HCLA News

Newsletter of the Halton County Law Association

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Spring 2015

Justice Michael R. Gibson appointed to Superior Court

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Deadline for Next Issue: July 1, 2015

The Honourable Michael R. Gibson was appointed to the Superior Court in Milton on Friday, March 13, 2015. Justice Gibson was a military judge in Ottawa and was appointed to replace Justice John C. Murray who resigned effective December 31, 2014. Mr. Justice Gibson received a Bachelor of Laws from the University of Toronto in 1994 and a Master of Laws, Public International Law, from the London School of Economics and Political Science in 2007. He was admitted to the Ontario bar in 1996. Mr. Justice Gibson was appointed a military judge in 2013. Prior to that, he had been legal counsel with the Judge Advocate General (JAG) office in Ottawa since 2003. He was defence counsel, JAG Directorate of Defence Counsel Services in Hull (2000-02) and Deputy Judge Advocate at the Canadian Forces Base in Trenton (1996-2000). His main areas of practice were criminal prosecutions, immigration and real property, and international law. We welcome Mr. Justice Gibson to Milton!

In other judicial news, The Honourable Francine E. Van Melle, Regional Senior Judge of the Central West Region, Ontario Superior Court of Justice, is transferred back to the regular judicial complement (Brampton) to replace Mr. Justice Peter Daley, who has been appointed Regional Senior Judge. Madam Justice Van Melle was appointed a judge of the Ontario Superior Court of Justice in 2000 and Regional Senior Judge of the Central West Region in 2009. At the time of her appointment, she had been a sole practitioner since 1996 specializing in family law. Madam Justice Van Melle received a Bachelor of Laws in 1980 from McGill University and was admitted to the Ontario bar in 1982.

The Honourable Peter A. Daley a judge of the Ontario Superior Court of Justice in Brampton, is appointed Regional Senior Judge of the Central West Region, to replace Madam Justice Francine E. Van Melle. Mr. Justice Daley was appointed a judge of the Ontario Superior Court in 2007 and had been administrative judge of the Small Claims Court for the Central West Region (2008-2013). Prior to his appointment, he had been a partner with the firm Miller Thomson LLP in Toronto since 1993. Mr. Justice Daley received a Bachelor of Laws (Common Law Section) from the University of Ottawa in 1974. He was admitted to the Ontario bar in 1976 and was certified as a specialist in civil litigation by the Law Society of Upper Canada.

President's Report by Rachael Pulis

I am very excited about the challenges ahead for the next two years as I begin my term as Association President of the Halton County Law Association. I would like to acknowledge the hard work of my predecessor, Laura Oliver, who finished her term as President at the Association's Annual General Meeting on March 12, 2015 and will continue to serve on the board for two years as past President. Sadly, we bid a fond farewell from the Executive to Claire Wilkinson, who began on the HCLA board in March 1998 and has provided17 years of dedicated service to this organization. We will most certainly miss her great ideas and lively spirit at our monthly meetings! I would also like to extend a message of thanks to former board members Ann Stoner and Sally Chiarelli for their dedicated service.

Our current board of directors includes Inga Andriessen, Katherine Batycky, James Butson, Ryan Gibson, Ken Kelertas, Sam Misheal, Ken Mitchell, James Page, Harpreet Sidhu, Matthew Soble, Jennifer Stebbing, KC Wysynski and Laura Oliver (past President). They are a dedicated and hardworking group of individuals who will work hard on your behalf. If you have any questions or comments, please do not hesitate to reach out to me.

Our AGM/Awards and Judges' Night, held at the Harbour Banquet Centre in March was a great success, with 14 members of the judiciary in attendance. I would like to extend once again my sincere congratulations to Andy Snelius who received the Eric Swan Award for Civility and Paul Stunt, who received the Alan B. Sprague Award of Excellence. Pictures from the event can be found on page 16.

Thanks to Ian Hull and Suzana Popovic-Montag for chairing the Estates and Family Law Seminar on Friday, May 1st at the Oakville Golf Club. They planned a terrific educational program that included the former Chief Justice of Ontario, the Honourable R. Roy McMurtry, OC, O. Ont, QC, LSM as the lunch speaker.

I would like to thank the Honourable Mr. Justice George Czutrin and the Honourable Madam Justice Kendra Coats for their participation in our Family Law Rules Seminar, held on Tuesday, June 9th. This program was very well attended by members of the local family law bar.

I attended the CDLPA plenary in Thunder Bay on May 13-15, along with Vice-President, Sam Misheal. CDLPA (the County and District Law Presidents Association) has two meetings per year and the conference provides a great opportunity to network with other Law Association Presidents. The future of the law library system was the focus of discussions this year. We had a tour of the new Thunder Bay Court House and were able to come away with some great ideas from this model. I would like to take this opportunity to thank Ken Kelertas and Paul Stunt for their drive and determination in regards to highlighting the need for a new consolidated Court House in Halton and for moving this project forward. While it often feels like it is moving forward at a snail's pace, they have made great strides in raising awareness and keeping this a priority for the Ministry of Attorney General.
We recently held the Annual Charity Golf Tournament on Thursday, June 11 and had a record number of golfers. We were able to raise funds for The Darling Home for Kids, whose mission is to optimize the quality of the lives of children with life-limiting or life-threatening illness by providing respite services and paediatric hospice care in a home-like environment. Plan to join us next year on **Thursday, June 9th** at Hidden Lake Golf Club!

I wish you all a nice summer and hope you take time to relax and enjoy!

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Congratulations Mr. Justice Paul Sweeny

The Honourable Paul R. Sweeny, a lawyer with Evans Sweeny Bordin LLP in Hamilton, is appointed a judge of the Ontario Superior Court of Justice to replace Madam Justice C.A. Tucker (Welland), who resigned effective January 16, 2015.

Mr. Justice Sweeny received a Bachelor of Laws from the Osgoode Hall Law School in 1989 and was admitted to the Bar of Ontario in 1991. He had been a lawyer with the firm Evans Sweeny Bordin LLP since 2005 and with Evans - Lawyers - Advocates in Hamilton from 1991 to 2004. He practised corporate law, commercial law, civil litigation, and personal injury law.

Mr. Justice Sweeny had been a member of the Ontario Judicial Council since 2013. He is a past director of The Advocates' Society (2006-2009). He is a past member of the Halton County Law Association and is a past member and past president of the Hamilton Medical-Legal Association and of the Hamilton Law Association, Professional Issues Committee (2006-2007). He had been a director of Fanconi Canada Inc. since 2006 and Chair for the legal sector (Hamilton) of the United Way of Burlington and Greater Hamilton since 2005.

Mr. Justice Sweeny's swearing in ceremony was held in Welland on Monday, April 27th.

Congratulations Mr. Justice Sweeny!

Justice Trimble (left) and Justice Sweeny (right)

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Library News by Karen Kennett

Library Renovations

I am excited to see the start of the library renovations, which should begin shortly. It will be nice to offer our members a refreshed space for the law library and lawyers lounge, with many technological upgrades. As the last renovations were done in 1999, we're due! We appreciate your cooperation and patience during this time of disrupted service.

Divorcemate Forms

I am pleased to advised that effective immediately, we have upgraded our Divorcemate subscription to include the forms. Just a reminder that Divorcemate is available only on far right computer in the Lawyers Lounge.

New Books

van Kessel—The Law of Fraud in Canada
Power—The Law of Privacy
Estey—Legal Opinions in Commercial Transactions (3d ed.)
Swan—Canadian Contract Law 3d ed.
Meehan—Creditor's Remedies in Ontario 3d ed.
McGuinness—Law of Guarantee 3d ed.

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Estates News by Suzana Popovic Montag & Laura Betts

Estate Information Returns and the Use of Multiple Wills

In 2011, the Ontario Government made amendments to the *Estate Administration Tax Act, 1998* (the "**EAT Act**") which provided for expanded reporting requirements and enforcement powers. However, the accompanying regulation, which would be needed to support and implement the amendments to the EAT Act, was not introduced until late 2014.

As a result, there was much speculation amongst the wills and estates community as to what the regulation would look like and the effect it might have on estate planning techniques commonly used to minimize the amount of estate administration tax payable, such as the use of multiple wills.

The long-awaited Regulation has since been introduced and a review of its provisions does provide some guidance regarding the implications for both estate planning and estate administration.

The Estate Information Return

The 2011 amendments to the EAT Act introduced section 4.1(2), which imposed a duty to disclose information about the deceased to the Minister, but failed to specify the extent of the information disclosure required.

Section 3 of the Regulation has provided some clarity as to the nature of the information that must be disclosed, and the corresponding form that must be used for such disclosure, the "Estate Information Return" (the "EIR"). Specifically, section 3.1 provides a detailed list of the information that will need to be reported on the EIR, which includes information about the deceased person, the estate representative, the application for the certificate of appointment, and the estate assets. Importantly, not only must the estate trustee provide an estimate of what the estate is worth, but he or she must now also be prepared to provide documentation to substantiate that estimate.

The Ministry of Finance has published a Guide outlining the procedural and information disclosure requirements in greater detail, which can be found here.

Time for Filing the EIR

Pursuant to section 3(1) of the Regulation, the EIR must be filed no later than 90 days after an estate certificate is issued to the estate representative.

However, section 2 of the Regulation provides that the EIR is deemed to have been given to the Minister on the day on which it is received by the Minister, not the day on which it was mailed or dispatched by courier. For this reason, it is advisable to file an EIR in advance of the 90 day time limitation and in a way that provides confirmation of the time of receipt (e.g. by fax or registered mail).

Application of Penalty Provisions

The estate representative is required to certify that information provided in the EIR and in any supporting documents is true, correct and complete. A failure to provide accurate and honest disclosure can result in penalties including a fine of at least $1,000, imprison-ment for up to two years, or both.

The EIR and Multiple Wills

The use of multiple wills has become increasingly common over the past decade. This is due to the fact that, when correctly drafted, multiple wills can reduce the total probate fees payable and preserve privacy in relation to certain estate assets.

These benefits are obtained by dividing one's assets into two separate wills. The first or "primary will" contains assets that must be submitted for probate, while a "secondary will" contains only assets that do not require probate to be administered. As probate fees are calculated only on the value of the assets included in the will submitted for probate, by splitting one's assets into probated and non-probated wills, one can reduce the overall assets upon which probate fees are ultimately calculated.

Prior to the release of the Regulation, there was some concern amongst wills and estates practitioners that all assets, including the assets that were contained in the secondary, non-probated, will would have to be detailed in the EIR. Contrary to these speculative concerns, however, the Regulation does little to affect the Ontario practice surrounding the use of multiple wills as an estate planning tool. The EIR specifically provides that if the certificate of appoint-ment is limited to the assets referred to in the will, only assets included in that will are to be listed on the EIR.

Further, the EAT Act's definition of "value of the estate" refers to section 32 of the *Estates Act*, which provides that where an application or grant is limited to only part of the deceased's property, it is sufficient to set out only the value of property intended to be affected by the application or grant.

However, in order to ensure the full benefits of this estate planning technique, it is important to avoid the errors commonly seen in the drafting of multiple wills. We need to be careful when drafting revocation clauses in order to avoid inadvertently revoking the accompanying will, which can result in an intestacy. We also want to ensure that the assets included in the secondary will are not of the nature that they may require probate. If probate is required in relation to even one asset contained in the secondary will, the whole secondary will, and all assets contained therein, may need to be submitted for probate. Finally, it is important not to double up on specific bequests.

Additional Responsibilities for Estate Trustees

While the introduction of the Regulation has provided some guidance as to the obligations imposed upon estate planners and those administering estates, there remain many questions as to the full impact this Regulation will have and can only be revealed upon application of the provisions.

Anyone who has applied or will be applying for a Certificate of Appointment after January 1, 2015, should review the Guide published by the Ministry of Finance and sure they understand the changes and, in particular, the obligations for disclosure imposed by the EIR.

Family Law News by Darryl A. Willer

Variations and the Spousal Support Advisory Guidelines

The Ontario Court of Appeal in the decision of *Gray vs. Gray, 2014 CarswellOnt 13066 (ONT. C.A.)* has issued yet another ruling which clarifies the applicability of the *Spousal Support Advisory Guidelines* within the context of a spousal support variation proceeding.

As a result of this decision, it is clearly no longer appropriate for counsel or the Court to disregard or downplay the *Spousal Support Advisory Guidelines* in variation proceedings, and there is now a requirement to undertake a careful analysis in every case to determine whether applying the *Guidelines* is helpful and appropriate given the specific facts of the case.

In this case, the parties were married in 1980 and had four children together. They separated after approximately 15 years of marriage. At the time of the trial, the husband had remarried and was earning an income of approximately of $175,000.00 per year. By contrast, the wife had not worked outside the home, had significant health problems, and was earning approximately $33,500.00 per year from disability benefits.

The Divorce Order required spousal support payments in the amount of $800.00 per month, which was much less than needed by the wife, however the Court concluded that the child support and the needs of the children should take priority over spousal support at that point in time.

During the variation proceeding, the Court held that even though the child support Order should now be terminated, there should be no increase in spousal support and that spousal support should continue in the amount of $800.00 per month on an indexed basis as the wife's need had not increased.

In additional to finding the wife was entitled to increased spousal support on a needs and compensatory basis, the Court of Appeal noted that while the *Spousal Support Advisory Guidelines* are neither legislated nor binding, they are an important and helpful tool in assisting Courts to measure the quantum and duration of spousal support. Although the Judge hearing the variation referenced the *Spousal Support Advisory Guidelines*, there was no specific consideration or analysis using the *Guidelines* in arriving at the final quantum of spousal support.

Given the fact that the Court of Appeal concluded that the 1998 support Order was clearly lower than the amount that ought to have been paid (since priority was given to child support at the time) the Court held that the *Spousal Support Advisory Guidelines* should have been considered as they represent a critical tool in assessing ranges of spousal support and should be routinely consulted in variation proceedings.

Though not an exhaustive list, the most common cases where the Court should apply the *Spousal Support Advisory Guidelines*

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in a variation proceeding are post-separation increases in income, termination of child support payments and the financial implications of second families.

Continued from page

The bottom line is that the Court must undertake an analysis of the specific factual matrix in each case to determine whether the *Spousal Support Advisory Guidelines* are appropriate. This binding decision from the Ontario Court of Appeal should make clear that the previous argument that the *Spousal Support Advisory Guidelines* only apply to initial spousal support claims is no longer an accurate statement of law and that the facts of each case must be carefully considered to determine whether it is appropriate to apply the *Spousal Support Advisory Guidelines* in a variation proceeding.

Darryl A. Willer is partner at the law firm of Jaskot Family Law Barristers LLP in Burlington, Ontario and has been practicing exclusively in the area of family law since 2002.

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Expert Witnesses by Ryan Bensen

The *Moore v. Getahun* Appeals Edition
For those of you who tuned in to Ontario Court of Appeals (2015 ONCA 55) decision regarding the *Moore v. Getahun* (2014 ONSC 237) Superior Court decision presided by Justice Janet Wilson will know that it is now Open Season again, at least regarding the use of Draft Reports and discussion between Counsel and Experts… *Or is it?*

To recap the most significant points, Justice Wilson stated in her decision (my emphasis in bold):

"*The expert's primary duty is to the court. In light of this change in the role of the expert witness under the new rule, I conclude that counsel's practice of reviewing draft reports should stop. There should be full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections, suggestions, or clarifications,* ***to ensure transparency in the process and to ensure that the expert witness is neutral.****"*

The key here being to ensure that experts would remain neutral, should the oft-used procedure of reviewing Draft Reports and corresponding with Experts, be stopped.

In a case that held significant ramifications across the industry, the ONCA has primarily overturned Justice Wilson's decision, but has also recognized that Expert Bias does not only exist, but is a significant issue which has yet to be addressed. These implications extend beyond Civil & Tort Law, and are likely to extend into all other areas of the Law, especially in the Family Law Bar.

The Ontario Court of Appeals Decision
The decision, passed down by Justices Sharpe, Laskin, and Simmons, is interesting in that this really was a trial to appeal the procedural issues alone, as the chance of the ONCA ordering a re-trial was remote.

In their decision, the ONCA covers not only the use of Draft Reports, but also the rules regarding disclosure to opposing counsel.

The Use of Drafts
The ONCA has stated, in no uncertain terms, that the practice of reviewing draft reports by counsel is not only prudent, but advisable. The relevant excerpts read as follows:

"Leaving the expert witness entirely to his or her own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner.

"There would be an ***incentive to jettison*** *rather than edit and improve badly drafted reports, causing added cost and delay."*

Precluding consultation would also ***encourage the use of those expert witnesses*** *who make a career of testifying in court and* ***who are often perceived to be hired guns likely to offer partisan opinions****, as these expert witnesses may require less guidance and preparation."*

In addition, the Justices commented quite firmly regarding the role of effective cross-examination:

"…the adversarial process, particularly through ***cross-examination, provides an effective tool*** *to deal with cases where there is an air of reality to the suggestion that counsel improperly influenced an expert witness. Judges* ***have not shied away from rejecting*** *or limiting the weight to be given to the* ***evidence of an expert witness*** *where there is* ***evidence of a lack of independence or impartiality****".*

In summary, the Justices strongly endorse reviewing draft reports, and providing guidance to Experts to ensure that the Report follows the Rules of Civil Procedure, namely that it is unbiased, within the Expert's realm of expertise, and is relevant to the case facts.

That being said, they also strongly endorse the use of the adversarial process, cross-examination in particular, to challenge the evidence of expert witnesses where there may be a concern regarding independence or impartiality.

Documentation and Disclosure
The second procedural issue in the appeal was the appropriateness of Justice Wilson ordering the backup documentation and draft report of the Expert in question.

In cross, the Expert divulged that he had made edits to a draft report over ninety minute conversation with Defence Counsel. Justice Wilson challenged the appropriateness of this practice, and at the request of Plaintiff's Counsel, requested the draft report and further documentation to determine the extent to which (if any) counsel had impaired the independence and impartiality of the Expert Witness.

The decision primarily relies on the Supreme Court of Canada decision in *Blank v. Canada (2006 SCC 39)* which states:
"…the party seeking their disclosure ***may be granted access to them upon a prima facie showing of actionable misconduct by the other party*** *in relation to the proceedings with respect to which litigation privilege is claimed."*

The question posed to the ONCA in *Moore v. Getahun* however, was whether this ninety minute phone call constituted the *prima facie* evidence as referred to in *Blank,* and if this warrants a wholesale change in current practice where draft reports, file notes, and solicitor-expert communications are not routinely disclosed.

Does Communication Equal Actionable Misconduct?
As of the time of writing, there has been no precedent set in case law for what constitutes *prima facie* evidence of actionable misconduct, and where litigation privilege should be waved.

It has tended to be decided on an case by case basis, as opposed to defining a specific threshold test.

The decision recognizes that solicitor-expert communication is both common and necessary, especially under circumstances where said Expert may not be knowledgeable of the Rules of Civil Procedure, and their duty to the Court.

The decision reads as follows:
"Evidence of an hour and a half conference call plainly does not meet the threshold of constituting a factual foundation for an allegation of improper influence."

The ONCA decision does not set out to determine this threshold, and has chosen to leave this issue for future case law.

Where do we go from here?
In spite of the collective sigh of relief across the industry, the fact remains that Expert Bias remains a significant issue, and focus area to the Court. Justice Wilson's decision, albeit overturned, has successfully shone a bright light into the oft-forgotten dark corners of retaining an Expert, and the importance of cross-examination.

The buzz-word amongst the Expert Industry for bias is "aggressive", which is to say that the Expert in question is aggressively pursuing a result for their client, and pushing their opinion as close as possible to one end of the black/white spectrum. Aggressive Experts are not a new phenomenon – in fact, many have enjoyed very successful practices. However, given the focus on Bias in Expert Testimony, it appears as though the winds of change are beginning to gust.

The questions you want to ask of your Expert are simple, and will aid your advocacy for your client. These are:

Does this Expert have a reputation for aggressive reports? If so, why? Is their position defensible, or does it run a higher risk of being thrown out in Court?

Does this Expert have a balanced practice, or is it primarily Plaintiff/ Defence based? A balanced Expert can attract Defence and Plaintiff engagements, whereas an aggressive one will typically specialize in one industry.

Are there assumptions which your Expert makes that are up for debate? On a typical Expert Report, the data will be largely similar between Plaintiff and Defence, however, the Assumptions in the Report will be significantly different, and materially change the determination. With a better understanding of your Expert's assumptions, your ability to cross-examine the opposing Expert is significantly enhanced.

What about the opposing Expert? Repeat these same questions to gain better insight into the case that Counsel is presenting – If they have retained a Hired Gun, retaining an Expert with a balanced reputation may be the best route to a win in Mediation or Trial.

Summary
The Appeals decision represents a year of reflection over what was a well-intentioned, but ill-fated precedent set by Justice Wilson in the Superior Court. After a year of discussion and analysis, including input by various Legal and Expert Associations, the ONCA has largely reversed her decision, and encouraged the use cross-examination as a vehicle to mitigate Expert Bias.

By deciding on such a drastic precedent change, Justice Wilson had likely planned for some or all of these procedural changes to be overturned in the Ontario Court of Appeals. However, by introducing such a radical shift in practice, she successfully shocked the Legal and Expert Witness industries to attention by shining a bright light on the issue of Hired Guns and Expert Bias.

A year later, this decision and subsequent reversal serves as a warning to Lawyers and Experts alike – Judges are aware of bias, and should it continue to propagate unchecked by Counsel, they may not be so kind in the future. The importance of vetting, examining, and cross-examining has now been underlined, bolded, and italicized – Expert's beware, the Bar has been raised.

Ryan Bensen is a Partner of Bensen Industries Ltd., a boutique Litigation Accounting and Valuations Firm with clients throughout the Golden Horseshoe and Southern Ontario.

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Receiverships by Bart Sarsh

1. PICTURE THIS!

It's late. You've had a long day. You are sitting at your desk with your hand holding the left side of your cheek while glancing at your computer screen and come upon an unread email from your client with the terse message, "Where are we on enforcing that judgment?"

You look further and notice that the email was sent several days ago and that you should probably respond to your client with an update. You suddenly feel pressure akin to the downward force an airline passenger feels inside a descending plane.

With your newly discovered motivation, you pull the file and begin reviewing the various property searches, corporate searches, and judgment debtor examination transcripts. Then you are reminded why you set this file aside in the first place and delayed reporting to your client–the defendant debtors are effectively "creditor proof." It seems as though, through the paper records, the defendant debtors are taunting you: "Hey, lawyer! Catch us if you can."

Your client is waiting for an answer. What do you say in your reporting letter?

This article is designed to educate you about the court-appointed receiver as an enforcement tool. If the circumstances are "just and inconvenient", you will be able to respond to our mythical debtor defendants, "I can't catch you, but a receiver can."

This is a subject that occupies a relatively narrow and focused scope of debtor-creditor law. You might hear the phrase "equitable execution". But as Chuck Gastle and Brad Pleavin—the authors of a 2007 paper on this subject—said, "[i]t isn't 'execution' *per se* but involves the appointment of a receiver to overcome a technical impediment in the common law to seize a particular asset, or where 'special circumstances' exist making recovery effectively impossible".

Read that quote carefully enough and you will immediately see that Gastle & Pleavin identify two main categories of cases for the appointment of a receiver: (1) a common law technical impediment that prevents seizure; and (2) the existence of "special circumstances", which is a favorite in Black letter legal doctrine.

Before discussing these two categories, however, I discuss the procedural and statutory rules that define the jurisdiction for the appointment of a receiver.

The relevant provisions of the *Rules of Civil Procedure* are rules 60.02(1)(d), 60.11(5) insofar as the language "any other order that the court considers necessary" engages such jurisdiction, 41.02, and 41.03. Section 101 of the *Courts of Justice Act* is also a necessary provision.

There are practical and somewhat technical issues one needs to consider when drafting the material for the appointment of a receiver. These issues, which include the bringing of a motion as opposed to an application and preparing the draft Receivership Order, are beyond the scope of this article although some practical points that touch upon substantive grounds are explored later in this article in order to inform the reader.

2. CATEGORY 1 – COMMON LAW TECHNICAL IMPEDIMENTS PREVENTING SEIZURE

Cases under this category share a common theme–judgment creditors are unable to enforce on a judgment because of technicalities in the common law. Old examples that were decided prior to the "modern day" amendments to the *Rules of Civil Procedure* in the last 20 years include the following:

seizing the wages of an employee of the Crown;

seizing the debtor's share and interest in an estate under a will where executors have no discretion to decide if income should be paid to the debtor;

a debtor's reversionary interest in the proceeds of sale of realty;

a share of rents and profits of realty and leaseholds held on joint tenancy subject to mortgages;

interest in pure personalty subject to a mortgage;

income of a trust fund.

The existence of a common law technicality that thwarts enforcement of a judgment—which is a valid basis for the appointment of a receiver—must be distinguished from an outright statutory prohibition on enforcement. The latter does not confer the court with any jurisdiction to appoint a receiver because the prohibition is not a creature of the common law; rather, it is one of statute.

An example of a statutory prohibition on enforcement is pensions. In *Hooper v Hooper*, the Court of Appeal overturned a trial decision appointing the wife as receiver of her ex-husband's pension benefits with 50% of the pension benefits to be applied to the ex-husband's support obligation and the balance towards the equalization payment. The court stated that the order appointing the wife as receiver "is not an example of the court using its equitable jurisdiction to circumvent a common-law obstacle of its own making. Rather, that order would effect a result which, for clear policy reasons, the legislation prohibits." The same outcome was reached by the court in *Trick v Trick*, although *Trick* did not specifically involve the appointment of a receiver, but a request for a vesting order.

3. CATEGORY 2 – "SPECIAL CIRCUMSTANCES"

A good summary of the special circumstances doctrine as it relates to the appointment of a receiver is provided by Brown J. in *Weig v Weig*:

[18] Ontario jurisprudence recognizes that a receiver may be appointed to enforce an order for the payment of money or special circumstances exist which would render the normal methods of execution ineffective or impractical or where certain property of the debtor might not be exigible for execution. Gray J. in *Canadian Film Development Corp. v Perlmutter*

(1986), 53 OR (2d) 283 reviewed, at length, the historical origins of the appointment of equitable receivers or receivers in aid of execution. In his text, *Bennett on Receiverships, 3rd Edition* (Toronto, Carswell, 2011) at pp. 790 -791, Frank Bennett provided a nice summary of that history:

a creditor could only invoke the appointment of a receiver by way of equitable execution where there was a legal impediment in seizing the debtor's property or where the common -law remedy was likely to be ineffective. The appointment by way of equitable execution as a remedy assumes that all ordinary remedies to collect have been exhausted. Where the creditor could not seize the debtor's property through execution of law, garnishment or attachment, the creditor could apply for the appointment of the receiver to seize or intercept specific property.
…

In view of the expanded application of garnishment proceedings in the province of Ontario, the need for and the types of situations where a court may appoint a receiver to enforce an order for the payment of money after judgment have diminished.

Bennett, at p. 793, went on to note that under section 101 of the *Courts of Justice Act*, the court has the jurisdiction to grant broad powers the receiver given the circumstances of the case despite the earlier law that a receiver would be appointed to seize only a specific asset.

[19] Amongst the criteria which a judgment creditor must meet in order to secure the appointment of an equitable receiver, Bennett listed the following:

the debtor must own or have an interest in an asset which is not exigible at common-law. As a result of legislative changes over time, there are more assets that can be seized under a writ of seizure and sale. In Ontario, the scope for the appointment of receiver by way of equitable execution has been limited by such other legislation.
…

If the creditor could not enforce the judgment by legal execution or where legal execution was difficult, if not impossible, there might exist special circumstances. The creditor must show that there are special circumstances and that without an order appointing a receiver, it would be practically very difficult, if not impossible, to obtain any fruit of the judgment. However, it is doubtful that a court would appoint a receiver if the creditor were mearly inconvenienced in pursuing a legal remedies [*sic*].
As far as specific examples of cases that fall within the "special circumstances" category, the following are instructive:

contrived or elaborate business structures;

where large amounts of money are at stake that may not be realized without the appointment of a receiver;

the existence of foreign defendants who may remove assets and property from Ontario or Canada;

to enforce compliance with regulatory obligations imposed by various statutes that regulate the health profession and to enforce fines imposed by such regulatory statutes;

to enforce compliance with the sale of a commercial plaza in order to pay monies owing on an outstanding judgment where the judgment debtors are delaying the voluntary sale of the property and permitting waste on the commercial property to continue; and

where the garnishment process might involve difficult mechanics, will be expensive and be ineffective.

4. PRACTICAL ISSUES TO CONSIDER BEFORE DECIDING TO PROCEED WITH THE RECEIVERSHIP APPOINMENT

The following practical issues need to be evaluated in deciding whether to proceed with the receivership application:

Receivers cannot go on what is commonly referred to as a "fishing expedition". A receiver will not be appointed because there may possibly be something to receive; there must be evidence to indicate that it is probable that there is a valid claim that cannot be conveniently reached except through the appointment of a receiver;

specific assets must be identified insofar as possible and those assets must be located in Ontario;

the liability of the receiver to third parties during the course of the receivership should be carefully considered;

the facts should be carefully reviewed to verify that the impediment to enforcing a judgment does not fall within the category of "mere inconvenience of an available remedy" as that phrase was discussed by the court in *Sengmueller v Sengmueller*;

significant evidence of "special circumstances" – if moving for the appointment of the receiver under this category – will need to be adduced in order to justify the appointment of a receiver;

a party moving for the appointment of a receiver must show that some benefit will be gained by the appointment and that the benefit is enough to justify the making of an order. This necessitates a review by the court of:

1. the amount of the debt owed to the creditor;
2. the amount or amounts likely to be collected if a receiver is appointed;
3. the type of asset that cannot be seized through legal execution;
4. the nature of the debtor's interest; and
5. the probable cost that will be incurred in the appointment of the receiver.[18]

5. DOES THE CREDITOR WHO APPOINTED THE RECEIVER KEEP THE PROCEEDS TO THE EXCLUSION OF ALL OTHER CREDITORS? AND WHAT HAPPENS IF THE DEBTOR GOES BANKRUPT BEFORE THE RECEIVERSHIP IS COMPLETE?

The short answer to the first question is "No". Funds recovered under a court-appointed receivership will be for the benefit of all creditors subject to a priority claim in favour of the creditor who appointed the receiver for the costs of the receivership. Section 9 of the *Creditors' Relief Act, 2010* speaks to this:

9(1) This section applies if a judgment creditor obtains the appointment of a receiver by way of equitable execution of property of the creditor's debtor.

(2) The receiver shall pay into court all money received by virtue of the receivership.

(3) Subsection 9(2) applies except that the judgment creditor is entitled to be paid out of that money the costs of and incidental to the receivership order and the proceedings, in priority

to the claims of other creditors.
If the debtor makes an assignment in bankruptcy after the receiver is appointed by the court but before the receivership is completed (i.e., before the receiver is discharged by the court), then the proceeds vest in the trustee in bankruptcy. This was confirmed in *Scherer v Price Waterhouse*. Section 70(1) of the *Bankruptcy and Insolvency Act* is the statutory authority for this:

70. (1) Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, *except those that have been completely executed by payment to the creditor or the creditor's representative*, and except the rights of a secured creditor [emphasis added].

As confirmed by the words in s. 70(1) "except those that have been completely executed by payment to the creditor", the creditor who appointed the receiver would have priority if the proceeds were fully paid to the creditor before the debtor's assignment in bankruptcy.

6. IF YOU RUN, WE WILL CATCH YOU!

Returning to where we left off, it turns out that you have a fertile option through the appointment of a receiver to chase, on behalf of your client, those who might share one or more traits of Leonardo DiCaprio's character, Frank Abagnale Jr., in the 2002 film *Catch Me if You Can*. But only if you have the right set of facts will this tool assist your case.

On a more serious note, this remedy should be carefully screened with the assistance of experienced counsel as part of an overall litigation strategy in order to maximize efficiency and recovery while minimizing procedural impediments. Experience with this enforcement tool cannot be underestimated.

This writer and members of our firm's Insolvency and Commercial Litigation practice groups have experience with receiverships of this sort and the more common receiverships that are routinely deployed in the debtor-creditor context. You have options if you find yourself sitting in the same chair as our hypothetical lawyer introduced at the beginning of the article, wondering what to do and how to respond to the client about "enforcing *that* judgment".

Bart Sarsh is a lawyer at SimpsonWigle LAW LLP and a member of the Bankruptcy/Insolvency and Commercial Litigation Practice Group.

1. Chuck Gastle & Brad Preavin, "Equitable Execution: a Remedy for Donkeys and Rogues" Paper presented at the Ontario Bar Association's, Remedies Fast Forward. October 31, 2007 at p. 1 ("Castle & Preavin").

2. Castle & Preavin, *ibid* at 405.

3. (2002) 59 O.R. (3d) 787 (Ont. CA); see also KLA v. RCS [1997] AJ 1072; Gastle & Pleavin, ibid 7-8.

4. *Hooper, ibid* at para. 51.

5. [2006] OJ No 2737.

6. 2012 ONSC 7262 at paras 18-20 (Comm List). See also Gastle & Pleavin, supra note 1 at 9-13.

7. See, for example, *AG Can v. Rahey*, 36 CBR (NS) 280; *Canadian Film Development Corp vPerlmutter* (1986) 53 OR (2d) 283; *Weig, supra note* 6; *NEC Corporation v. Steinron International Electronics Ltd.* (1985) 67 BCLR 191.

8. *College of Optometrists (Ontario v. SHS Optical Ltd.* 2010 ONSC 5220 [*SHS Optical*].

9. *NEC Corporation v Steinron Interational Electronics Ltd.* (1985) 67 BCLR 191.

10. *SHS Optical*, supra note 8 as cited in *Weig, supra* note 6 at para. 20.

11. *Aly v Nader Halal Meat Inc et al*, 2013 ONSC 1313. This is an example of a case in which members of our Bankruptcy/ Insolvency and Commercial Litigation practice groups, including the writer, were successful in obtaining the appointment of a receiver for the sale of the commercial Plaza. The endorsement authorizing the appointment of a receiver is an unreported decision of Brown J. in court file number CV-13-10311-00CL, proceeding commenced in Toronto on the Commercial List.

12. *Bennett on Receiverships, 3rd Edition* (Toronto, Carswell, 2011) at pp. 800 as cited in *Weig v Weig*, *supra* note 6 at para. 20.

13. Gastle & Pleavin, *supra* note 1 at 5-6. *Strong v. Beal* (1922) 52 OLR 207.

Memorandum

To: Halton County Law Association

From: Regional Senior Justice Peter A. Daley

Date: March 20, 2015

Re*:** ***Masters – Central West Region

I am very pleased to advise that effective April 1, 2015, both Brampton and Milton will have a Master sitting four days each month on civil motions and/or pretrial conferences in each of these judicial centres.

Masters will not be sitting during the months of July and August.

Masters have jurisdiction to hear civil motions, other than in respect of family law proceedings, construction liens and bankruptcy matters.

Counsel may determine the Master's sitting schedule in each centre by referring to their schedules as posted in each courthouse.

Counsel are directed to ensure that all civil motions, within the jurisdiction of a Master are scheduled and returnable before a Master, rather than before a Judge sitting in motions court.

Notices of Motion must clearly indicate whether the motion is returnable before a Judge or Master.

Your cooperation in ensuring that motions are brought before the proper court will be expected and appreciated.

Thank you,

PAD/ac

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For the purposes of sorting which motions a Master may hear, the Notice to the Profession says that:

Masters have jurisdiction to hear civil motions, other than in respect of family law proceedings, construction liens and bankruptcy matters.

I will add to that any application to have someone declared a vexatious litigant as s.140 of the *Courts of Justice Act* reserves that decision to a judge of the Superior Court of Justice.

The Notice to the Profession indicates that the Notice of Motion MUST indicate whether it is a motion that may be heard by a Master.

The jurisdiction of a Master is set out at Rule 37.02:
37.02 (1) A judge has jurisdiction to hear any motion in a proceeding. R.R.O. 1990, Reg. 194, r. 37.02 (1).

Jurisdiction of a Master

(2) A master has jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge in respect of a motion, except a motion,

(a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;

(b) to set aside, vary or amend an order of a judge;

(c) to abridge or extend a time prescribed by an order that a master could not have made;

(d) for judgment on consent in favour of or against a party under disability;

(e) relating to the liberty of the subject;

(f) under section 4 or 5 of the Judicial Review Procedure Act; or

(g) in an appeal

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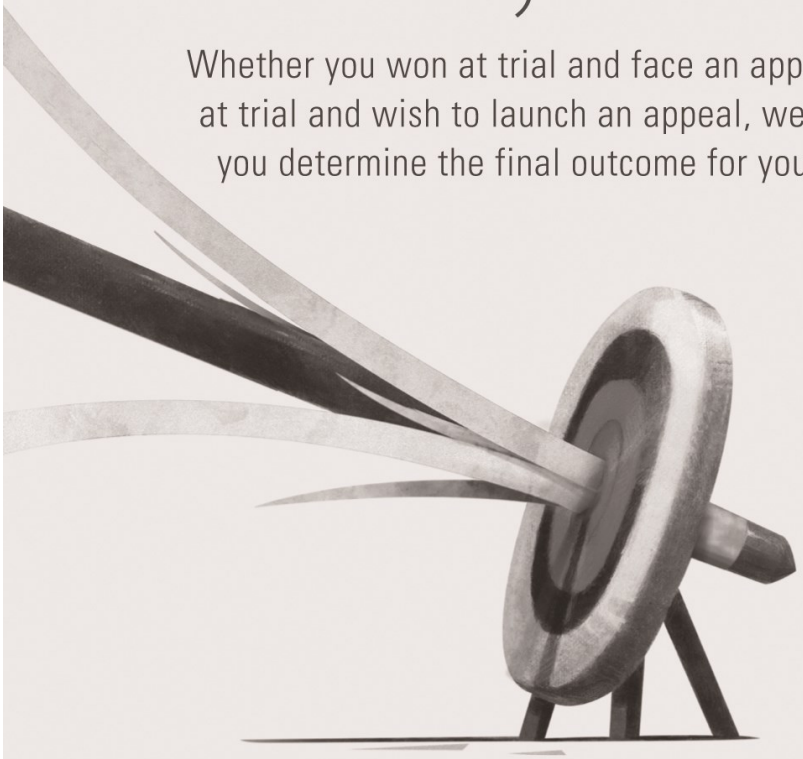
2015 MASTER'S SCHEDULE	***MASTER GRAHAM -BRAMPTON (current schedule and** extra days to be added)*	***MASTER MCAFEE - MILTON (current schedule and** extra days to be added)*
APRIL	**April 20, 21 & 22** add April 23	**Master McAfee – April 27, 28 & 29** add April 30
MAY	Add May 25, 26, 27, 28	Add May 25, 26, 27, 28
JUNE	**June 8, 9 & 10,** add June 11	**June 22, 23 & 24** add June 25
JULY	N/A	N/A
AUGUST	N/A	N/A
SEPTEMBER	**September 21, 22 & 23,** add September 24	**September 8, 9 & 10** add September 11
OCTOBER	Add October 19, 20, 21, 22	Add October 26, 27, 28, 29
NOVEMBER	**November 16, 17 & 18,** add November 19	Add November 23, 24, 25, 26
DECEMBER	Add December 7, 8, 9, 10	**December 14, 15, 16,** add December 17

- Commencing in April 2015 the circuiting schedule of the Masters in Brampton and Milton will be extended to 4 days, every month (previously 3 days every other month), except for July/August
- In addition to Simplified rules civil pre-trials, Masters will now also preside over ordinary civil pre-trials and short (***less than 2hrs)*** civil motions
- Will not preside over family motions/conferences, construction lien or bankruptcy matters
- Monday and Tuesday will be reserved for civil pre-trials only; Wed/Thurs schedule can be determined locally (either motions or pre-trials)
- Maximum 5 hour confirmed matters/day

Judges & Awards Night a great success!!

He who wins last, wins.

Whether you won at trial and face an appeal or lost at trial and wish to launch an appeal, we can help you determine the final outcome for your client.



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Looking for a Will
Anyone with knowledge of a will by the late Catherine Fillion dated later than July 15, 1974, or a codicil dated later than September 17, 1974, please contact the law office of Dingle, Charlebois, 411 Guelph Line, Burlington, ON L7R 3L7, telephone 905-634-5411.

People in the News

Katherine Batycky has joined Stoner & Company Family Law Associates and her new contact information is Katherine Batycky, Associate Lawyer, Stoner & Company Family Law Associates, 390 Brant Street, Suite 203, Burlington, Ontario L7R 4J4, Tel: (905) 632-8607, Fax: (905) 632-6141, Email: kbatycky@scfamilylaw.ca

Effective April 1, 2015, the law firm of Kyle & van der Steen LLP will be dissolved. W. Alex Kyle, Robert W. Wilson and Scott Mitchinson will continue to practice law together under the firm name of Kyle & Associates, Barristers and Solicitors at 416 North Service Road East, 3rd Floor, Oakville, Ontario L6H 5R2. New phone and fax numbers 905-845-5000 (tel); 905-845-5800 (fax), emails: wakyle@wakylelaw.com; rwilson@wakylelaw.com and smitchinson@wakylelaw.com. website: www.wakylelaw.com.

Ronald van der Steen will continue his practice at 102 Lakeshore Road East, Oakville, Ontario L6J 6N2. Email rvandersteen@oakvillelawyers.ca, telephone and fax remain the same.

After 40 years Gary Rich has decided to retire and is pleased to announce that Simpson Wigle LAW LLP has acquired the practice. Serena Lee will be responsible for future service to Gary's Clients and she can be reached at lees@simpsonwigle.com. We wish Gary all the best on his retirement!!