HCLA News

Newsletter of the Halton County Law Association

Volume 8 Issue 1

Winter 2017

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Deadline for Next Issue:
April 3, 2017

You are cordially invited to attend

The Halton County Law Association

Judges' Night

Thursday, March 2, 2017

Harbour Banquet Centre
Ontario Street, Oakville, Ontario

AGM 5:00 p.m.
Cocktails 6:00 p.m. Dinner 7:00 p.m.

$100.00 per person
Includes wine with dinner
(hst included)

RSVP :
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Halton County Law Association
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Milton, Ontario L9T 1Y7
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President's Report by Rachael Pulis

Dear Members,

After eight years on the executive board and the past two years as President of the HCLA, the time has come for me to leave. Let me begin by saying how privileged I feel to have had the opportunity to serve the HCLA and its members.

I was encouraged to join the board 8 years ago by my mentor and boss, Andy Snelius. I was new to the legal profession and to Halton. At the time I was unsure about this suggestion, but now I can confidently say it was great advice. Thank you Andy.

I remember going to my first meeting and being welcomed by everyone on the board at the time. I had no idea what CDLPA meant for the longest time and other such acronyms – truly mind boggling stuff. I also realized that the busy lawyers in Halton that devoted their time to the HCLA executive did so because they wanted to help our legal community grown and flourish.

My intention is not to turn my final president's report into an Oscar acceptance speech but I cannot leave without saying thank you to all of the great people I have worked with over the years. I also want to highlight some of the great work your executive members have done this past year.

Let's start with courthouse. No word on whether or not the fairy court godmother (aka our provincial government) will grant us funding for a new consolidated courthouse. Thank you to everyone who has committed time and effort to this project throughout the Halton community. However, a special thanks is owed to Paul Stunt and Ken Kelertas who have and continue to devote so much time and effort to this project.

However, in our infinite wisdom, the HCLA board (mainly our past president Laura Oliver) decided that if a new court house is not a possibility at the moment, a renovated library will do the trick. Special thanks to our library committee – Laura Oliver, Ann Stoner and K.C. Wysynski and to Karen Kennett for tackling this project and for the outstanding result.

The HCLA continues to host outstanding continuing legal education programs. The number of CLE events and attendance on these events has continued to grow over the years I have been on the board. I want to thank everyone that has participated in organizing and speaking at our CLE's (including our local judges who have been very supportive of these programs) and to all of our members for attending. If you have any ideas for topics for the CLE's or any suggestions, please contact Karen Kennett at info@haltoncountylaw.ca.

Thank you to our current board of directors Inga Andriessen, Katherine Batycky, Melissa Fedsin, Fay Hassaan, Katherine Henshell, Ken Kelertas, Sam Misheal, Laura Oliver, William Perras, Ann Stoner and K.C. Wysynski. It has been a pleasure to work with all of you. K.C. will not be returning to the board next year – we are sad to see you go and thank you for all of your help over the years.

Karen – thank you for keeping us organized and helping the HCLA executive machine run smoothly!

Almost done… I wish to bid a fond farewell to our past president extraordinaire Laura Oliver. Thank you for all of the time and effort you devoted to the board for the many years that you did so. Also thank you for being my sounding board and guide when I needed help.

Finally, I want to welcome our incoming president, Sam Misheal. I owe a huge amount of gratitude to this gentleman. For those of you that don't know, I was off from work for most of last year as I was on maternity leave. I continued in my role as president but with a great deal of assistance from Sam. Sam is dependable, bright and hard working – he's the person you want in your corner. Sam - I wish you the best in your term as president.

I guess this was an Oscar acceptance speech after all:)

Stay well!

Hamilton Lawyers' Show

"Witness for the Prosecution"

Theatre Aquarius, Hamilton
June 8th, 9th and 10th, 2017

Proceeds will support the theatre as well as the Lawyers' Legacy Fund for Children.

Tickets are $50.00 and are now on sale through the Theatre Aquarius box office at theatreaquarius.org

Library News by Karen Kennett

Library Renovation
If you have not stopped by the Library or Lawyers' Lounge recently, you will be in for a very pleasant surprise! At last, I am able to report that the renovations are complete and everything is looking lovely! Thanks to the dedicated Renovation Sub-Committee Laura Oliver, K.C. Wysynski and Ann Stoner, who were able persevere and stick with this project for over two years! We are looking forward to hosting HCLA CPD programs in our new, snazzy space.

COLAL Conference
In October 2016, I was able to attend the Annual Conference of the Ontario Law Association Librarians (COLAL) and am pleased to report on some of the excellent sessions that were held throughout the day and a half conference.

Derry Millar, Chair of the LibraryCo Transition Committee chaired an Update and Q & A session that provided a synopsis of the committee's work to date and provided an opportunity for library staff to share comments and concerns. He touched on the results of the survey that was sent to all LSUC members last August regarding the future of Law Libraries. While the data is still being analyzed, he had some positive results to share in regards to usage of the county law library system. Soles and small firms are the biggest user group of the libraries and 71% of survey results reported that the library staff was helpful and knowledgeable.

Jeff Morrison from LexisNexis Quicklaw gave a demo of the Advanced Quicklaw and advised that LibraryCo has signed a 3 year contract so it will continue to be available in our library and the International content has been reinstated.

Jeanette Bosschart, Head of Library Client Services at the Great Library, gave an excellent presentation on Legislative Research. Paul Leatherdale, an Archivist with the Law Society of Upper Canada provided an interesting overview of the Archives Department, which was formed in 1982 to preserve the heritage of the legal profession in Ontario, and outlined the type of donations they are interested in acquiring.

Other great sessions included Social media and Blogs in Law Association Libraries, Lean Six Sigma Initiatives, Simply Accounting, an Update on our benefits plan and a tour of the Great Library and visit to various departments.

Family Law News by Darryl Willer

Update on Costs in Family Law Cases

Over the past year judges at both the trial and appellate level have attempted to clarify and provide direction on the proper principles and framework for costs awards in family law cases.

Arguably the two most significant cases in the last year are *Berta v. Berta,* 2015 CarswellOnt 19550 and *Jackson v. Mayerle,* 2016 CarswellOnt 3329.

In *Berta v. Berta*, the Ontario Court of Appeal set aside an award of full recovery costs after a lengthy and complex trial. Although the award of full recovery costs was set aside based on a misapprehension of the evidence, the most important statement in this case comes in the form of a reaffirmation of the principle that although a successful party in a family law case is presumptively entitled to costs, the award of costs is always subject to the factors enumerated in *Family Law Rules* 24 and 18. Failure to consider all of the various factors is a reversible error.

This reaffirmation of principle stands in contrast to a trend in many recent cases to award costs approaching full recovery where a party is successful, even in the absence of bad faith or even unreasonable conduct.

In *Jackson v. Mayerle*, the issue of costs in family law cases was comprehensively reviewed by Justice Pazaratz and the meaning and interplay of all of the provisions and terms in *Family Law Rules* 24 and 18 are discussed in detail. The case is especially helpful as it explains and defines important terms such as success in litigation, reasonable or reasonable conduct, bad faith and proportionality.

The case confirms that the starting point in any costs analysis is the presumption that a successful party is entitled to costs. Where there is divided success, a Court may apportion costs. Absent exceptional circumstances, costs should be decided promptly at each stage of the proceeding. In determining the success of a party, the Court will take into account how the Order or eventual result compares to any settlement offers that were made. Absent applicable settlement proposals, the Court will consider the issues involved, time consumed on the issues and which party was predominately successful on the important time-consuming issues. A successful party who behaved unreasonably may be deprived of all or part of their costs, or ordered to pay all or part of the unsuccessful party's costs. The presumption of full recovery costs is triggered either by obtaining an Order that is as favourable or more favourable than all of the terms of an Offer to Settle, or by a finding of bad faith by the Court. Even if these provisions are satisfied, the Court must ensure cost awards are proportional, fair and reasonable in the circumstances. The Court also has discretion to consider the limited financial circumstances of a party when determining the quantum of costs, and in particular, the impact of a costs award on a party's ability to provide for a child.

Both *Berta* and *Jackson* demonstrate that costs in family law cases are complex and that effective representation requires thoughtful analysis and argument. These cases provide a detailed and principled analytical roadmap for any lawyer arguing costs regardless of whether they represent a successful or unsuccessful party in a case.

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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Estates News by Suzana Popovic-Montag and Umair Abdul Qadir

Jointly-Owned Real Property and Bankrupt Estates

Re Cameron Estate
Is jointly owned real property which otherwise would appear to pass to the surviving joint-owner by right of survivorship available to satisfy the debts of the deceased joint-owner should their estate later be found to be bankrupt or insolvent?

In *Re Cameron Estate*[i], the Ontario Superior Court of Justice was asked to consider whether a matrimonial home which passed to the surviving spouse by right of survivorship could be clawed back into a bankrupt estate to satisfy the debts of the deceased spouse. In *Cameron Estate*, subsequent to the deceased spouse's death, it was discovered that there were insufficient assets in the estate to pay all liabilities, and the estate was pushed into bankruptcy.

The most significant asset which the deceased owned during his lifetime was his matrimonial home, which he owned as joint-tenants with his wife. At the time of his death, the deceased owed approximately $56,000.00 to a bank in association with a line of credit. As there were now insufficient assets in the estate to pay such a debt in full, the bank took the position that the matrimonial home passing to the surviving spouse by right of survivorship was a "transfer undervalue" in accordance with section 96 of the *Bankruptcy and Insolvency Act*[ii], such that the matrimonial home should be available to be clawed back into the bankrupt estate to pay for the deceased's debts.

In rejecting the bank's argument, Madam Justice Mesbur looked to the law surrounding joint-tenancy, providing the following commentary:

> *"When one joint tenant dies**, its interest in the property is extinguished, and the rights of the remaining joint tenant or tenants are correspondingly enlarged**. The enlarged interest immediately vests in the remaining joint tenant or tenants. As the court put in White, Re, at paragraph 8, '**The characteristic of an estate in joint tenancy is that the joint tenants have the same interests… and upon the death of one of the joint tenants the entire estate remains in the survivor in whom the whole estate immediately vests'**."* [iii]
> [emphasis added]

> *"I therefore cannot see that the automatic vesting by right of survivorship is a 'transfer' as contemplated by section 96 of the BIA…"* [iv][emphasis added]

As summarized by Madam Justice Mesbur, there is no "transfer" when a property is transferred on joint-tenancy by right of survivorship, but rather the deceased joint-owner's interest in the property is "extinguished", with the effect of the surviving joint-owner now owning the whole. As there is no "transfer", there could be no "transfer undervalue", and thus section 96 of the *Bankruptcy and Insolvency Act* could not be invoked to claw the matrimonial home back into the estate.

As an alternative argument, the bank took the position that the matrimonial home was now held on a constructive trust by the surviving spouse for the benefit of the estate. In reviewing the jurisprudence, Madam Justice Mesbur notes that constructive trusts are imposed to prevent unjust enrichment, and that to impose a constructive trust the court must find that there has been an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment[v]. In rejecting that a constructive trust should be found to apply, Madam Justice Mesbur provides the following commentary:

> *"…**I am not persuaded the automatic vesting of title in a survivor enriches the survivor and deprives the estate**. I say this because the parties each acquired their inchoate rights of survivorship at the time the property was acquired, not at the date of death. It was part of what each had from the beginning. **There was mutual consideration passing between the spouses in the sense that each acquired the chance of acquiring the whole by way of survivorship, and each risked the fact that he or she might predecease the other, and thus lose his or her right to the whole…"*** [vi][emphasis added]

> *"…even if there were enrichment and deprivation, I echo the words of Herold J. in Harrison Estate v. Harrison in which he said that **even if automatic vesting of title by operation of law 'enriches the survivor and deprives the estate, it surely cannot be said that there is no juristic reason for it.'** He identified the juristic reason as what the law dealing with joint tenancy requires. I agree with his statement that '[i]t would lead to a preposterous and unfortunate result if every transfer by operation of law which occurs on the death of a joint tenant could set up a claim for a remedial constructive trust.' It the law itself provides for the right of survivorship,*

Continued on page 7

Mental Incapacity and family law proceedings – a recent case that informs by Katherine Batykcy

What happens if a party to a divorce or other family law proceeding is found to be mentally incapable? What does it mean to be mentally incapable with regard to a court proceeding? What has to be proven for someone to be declared mentally incapable?

These issues were the focus in the recent decision of Mr. Justice Price in the case of *Costantino v. Costantino (2016) ONSC 7279*.

The reported decision was a Motion by the husband's lawyer to be removed as his solicitor in the proceeding. In this motion, the court had to decide whether the husband was capable of representing himself, or incapable of making the decisions necessary for the divorce proceeding and thereby appoint a Litigation Guardian forhim.

The husband in this case was a diagnosed paranoid schizophrenic who had from time to time refused to take his prescribed medication. At the beginning of the case, he was represented by a lawyer. However, as the divorce application proceeded, the husband was hospitalized and his lawyer commenced a Motion seeking (1) an Order removing him as lawyer for the husband; (2) to have the husband declared a "special party", under Rule 4 of the *Family Law rules*, and (3) for the appointment of the Public Guardian and Trustee to act as the husband's Litigation Guardian. The lawyer informed the court that he had some concerns about his client's capacity to give instructions, and felt unable to make his own assessment as the husband refused to release his medical records.

In this reported decision, Mr. Justice Price provides a comprehensive review of the current law as to whether a person is deemed "incapable" for the purposes of the litigation such that a Litigation Guardian needs to be appointed.

Generally speaking, if a litigant lacks mental capacity, the court may designate him a "special party", and appoint the Public Guardian and Trustee to act as his or her representative, if there is no appropriate person willing to act as the special party's representative that official consents to take on the retainer.

As the court pointed out the legal framework includes Rule 4 of the *Family Law Rules* which authorizes the court to appoint legal representation for a person who is a "special party. Rule 2(1) provides the definition of "special party" as *a "*party who is a child or who is or appears to be mentally incapable for the purposes of the Substitute Decisions Act, 1992, in respect of an issue in the case and who, as a result, requires legal representation, but does not include a child in a custody, access, child protection or child support case."

With regard to the definition of "mentally incapable", the court pointed out that the *Substitute Decisions Act, 1992*, states that a person over the age of eighteen is presumed to be mentally capable of entering into a contract.

Thus, a person who appears to be mentally incapable of understanding the consequences of decisions made within the litigation including whether to accept or proffer an Offer to Settle may fall within the definition of a "special party" for whom a litigation guardian is to be appointed.

Justice Price outlined from the case law and authorities he reviewed extensively (as set out in the footnotes to his decision) that the onus of proof on the issue of appointing a litigation guardian due to mental incapacity is on the moving party to prove on a balance of probabilities that the party is mentally incapable with respect to an issue in the case and as a result, under Rule 4, requires a litigation guardian to be appointed by the Court. The cause of incapacity must stem from a source of mental incapacity, such as mental illness, dementia, developmental delay, or physical injury, and not from a reason such as lack of sophistication, education, or cultural differences. In addition, this incapacity must affect the litigant's decision-making in relation to the issues in the litigation. In other words*,* the evidence used in support of such motion must establish that the party is unable to understand and appreciate relevant information or the reasonably foreseeable consequences of a decision, (or lack of decision) in respect of the issues in the proceeding*,* and not simply that they fail to do so. Finally, although the evidence required is medical evidence, the court noted that there have been circumstances in previous cases where other evidence was accepted, such as evidence from persons who know the litigant well, the appearance and demeanour of the person including the testimony from the litigant as well as the opinion of litigant's own counsel (if there is one).

In this specific case, Mr. Justice Price finds that the husband suffers from paranoid schizophrenia which has over the course of the court proceeding interfered significantly with his ability to make necessary decisions within the proceedings and further that the husband is unable to appreciate the reasonably foreseeable consequences of decisions or a lack of decision in respect of issues within the proceeding. The husband is found to be incapable of instructing counsel or making the decision

continued on page 7

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within the court proceedings as he had demonstrated an inability to know or understand the minimum choices or decisions required within this specific case, showed a lack of appreciation of the consequences and effects of his choices or decision, including whether or not to respond to an offer to Settle, and he refused or was unable to provide necessary instructions to his lawyer. Mr. Justice Price allows the lawyer to be removed as Counsel for the husband and, as there is no other person willing and able to act as the husband's litigation guardian, the Public Guardian and Trustee (who had provided consent to do so) is appointed.

This case is a good review of the law regarding the appointment of a litigation guardian in family proceedings, and should be considered by any counsel who may face such issue.

continued from page 5

> *then surely that is the juristic reason for it."* [vii] [emphasis added]

Re Cameron Estate is clear that, absent extraordinary circumstances, jointly-held real property which passes to a surviving joint-owner by right of survivorship is not available to satisfy the debts of the deceased joint-owner should their estate later be pushed into bankruptcy. Presuming that the debt itself is not registered against the property, the property passes to the surviving joint-owner upon death free and clear of the deceased joint-owner's debts.

Resulting Trust

Although the issue is not addressed in *Re Cameron Estate*, the question remains of whether a creditor in a similar situation could have taken the position that the property was held by the surviving spouse on a resulting trust for the benefit of the deceased spouse's estate. While section 14 of the *Family Law Act* [viii] provides that there is a presumption that property that is held jointly between married spouses passes to the surviving spouse by right of survivorship, it is a rebuttable presumption. If there is evidence which shows that it was the deceased spouse's intention that the property not pass by right of survivorship, the presumption can be rebutted, and the court may conclude that the property is held by the surviving spouse on a resulting trust for the benefit of the deceased spouse's estate. When the joint-owners were not married spouses, the rebuttable presumption from *Pecore v. Pecore* [ix] that the joint-asset is held on a resulting trust for the benefit of the estate could similarly apply.

i Re Cameron Estate, 2011 ONSC 6471

ii Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

iii Re Cameron Estate, 2011 ONSC 6471, at para. 25

iv Re Cameron Estate, 2011 ONSC 6471, at para. 35

v Re Cameron Estate, 2011 ONSC 6471, at para. 44

vi Re Cameron Estate, 2011 ONSC 6471, at para. 47

vii Re Cameron Estate, 2011 ONSC 6471, at para. 49

viii Family Law Act, R.S.O. 1990, c. F.3, as amended

ix Pecore v. Pecore, 2007 SCC 17

On-line Use of Trademarks by Ryan Smith

A lot of trade-mark law revolves around the geographic area where the trade-mark is known. Centuries old legal tests (like passing off still used today) try and figure out whether two trade-marks can co-exist in the same geographic area when one of the parties thinks the trade-marks are confusing with one another. This basic analysis has had to adapt to the online use of trade-marks.

Below we'll look at the impact of using trade-marks in different ways in the online environment, in particular, in social media accounts/websites, as metatags, and in keyword advertising.

1. Social Media Accounts

Many businesses are quick to secure social media accounts once they've decided on a new brand for their product or service. Social media services such as Twitter, Instagram, and Facebook, are accessible in most countries in the world. That means that consumers, wherever they're located, can at least be exposed to your product and service offerings. The great advantage of giving your business an online presence is that it puts you in touch with a massive audience in multiple countries. The legal effect however is that if you are offering goods or services to anyone in a particular place, then you are using your trade-mark in that place.

Before adopting for use or using a trade-mark in a new marketplace it is worthwhile to conduct a search and find out whether the trade-mark may be adopted in the new marketplace without infringing on anyone else's rights. This level of due diligence is quite common for international expansion.

When registering a social media account, businesses rarely perform a search in all the countries where the account may be accessible. In fact they rarely perform a search in the main country where they intend to use the account. As a result, simply by registering the social media account, an argument can be made that they are using their trade-mark in any of the countries where the social media account is viewable.

Many companies including Canadian ones have been sued in the U.S. when they adopted a trade-mark and began using it on the internet or social media accounts. U.S. companies with registered trade-marks in the U.S. alleged trade-mark infringement because the accounts registered by Canadians were viewable in the U.S. Whether a Canadian company in such a situation would be guilty often depends on the facts surrounding their use of the trade-mark online. Here are some key tips you should employ if you

Halton County Law Association

Annual Charity Golf Tournament

Wednesday, June 14th

Crosswinds Golf Club

6621 Guelph Line, Burlington

In support of Home Suite Hope

Home Suite Hope is on a mission to help low income single-parent families go from crisis to stability, by breaking the cycle of poverty. We are a homelessness prevention program that:

- Provides innovative affordable accommodation
- Offers options to achieve individual potential
- Creates shared community, and inspires hope

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wish to bolster your case that your use of your trade-mark only applies to Canada:

(i) Do not accept any orders from or conduct e-commerce with anyone from outside of Canada;

(ii) Note on your social media account and website that you only provide goods and services to those based in Canada;

(iii) State that your website and social media account are intended only for Canadian-based consumers and businesses;

(iv) List Canadian addresses and telephone numbers, and do not provide any information in the contact section for those people based outside of Canada, for example by providing international calling code numbers; and

(v) Do no solicit for advertisers or money from companies doing no business in Canada.

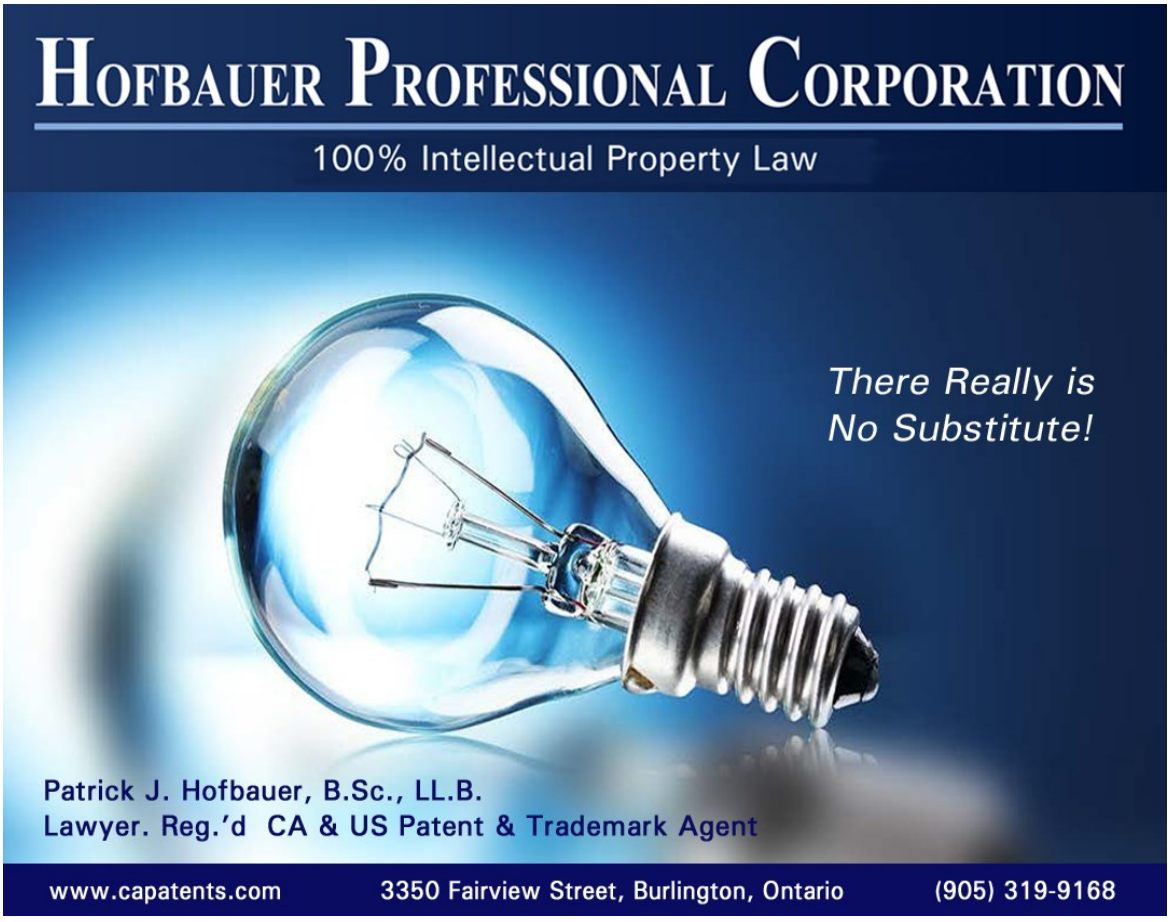
2. Use of Metatags

A metatag is a word or phrase embedded into a website that is supposed to describe the webpage or its contents. Search engines automatically make a record of what metatags are associated with a website. As a result when someone uses a search engine to search for those terms that are the same or similar to those metatags, the search engine displays in the search results those websites having the same or similar metatags. The owner of the website designates what metatags are associated with its website. The metatags are not typically visible on a website.

In a recent court case involving *Red Label Vacations v. 411 Travel Buys Limited*, 411 inserted into metatags on its websites the trade-marks of its competitor Red Label, namely, "redtag.ca", "redtag.ca vacations", and "Shop. Compare. Payless!! Guaranteed." As a result Red Label sued 411 for passing off and trade-mark infringement among other matters. Passing off means where one party directs attention to its goods, services, or business in a way that causes confusion with another party's goods, services, or business.

In the decision, the judge ruled that the use of a competitor's metatags in your own website does not constitute passing off because when looking at the search results the consumer is still free to choose and purchase the goods or services from the website he initially searched for. That said, the court did leave open the door to finding that in some instances the use of a competitor's trade-marks in your website's metatags would constitute passing off.

In the U.S., some courts have held that the use of metatags as 411 did can cause "initial interest confusion", where



confusion is caused in the customer before actually purchasing a good or service. This confusion arises when the customer seeks a particular brand of goods or services, but is drawn or enticed to a competitor's goods or services through the competitor's use of the first company's trade name or trademark. The Canadian court said that this approach is not used in Canada when assessing confusion.

3. Purchase of Search Engine Keyword Advertising

For certain search engines such as Google, parties are able to purchase certain key words or phrases to associate with their website. When someone searches for the keywords using the search engine from whom you bought the keywords, because you own those keywords, your website will be displayed in some prominent fashion, for example as a sponsored link, in the search results.

In *Vancouver Community College v. Vancouver Career College*, Vancouver Community College claimed that it has gained a reputation in the words VCC. Vancouver Career College purchased the acronym VCC from Google as keyword advertising with the effect that anytime someone searched for VCC on Google they would be shown the website link for Vancouver Career College. Vancouver Community College sued the other party for passing off.

The court found no passing off. In its ruling, the court said passing off did not exist because the only thing the purchase of the keywords would cause is perhaps a more prominent place for the subject website in the search results. When the search results are displayed, the searcher can choose whichever link he wants to follow. The searcher is not compelled to go to any website irrespective of whether a party has purchased certain keywords. The court could not conclude that the defendant caused confusion by taking advantage of keyword advertising via Google, even if those keywords contained a term associated with the defendant's competitor.

Ryan K. Smith is a Lawyer and Trade-mark Agent at Feltmate Delibato Heagle LLP. You can reach Mr. Smith at (905) 287-2215 and rsmith@fdhlawyers.com. *This article represents general information only and does not constitute legal or other professional advice or an opinion of any kind.*

Personal Injury News by M. Claire Wilkinson

What constitutes a contingency fee agreement?

Now more than ever lawyers must pay particular attention to the retainer agreements that they are having clients sign.

The case of Kee Kwok v. State Farm Mutual, (2016 ONSC 7339) has given lawyers a great deal of guidance as to which retainer agreements will be considered to be true contingency fee agreements.

Mr. Kwok , age 75,was struck by a motor vehicle while crossing the street. His injuries were deemed to be "catastrophic" by his automobile insurance company, State Farm, resulting in access to increased accident benefits coverage and payments. Ten years later, his lawyers settled his accident benefits file with State Farm on a lump sum basis. Mr. Kwok suffered a brain injury in the collision, and his cognitive difficulties resulted in him being considered a person under disability under the *Rules.* As a result, an application had to be brought to the Superior Court of Justice to approve his accident benefits settlement, including the amount that Mr. Kwok was paying out of his settlement for legal fees.

The judge considering the application detailed the amounts being proposed for the settlement, and concluded that "the proposed settlement represents a fair and appropriate resolution of the plaintiff's claims for SABS having regard to the complete factual matrix of this case".

Mr. Kwok's lawyers sought payment of $40 680.00 inclusive of HST **plus** $10 000.00 for partial indemnity costs inclusive of HST, plus assessable disbursements of$ 3000.00.

Justice Firestone noted that section 28.1(8) of the Solicitors Act states that, if proceeding under a contingency fee agreement, any award of costs or costs obtained as part of a settlement is **not** payable to the solicitor unless the solicitor and client jointly apply to a judge for approval because of exceptional circumstances.

As plaintiff's counsel was requesting he be paid a portion of the settlement obtained, **plus** $10 000.00 in

"costs", Justice Firestone was required to determine if the retainer agrement was a true contingency fee agreement, which would ordinarily preclude the lawyer from being paid any portion of the costs awarded.

Justice Firestone noted that section 2.3(i) of Ontario Regulation 195/04 pertaining to the Solicitors Act specifically provides that a written contigency fee agreement must contain a provision "that the client and the solicitor have discussed options for retaining the solicitor *other than by way of a contingency fee agreement,* including retainer the solicitor by way of an hourly rate retainer" (emphasis added).

Justice Firestone noted that if the retainer was intended to be a contingency fee agreement, there must be strict compliance with the requirements of both the Solicitors Act and the regulation regarding the form and content of the agreement. Notably, Justice Firestone also stated:

> If the agreement is non-compliant, it may, depending on the deficiency, be deemed unenforceable. This does not necessarily mean that the solicitor is disentiteld to any fees for services provided. The quantum of any fees owing can be based and assessed on a quantum merit basis.

Justice Firestone noted that section 15 of the Solicitors Act provides that a "contingency fee agremeent" means an agreement referred to section 28.1 of the Solicitors Act, and that section 28.1(2) defines the term "contingency fee agreement" for the purposes of the Act as an agreement that provides that:

> the remuneration paid to the solicitor for legal services provided to or on behalf of the client is contingent, in whole or in part, on the successful disposition of completion of the matter in respect of which services are provided.

Justice Firestone distinguished the retainer agreement that Mr. Kwok had with his lawyer from a contingency fee agreement as defined in the Act. He indicated that Mr. Kwok's agreement was NOT a contingency fee agreement. Justice Firestone noted that the agreement set out the amount and manner of payment on a fee for service basis, and that whether remuneration is to be paid for legal fees was NOT contingent in whole or in part on the successful dispotion or completion of the matter, although the agreement did indicate that an account would be rendered at the conclusion of the case.

With respect to the payment of costs, Justice Firestone commented that the agreement in question anticipated a fee range in percentage terms for the benefit of the client, and that the agreement provided an explanation of party and party costs payable by the defendant upon settlement or judgment, and that such

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party and party costs would defray a portion of the total legal bill. Significantly, the agreement also provided that the account rendered by the lawyer at the end of the case would be in excess of costs recovered in the litigation.

Having concluded that the retainer agreement in question was **not** a contingency fee agreement, Justice Firestone next went on to discuss the reasonableness of the proposed legal fees to be charged given a variety of factors, considering a number of factors including the time expended by the solicitor, the legal complexity of the matter, the monetary value of the matters in issue, the degree of skill and competence demonstrated by the solicitor, the degree of responsibility assumed by the solicitor, the importance of the matters to the client, the results achieved, the ability of the client to pay, the client's expectation of the amount of the fee, the financial risk assumed by the solicitor including the risk of non payment, and the social objective of providing access to justice for injured parties.

Ultimately, Justice Firestone concluded that the settlement was in the best interests of Mr. Kwok, and that the legal fees his lawyer was seeking to charge were reasonable based upon all the factors indicated above. Further, Justice Firestone found that it was acceptable for Mr. Kwok's lawyer to charge him for the "costs" award in the settlement in addition to his fee, because the agreement between Mr. Kwok and his lawyer was not a contingency fee agreement, and, therefore, the restriction against this sort of arrangement found in section 28.1(8) of the Solicitor's Act did not apply.

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Some personal injury lawyers have raised concerns that section 28.1(8) creates an access to justice issue, as requiring all costs to be paid to the litigants creates a disincentive for lawyers to get involved in modest but meritorious claims on a contingent basis if the claim carries the risk of trial, or will require a great deal of time and effort to pursue. With no ability to at minimum keep the costs award as payment, lawyers may not be confident that there will be sufficient funds at the conclusion of a settlement or trial to at least cover their time on the file.

Alternative retainer arrangements such as the one in place between Mr. Kwok and his lawyers are one option that may help personal injury lawyers deal with this dilemma.

Another solution might be found in Section 20.1 (3) of the Solicitor's act, which, together with s. 20.1(2), appears to permit a lawyer to enter into an agreement with a client that would allow the lawyer to recover a costs award *instead of* the contingency fee that would otherwise be payable under the agreement. Such a provision would at least give *some* incentive to a lawyer to pursue a case through a complex trial, even if the damages were not large, since the lawyer could at minimum hope to recover his or her partial -indemnity costs.

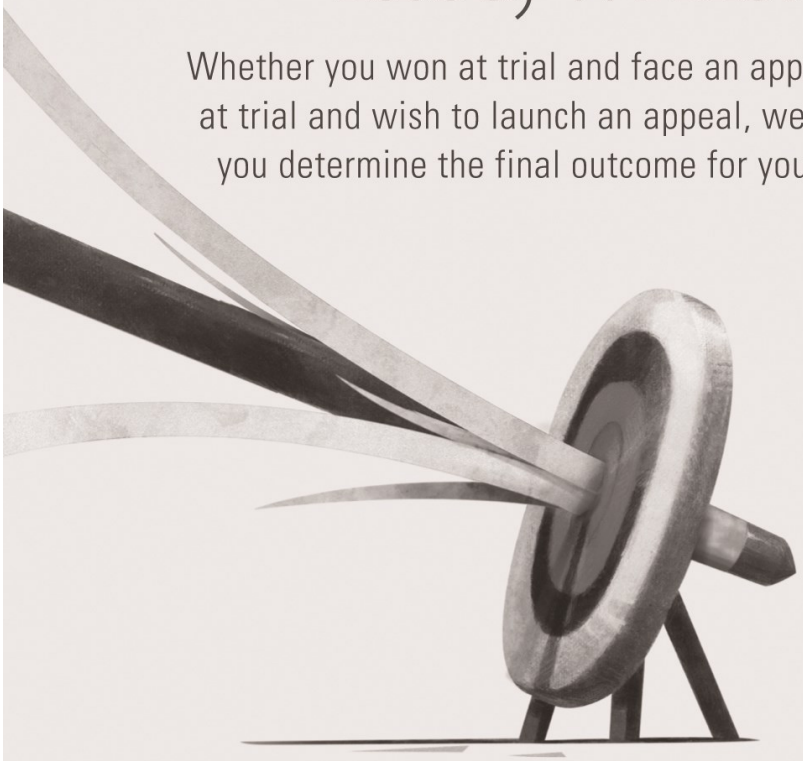
However, there has been minimal judicial treatment of this section of the Act to date, and it is not entirely clear how the section fits into the broader scheme of the Act and its regulations – of particular concern is section 7 of the Contingency Fee Regulation which prohibits a lawyer from recovering more in fees than a client recovers in damages if proceeding under a contingency fee retainer. It has yet to be decided whether an agreement that included a provision allowing the lawyer to take only the costs in accordance with s. 20.1(3) would be enforceable if it resulted in the lawyer recovering more than the client recovered in damages.

Given the current uncertainty in the law, when entering into a retainer agreement with a client, it is important to look at the specific issues in the case to determine if a contingency fee agreement or a non contingency fee agreement will work better for you and your client.

In the world of retainer agreements, one size does not fit all.

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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