughout Canada as well as with other trends in Ontario jurisprudence with respect to testator intentions. The law is evolving to support a more

purposive approach to determining the intentions of a testator, rather than relying on strict formalities. This will hopefully lead to a decline in cases of the unfortunate sort where an inadvertent error defeats the clear intentions of a testator.



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Please join the Middlesex Law Association  
in a celebration of the

# 195th *Fall Opening of the Courts*

**Tuesday, September 19th**

**Museum London**

421 Ridout Street, London, Ontario

Procession to commence at 4:30 p.m.

## **Keynote Speaker:**

Ali Chahbar, Chairperson,  
London Police Services Board

We look forward to celebrating our  
colleagues and community.

Reception to follow hosted by the  
Middlesex Law Association.

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**FOR INFORMATION CONTACT:**

David S. Thompson  
[dthompson@shillingtonmccall.ca](mailto:dthompson@shillingtonmccall.ca)

or David J. Kirwin  
[dkirwin@lawhouse.ca](mailto:dkirwin@lawhouse.ca)

# Not-for-Profit Corporations and Charities Law Update



Contributed by:  
**Kerry McGladdery Dent / Partner at Spero Law**

Several recent and ongoing legislative changes at the provincial and federal level impact the legal services and advice that may be required by not-for-profit and charitable clients. The leadership of such organizations changes frequently and is composed largely of volunteers. The cyclical loss of institutional knowledge at the board level often results in lags between legislative changes and implementation of change at an institutional level. Lawyers who practice in this area should maintain frequent communication with the Boards of Directors and Executive Directors of not-for-profit and charitable clients to ensure the organization's legal obligations are met.

For provincially-incorporated clients, most are still in the process of adapting to the changes implemented by the *Not-for-Profit Corporations Act, 2010* ("ONCA"), which finally came into force on October 19, 2021. The transitional provisions of this legislation<sup>1</sup> permit bylaws, letters patent and articles of incorporation that are inconsistent with the legislation to remain valid until October 19, 2024, at which time such inconsistent bylaws and foundational documents will be deemed to be amended to the extent necessary to bring them into compliance.

Of course, the risk here is that unless the written bylaws of the organization are actually changed, directors and

officers of the corporation may continue to operate the organization in accordance with outdated and legally inconsistent bylaws. For virtually all provincially-incorporated not-for-profit and charitable clients, it is preferable to actually amend the organizational bylaws (and foundational documents, if necessary), to bring them into compliance with ONCA.

Another change that accompanied ONCA is the requirement for all corporations, including provincially-incorporated not-for-profit corporations, to file their annual returns and corporate updates online. Lawyers should connect with their not-for-profit clients to ensure they are aware of this requirement and assist with filings if necessary.

Federally-incorporated not-for-profit corporations have been filing their annual returns online for several years. However, the Corporations Canada recently announced that in July 2023, it will begin administratively dissolving federal not-for-profit corporations that have not filed their annual returns for 3 years. Lawyers with federally-incorporated not-for-profit clients should take this opportunity to connect with their clients to assist them in bringing overdue filings up-to-date.

For charities, there have been two significant changes. The first exciting change, made in June 2022, permits registered charities to make grants to

non-qualified donees (for example, a not-for-profit corporation that is not a registered charity, a person, club, society, or association), provided certain accountability requirements are met. The ability to make these grants provides registered charities with a wide range of opportunities to further their objectives, without unnecessary expansions to their payroll or infrastructure, and without having to demonstrate control over the activities of the grantee. Charitable clients interested in providing such grants should be directed to CG-032: Registered charities making grants to non-qualified donees to ensure the appropriate accountability measures are in place.

The second change, in force as of January 1, 2023, to the disbursement quota rules for larger charities, with the disbursement quota rate increasing to 5% for property exceeding \$1 million. In addition, charities are no longer permitted to accumulate property, except under previously approved accumulation agreements. However, charities can apply for a reduction in the disbursement quota obligation for a particular tax year. For larger charities, lawyers should encourage their clients to review this change with their accountant.

The next year will likely be a busy one for not-for-profit and charity lawyers as they continue to support clients to adapt to the various changes that impact them.

<sup>1</sup> ONCA, ss. 207(1)-(5)



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# Is Public Parkland Immune to Adverse Possession:

*Kosicki v. Toronto (City)*, 2023 ONCA 450



Contributed by:  
**Megan Jenner / Cohen Highley LLP**

**C**an private landowners gain title over public parkland by adverse possession? This question was central to the Ontario Court of Appeal's recent decision in *Kosicki v Toronto (City)*<sup>1</sup>, where the court was divided on this issue. At trial, the application judge held that municipal parkland is immune to adverse possession.<sup>2</sup> The majority of the Court of Appeal agreed, dismissing the appeal. Brown J.A., wrote a strong dissent, disagreeing with both the application judge and his colleagues in his thorough reasoning, which may well get the attention of the Supreme Court of Canada in a further appeal.

The City of Toronto (the "City") owns a laneway-like strip of land behind a row of 27 properties, the most westerly in the row belonging to the appellants. The strip of land is adjacent to one of Toronto's parks. Both the strip of land and the park are considered part of the City's Green Space System.<sup>3</sup> At some point, a portion of the strip of land located behind the appellants' property (the "Disputed Land") was fenced in by the then-owners of the property enclosing it into their backyard. Fencing in the parcel of land effectively prevented its access by the public and gave the property owners

exclusive enjoyment. For decades, the appellants used the Disputed Land as part of their yard and paid property taxes on the Disputed Land, which the City accepted until 2020.

The appellants approached the City to purchase the Disputed Land, but when the City refused, they brought a claim for possessory title. It was accepted that because the Disputed Land was fenced into the appellants' land since at least 1971 with no objection and since undisputed and exclusive possession of the Disputed Land had been maintained, a claim for adverse possession would have been successful had it been brought against a private party. However, the application judge held that disputes involving publicly owned land are immune from claims of adverse possession and cautioned that if the claim were allowed, it would set a "dangerous precedent."<sup>4</sup>

On appeal, all the Justices agreed that adverse possession is established at common law when a claimant had (i) actual, open, notorious, constant, continuous and peaceful possession of the subject land for 10 years; (ii) an intention to exclude the true owner from possession; and (iii) effective

exclusion of the true owner for the entire 10-year period.<sup>5</sup>

## Decision of the Majority

MacPherson J.A. and Sossin J.A., for the majority of the Court of Appeal, summarized a line of lower court decisions in which adverse possession claims involving "public" lands were rejected. From these cases the "public benefit" test emerged, which was summarized by Howden J. in *Oro-Medonte (Township) v Warkentin*, as follows:<sup>6</sup>

[L]ands held by a municipality other than as public road allowances which meet the following factors are immune from claims of neighbouring landowners based on prescriptive rights or adverse possession:

[(i)] the land was purchased by or dedicated to the municipality for the use or benefit of the public, or as here, for the use or benefit of an entire subdivision as well as the public at large; and

[(ii)] since its acquisition by the municipality, the land has been used by and of benefit to the public.

The appellants argued that the public benefit test should be rejected on the basis that it is inconsistent

<sup>1</sup> *Kosicki v Toronto (City)*, 2023 ONCA 450.

<sup>2</sup> *Ibid* at para 1.

<sup>3</sup> *Ibid* at para 3.

<sup>4</sup> *Ibid* at paras 7 and 11.

<sup>5</sup> *Ibid* at para 14.

<sup>6</sup> *Oro-Medonte (Township) v Warkentin*, 2013 ONSC 1416, at para 119.



with the *Real Property Limitations Act* (the “*RPLA*”).<sup>7</sup> The majority of the court disagreed and explained that the availability of an adverse possession claim in the context of municipal parkland “[lies] between the two positions of the parties in this appeal. Under this approach, while municipal parkland is generally unavailable for adverse possession, it may become available exceptionally where the municipality has waived its presumptive rights over the property either expressly or by acknowledging or acquiescing to a private landowner’s adverse possession of parkland.”<sup>8</sup>

The majority of the Court of Appeal held that parkland should be *presumed* to be *in use* for the public benefit unless there has been acknowledgement or acquiescence to use by private individuals, stating that the sole question to be addressed was whether the appellants could rebut this presumption by showing that the municipality acknowledged or acquiesced to their use of the land.<sup>9</sup> The majority held that the City had not acknowledged, consented, or acquiesced to the use of the Disputed Land prior to or after it being fenced in, but rather that the City was completely unaware that the Disputed Land existed as municipal parkland.<sup>10</sup>

The majority went on to “reframe” the test for adverse possession of public land: “adverse possession claims which are otherwise made out against municipal land will not succeed where the land was purchased by or dedicated to the municipality for the use or benefit of the public, and the municipality has not waived its presumptive rights over the property,

or acknowledged or acquiesced to its use by a private landowner or landowners.”<sup>11</sup>

Recall that section 4 of the *RPLA* sets out the 10-year limitation period after which rights over land having been adversely possessed arise; section 15 of the *RPLA* acts to extinguish the rights of the registered owner; and section 16 of the *RPLA* provides an exception to certain types of public lands, being any waste or vacant land of the Crown and public highways.<sup>12</sup> Section 16 makes no mention of an exception for municipal parkland such as the class of public lands at dispute here. While the majority briefly considered the applicable statutory framework, they held that the common law “public benefit” test should prevail unless the lands were municipal lands explicitly excluded under section 16 of the *RPLA*. The Court of Appeal ultimately held that under the “public benefit” test, adverse possession claims are generally unavailable unless the presumptive rights of the municipality were waived, or the municipality acknowledged or acquiesced to the possession. Based on the application of this formulation of the common law test and overlooking the fact that the *RPLA* offered limited exceptions only, they dismissed the appeal.<sup>13</sup>

### Dissenting Reasons of Brown J.A.

The dissent of Brown J.A. is strongly worded, extensive, and highlights numerous instances of what he refers to as legal errors of his colleagues. He scrutinizes the application judge’s failure to apply the governing legal principles found in the *RPLA*, explaining that she broadened a “judge-made

exception to the statutory scheme” and rather than affording the appellants the relief they were entitled to under the legislation, ignored the *RPLA* and created a new judge-made rule.<sup>14</sup> In his persuasive and pointed dissent, Brown J.A. states that:

“the application judge and my colleagues have denied the appellants’ claim on the basis that courts are entitled to look beyond the law as it is and, instead, determine the claim based on the law as the courts think it ought to be. They have pushed the *RPLA* aside in order to create a legal rule, not found in the statute, about what type of land should be immune from claims for adverse possession. In my respectful view, their arrogation of such rule-making power constitutes legal error.”<sup>15</sup>

Browne J.A. went on to say that by creating this rule, “the application judge effectively enacted a retroactive judicial amendment to section 16 of the *RPLA* by adding a new category of land exempt from the [*RPLA*’s] adverse possession regime”<sup>16</sup>. The rule will operate, he concludes, as an amendment to the *Land Titles Act*, the *City of Toronto Act, 2006*, and the *Municipal Act, 2001*.<sup>17</sup>

Justice Brown held that the majority erred by focusing on this line of case law and crafted a legal rule rather than relying on the *RPLA*. The *RPLA* is comprehensive on the matter of adverse possession claims as it relates to real property and

<sup>7</sup> *Real Property Limitations Act* (“*RPLA*”), R.S.O. 1990, c. L.15.

<sup>8</sup> *Supra* note 1 at para 38.

<sup>9</sup> *Ibid* at para 41.

<sup>10</sup> *Ibid* at para 43.

<sup>11</sup> *Ibid* at para 47.

<sup>12</sup> *Supra* note 7.

<sup>13</sup> *Supra* note 1 at para 74.

<sup>14</sup> *Ibid* at para 80.

<sup>15</sup> *Ibid* at para 84.

<sup>16</sup> *Ibid* at para 108.

<sup>17</sup> *Ibid* at para 182.

provides only a narrow exclusion to its application. Justice Brown noted that the legislation governing Ontario's limitation regime received extensive review over the years ending in 2002. At the time the *Limitations Act, 2002* was proclaimed in force, the legislation dealing with real property claims was separated into its own statute, the *RPLA*.<sup>18</sup> A narrow exception was included, and more immunity could have been enacted if that was the intention. Moreover, in 2021, the *Supporting People and Business Act, 2021* created adverse possession immunities for public and park land through other statutory amendments. Such immunities do not apply to claims which matured prior to the amendments coming into force, which includes the case at issue.

Justice Brown emphasized the principle that legislation is paramount over the common law. During this

legislative reform and after, the legislature had the opportunity to address exceptions for adverse possession claims and did not. This claim matured prior to the statutory amendments that later addressed immunity. The legislation should have been the basis of the decision by the court, not a new judge-made rule.<sup>19</sup> While the City argued that the courts are entitled to fill a "gap" in legislation, Brown J.A. reasoned that the ability of a court to fill such a gap is quite narrow and that the *RPLA* has no such gap to fill. Rather, section 16 of the *RPLA* expressly sets out the exemptions from the application of the adverse possession regime – specifically exempting waste or vacant land of the Crown and lands included in any road allowance or highways owned by the Crown or municipalities. By its inclusion of some exceptions in section 16 of the *RPLA*, it is clear that the legislature turned its mind to exclusions and

did not intend to broadly exempt municipal public lands.

Brown J.A. held that the fact the majority wished to see a longer list of exclusions in the legislation did not justify the court effectively amending the *RPLA* to add what it sees as another exception to the legislated regime. Justice Brown held that the majority had essentially "crafted a legal rule that effectively amends four statutes."<sup>20</sup>

### An Issue for the Supreme Court of Canada?

*Kosicki v Toronto (City)* raises important issues concerning the availability of claims for adverse possession against public lands, and the role of the courts in developing the common law in the presence of a statutory scheme. The appellants are seeking leave to appeal, and based on Brown J.A.'s strong dissent, this issue may well get the attention of the Supreme Court of Canada.

<sup>18</sup> *Ibid* at para 104.

<sup>19</sup> *Ibid* at paras 185 and 194.

<sup>20</sup> *Ibid* at para 208.

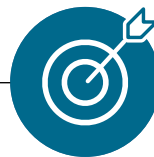
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Ivey Spencer Leadership Centre will host the Middlesex Law Association for this honoured tradition of the *Mentorship Dinner*. We hope you'll consider joining this event for cocktail networking and a rotating sit-down dinner with seasoned lawyers who have taken diverse paths and want to share their lessons, learnings, and advice.

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**4:30 Procession**

**4:45 Ceremony**

**6:00 Reception**

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# Member Updates

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.

**Roland Acheson** – new  
Call at Lakin Afolabi Law  
Professional Corporation,  
433 William St., London  
N6B 3E1, ph: 519-645-6969,  
fax: 519-645-2882, [roland@lakinafolabilaw.com](mailto:roland@lakinafolabilaw.com)

**Megan Alexander** –  
new paralegal member at  
Cohen Highley LLP, One  
London Pl, 255 Queens Ave.,  
11th fl., London N6A 5R8,  
ph: 519-672-9330 x389,  
[malexander@cohenhighley.com](mailto:malexander@cohenhighley.com)

**Melissa Anjema** – new  
paralegal member at Cohen  
Highley LLP, One London  
Pl, 255 Queens Ave., 11th fl.,  
London N6A 5R8, ph: 519-  
672-9330 x373, [manjema@cohenhighley.com](mailto:manjema@cohenhighley.com)

**Mason Arthur** – new  
Call at Siskinds LLP, 1-275  
Dundas St., London N6B  
3L1, ph: 519-672-2121, [mason.arthur@siskinds.com](mailto:mason.arthur@siskinds.com)

**Zohra Bhimani** – new  
Call at Siskinds LLP, 1-275  
Dundas St., London N6B  
3L1, ph: 519-672-2121, [zohra.bhimani@siskinds.com](mailto:zohra.bhimani@siskinds.com)

**Richard Braiden** –  
has joined Zegers Law as  
Counsel, 585 Talbot St.,  
London N6A 2T2, ph: 519-  
672-7410.

**John Brennan** – office  
is now at 585 Talbot St.,  
London N6A 2T2.

**Paul Cappa** – new  
paralegal member at Cohen  
Highley LLP, One London  
Pl, 255 Queens Ave., 11th fl.,  
London N6A 5R8, ph: 519-  
672-9330 x335, [cappa@cohenhighley.com](mailto:cappa@cohenhighley.com)

**Wendy Cavacas** –  
new paralegal member at  
Matters in Law Paralegal  
Services, 20937 Lakeside  
Dr., Thorndale N0M  
2P0, ph: 519-204-0069,  
direct ph: 519-860-2227,  
[mattersinlaw@gmail.com](mailto:mattersinlaw@gmail.com)

**Conor Culverhouse**  
– new Call at Ian S. Wright  
Law, 207-478 Waterloo St.  
London N6B 2P6, ph: 548-  
488-2228 x102, [conor@ianswrightlaw.com](mailto:conor@ianswrightlaw.com)

**Carmen Dawdy** –  
new paralegal member at  
Carmen Dawdy Paralegal  
Services, 115 Wellington  
St., Front Dr., London N6B  
2K5, ph: 519-433-0466,  
[dawdycarmen@gmail.com](mailto:dawdycarmen@gmail.com)

**Robert De Toni** – new  
member at Siskinds LLP,  
1-275 Dundas St., London  
N6B 3L1, direct ph: 226-  
330-0787, [robert.detoni@siskinds.com](mailto:robert.detoni@siskinds.com)

**Aimee Dezeure** – new  
Call at Brown Beattie  
O'Donovan LLP, 380  
Wellington St., 16th fl.,  
London N6A 5B5, 519-679-  
0400, [adezeure@bbo.on.ca](mailto:adezeure@bbo.on.ca)

**Chris Dobson** – direct  
phone is 519-870-1745

**Patricia Duwyn** – new  
paralegal member at Cohen  
Highley LLP, One London  
Pl, 255 Queens Ave., 11th fl.,  
London N6A 5R8, ph: 519-  
672-9330 x307, [pduwyn@cohenhighley.com](mailto:pduwyn@cohenhighley.com)

**Nicole Foster** – new Call  
at Salim J. Khot – LPC, 362  
Wharnccliffe Road South,  
London N6J 2M1, ph: 519-  
858-4958, fax: 519-858-  
4550, [nicolef@sjklpc.com](mailto:nicolef@sjklpc.com)

**Janet M. Gibbons** – is  
now with Cohen Highley LLP  
heading its Strathroy office  
and email has changed to  
[jgibbons@cohenhighley.com](mailto:jgibbons@cohenhighley.com)

**Laura Groshok** – new  
paralegal member at Cohen  
Highley LLP, One London  
Pl, 255 Queens Ave., 11th fl.,  
London N6A 5R8, ph: 519-  
672-9330 x387, [lgroshok@cohenhighley.com](mailto:lgroshok@cohenhighley.com)

**Kaitlan Huckabone**  
– new Call at Corporation  
of the City of London,  
City Solicitor's Office, 300  
Dufferin Ave., Box 5035,  
London N6A 4L9, ph: 226-  
559-2176, [khuckabo@london.ca](mailto:khuckabo@london.ca)

**Olga (Olivia)  
Humphreys** – new  
paralegal member at  
Humphreys Paralegal  
Services, 800 2nd  
Concession Rd. ENR,  
Langton ON N0E 1G0,  
ph: 226-268-0692,  
direct ph: 519-207-4800,  
[olivia.o.humphreys@gmail.com](mailto:olivia.o.humphreys@gmail.com)

**Steven A. Keyes** – new  
paralegal member at Steven  
Keyes Paralegal, 135 Albert  
St., London N6A 1L9, ph:  
519-933-3355, [keyeslaw@hotmail.com](mailto:keyeslaw@hotmail.com)

**Michael Lamb** – is now  
Counsel at Cohen Highley  
LLP, all contact information  
remains the same but  
email is now [mlamb@cohenhighley.com](mailto:mlamb@cohenhighley.com)

**Sarah Lawson** – new  
Call at Siskinds LLP, 1-275  
Dundas St., London N6B  
3L1, ph: 519-672-2121, [sarah.lawson@siskinds.com](mailto:sarah.lawson@siskinds.com)



**Beth Leaper** – office is now at 324V – 341 Talbot St., London N6A 2R5, all else the same

**Liam Ledgerwood** – is now at Info-Tech Research Group, 345 Ridout St. N., London N6A 2N8, ph: 888-670-8889 x3440, [llledgerwood@infotech.com](mailto:llledgerwood@infotech.com)

**Jordyn Liebman** – new Call at Siskinds LLP, 1-275 Dundas St., London N6B 3L1, ph: 519-672-2121, [jordyn.liebman@siskinds.com](mailto:jordyn.liebman@siskinds.com)

**Catherine McIntosh** – is now at Aviva Trial Lawyers, 1500-255 Queens Ave., London N6A 5R8, ph: 519-538-2981, direct ph: 226-234-9236, fax: 416-363-5386, [catherine.mcintosh@aviva.com](mailto:catherine.mcintosh@aviva.com)

**Dennis McKaig** – new paralegal member at Dennis McKaig Paralegal, ph: 519-868-8186, [dmckaig@sympatico.ca](mailto:dmckaig@sympatico.ca)

**Morrison, Watts** – law firm name has changed to Morrison, Watts, Hurtado & Buchner, all else the same

**Cindy Mueller-Parker** – new paralegal member at Frederick A. Mueller Law, 5-575 Wharnccliffe Rd. S., London N6J 2N6, ph: 519-673-1300, direct ph: 226-378-7986, fax: 519-673-1728, [muellerc@hotmail.com](mailto:muellerc@hotmail.com)

**Stacey Pipicelli** – new paralegal member at Fanshawe College, School of Public Safety, 1001 Fanshawe College Blvd, Box 7005, London N5Y 5R6, ph: 519-452-4430 ext. 15051, [spipicelli@fanshawec.ca](mailto:spipicelli@fanshawec.ca)

**Vickarna Pitambar** – new paralegal member at Hey Legal Services Professional Corporation, 1240 Meadowvale Dr., London N6K 5B5, ph: 519-852-8670, fax: 226-778-5056, [vic@heylegal.ca](mailto:vic@heylegal.ca)

**David Price** – new paralegal member at Select Legal Services, Box 88-101 Mill St., Ilderton N0M 2A0, 519-666-1062, fax: 519-666-1061, [selectlegal@bell.net](mailto:selectlegal@bell.net)

**June Purres** – new paralegal member at Cohen Highley LLP, One London Pl, 255 Queens Ave., 11th fl., London N6A 5R8, ph: 519-672-9330 x365, [jpurres@cohenhighley.com](mailto:jpurres@cohenhighley.com)

**Michael Radan** – new paralegal member at the Municipal Property Assessment Corporation (MPAC), Westmount Shopping Centre, Upper Level, 252-785 Wonderland Road S, London N6K 1M6, ph: 226-213-7056, direct ph: 519-854-8777, [michael.radan@mpac.ca](mailto:michael.radan@mpac.ca)

**Ryan Ramdin** – new Call at Morrison, Watts, Hurtado & Buchner, 4992 Colonel Talbot Rd., Box 314, Lambeth Stn, London N6P 1P9, ph: 519-652-8080 x5, fax: 519-652-2262, [ramdin@mmwlaw.ca](mailto:ramdin@mmwlaw.ca)

**Chanele Rioux-McCormick** – new Call at McKenzie Lake Lawyers LLP, 1800-140 Fullarton St., London N6A 5P2, ph: 519-672-5666, [chanele.rioux-mccormick@mckenzielake.com](mailto:chanele.rioux-mccormick@mckenzielake.com)

**Hannah Robins** – new Call at McKenzie Lake Lawyers LLP, 1800-140 Fullarton St., London N6A 5P2, ph: 519-672-5666, [hannah.robins@mckenzielake.com](mailto:hannah.robins@mckenzielake.com)

**Sean Robson** – new Call at Lerner LLP, 80 Dufferin Ave., Box 2335, London N6A 4G4, 519-672-4131, [srobson@lerner.ca](mailto:srobson@lerner.ca)

**Malcolm Scott** – is now with the Ontario School Board Insurance Exchange, 91 Westmount Rd., Guelph N1H 5J2, ph: 519-767-2182 x324, [malcolms@osbie.on.ca](mailto:malcolms@osbie.on.ca)

**Waseem Shahatto** – new Call at Lerner LLP, 80 Dufferin Ave., Box 2335, London N6A 4G4, 519-672-4131, [wshahatto@lerner.ca](mailto:wshahatto@lerner.ca)

**A. Frannie Simms** – new paralegal member at Cohen Highley LLP, One London Pl, 255 Queens Ave., 11th fl., London N6A 5R8, ph: 519-672-9330 x399, [fsimms@cohenhighley.com](mailto:fsimms@cohenhighley.com)

**Madeleine Stirland** – new paralegal member at Scott Petrie LLP, 200-252 Pall Mall St., London N6A 5P6, ph: 519-433-5310 x248, [mstirland@scottpetrie.com](mailto:mstirland@scottpetrie.com)

## Special Notice

### Re: Estate of John M. Litterick

Anyone interested in taking over the files (last 10 years) and Will and Powers of Attorneys (copies only) is to contact Josephine at 519-451-2790 for further details.

## Will Notices

### Walter Clark Barr & Roberta Hazel Barr (updated)

Anyone knowing of a Last Will and Testament of Walter Clark Barr, born August 18, 1942, and Roberta Hazel Barr, born July 11, 1941, of 231 Edgehill Crescent London N6G 2T6, London, please contact Christine Barr, 519-524-5333.

### 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](mailto:brandon@pvadamslaw.ca).

### Czeslaw Pawel (Peter) Gorecki

Anyone knowing of a Last Will and Testament for Czeslaw Pawel Gorecki, born May 17, 1944 and died June 25, 2023 of London, Ontario, please contact Aesha Patel at 226 476-0896, email: [apatel@cohenhighley.com](mailto:apatel@cohenhighley.com).

### Doris Hatherell

Anyone knowing of a Last Will and Testament for Doris Hatherell born October 16, 1923 and died June 5, 2023 of London, Ontario, please contact Cindy Ashley at 519-639-4784 email: [cindyashley17@gmail.com](mailto:cindyashley17@gmail.com).

### Katalin Horich-Kiss

Anyone knowing of a Last Will and Testament for Katalin Horich-Kiss, born September 26, 1956, and died July 3, 2023, of London, Ontario, please contact her daughters Patricia Brooks, [chris\\_trish@rogers.com](mailto:chris_trish@rogers.com), 519-702-6590, and Anita Rasuli, [anitahorich@hotmail.com](mailto:anitahorich@hotmail.com), 226-448-4581.

### Peggy Anne Horner

Anyone having knowledge of a Last Will and Testament for Peggy Anne Horner, born January 20, 1960, who died on May 21, 2023, please contact Frederick A. Mueller at 519-673-1300 or email: [fred\\_mueller@rogers.com](mailto:fred_mueller@rogers.com)

### David Kanatawakhon (Maracle)

Anyone knowing of a Last Will and Testament for David Kanatawakhon (Maracle), born July 1952 and died June 2023 of City of London, Ontario, please contact WILLIAM L. DEWAR at 519-672-1830, email: [judi@on.aibn.com](mailto:judi@on.aibn.com).

### Mary Jo-Anne McFadden

Anyone knowing of a Last Will and Testament for Mary Jo-Anne McFadden, born July 21, 1945 and died May 19, 2023 of Wallaceburg, Ontario, Please contact James McFadden at 705-968-0226, email [domcfadden@hotmail.com](mailto:domcfadden@hotmail.com).

### Helen Diane Poole

Anyone knowing of a Last Will and Testament for Helen Diane Poole, born November 25th, 1933 and died on or about April 10th, 2002, of London, Ontario, please contact Brandon Roach at 519-438-6077, [brandon@pvadamslaw.ca](mailto:brandon@pvadamslaw.ca).

### Michael (aka Mychalo/ Mychajlo) Prokopiw

Anyone knowing of a Last Will and Testament for Michael (aka (Mychalo/ Mychajlo) Prokopiw born Nov 14, 1925 and died April 15, 2023 of Strathroy-Caradoc, Ontario please contact Janet Gibbons at 519-245-0110, [jgibbons@cohenhighley.com](mailto:jgibbons@cohenhighley.com).

### Richard James Pucsek also known as Richard James Culbert

Anyone having knowledge of a Last Will and Testament for Richard James Pucsek also known as Richard James Culbert, born May 18, 1971, who died on May 21, 2023, of London, ON, please contact Michelle Lauber from Jeff Conway Law, email: [michelle@jeffconwaylaw.com](mailto:michelle@jeffconwaylaw.com), phone: 519-474-7500.

### John Rockwood

Anyone having knowledge of a Last Will and Testament for John Rockwood, born September 9, 1949, who died on June 28, 2023, of London, ON, please contact Michelle Lauber from Jeff Conway Law, email: [michelle@jeffconwaylaw.com](mailto:michelle@jeffconwaylaw.com), phone: 519-474-7500.

### Robert Gordon Ropchan

Anyone knowing of a Last Will and Testament for Robert Gordon Ropchan born July 21, 1948 and died June 24, 2023 in London Ontario please contact Janet Gibbons of Cohen Highley at 519 245 0110 email: [jgibbons@cohenhighley.com](mailto:jgibbons@cohenhighley.com)

### Dorothee Schaeubinger

Anyone knowing of a Last Will and Testament for Dorothee Schaeubinger, born February 9th, 1948 and died on or about November 5th, 2022, of London, Ontario, please contact Brandon Roach at 519-438-6077, email: [brandon@pvadamslaw.ca](mailto:brandon@pvadamslaw.ca).

### Maria Zurkan

Anyone having knowledge of a Last Will and Testament for Maria Zurkan, born March 22, 1943, who died on May 18, 2023, please contact Frederick A. Mueller at 519-673-1300 or email: [fred\\_mueller@rogers.com](mailto:fred_mueller@rogers.com).

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[jenniferh@sperolaw.ca](mailto:jenniferh@sperolaw.ca)

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[hilary.jenkins@mckenzielake.com](mailto:hilary.jenkins@mckenzielake.com)

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[jnicholson@cohenhighley.com](mailto:jnicholson@cohenhighley.com)

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[grsmith@london.ca](mailto:grsmith@london.ca)

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519-434-7669

[geoff@snowlawyers.ca](mailto:geoff@snowlawyers.ca)

**Anna Szczurko**

519-660-7784

[anna.szczurko@siskinds.com](mailto:anna.szczurko@siskinds.com)

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519-672-4131 x 6340

[gwillson@lerner.ca](mailto:gwillson@lerner.ca)

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