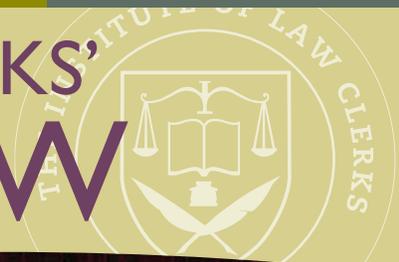




The Institute
of Law Clerks
of Ontario

LAW CLERKS, REVIEW



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From left: Claudia Tsui (David Boakes Award for Excellence in Estates), Zadiha Iqbal (Co-Chair, Education Committee), Angela Rudd (Victor Award for Excellence in Corporate), Anna Bernecka (Honours Certificate), Finuzza Baracuhy (Balfour Award Excellence in Real Estate and Honours Certificate), Evelyn Thompson (ILCO Fellowship Award for Excellence – Estates), Valerie Lafleur (James Bristow Award Excellence in Litigation), Joyce Marsden-Oliver (Honours Certificate) and Rupri Ahuja (Co-Chair, Education Committee). Absent: Amanda Hope (ILCO Fellowship Award for Excellence – Estates).

ILCO EDUCATION AWARDS

On Saturday, February 6, 2016, the Institute of Law Clerks of Ontario, in conjunction with its Education Committee hosted its annual Education Awards Ceremony at the glamorous Ritz Carleton Hotel in Toronto.

The ceremony recognizes and acknowledges students who are members of ILCO who have achieved (a) the highest mark in each of the Associate and Fellowship courses, or (b) an honours standing (80%) or higher on each of the four provincial examinations, which include Litigation, Corporate, Real Estate and Estates.

The ceremony was attended by award recipients, their family and friends and ILCO college instructors who shared personal thank-you's and acknowledgements of what these awards meant to them. Zadiha Iqbal

Co-Chair Education Committee was the MC for the day and Jim Sweetlove, was the keynote speaker

who shared his affiliation with ILCO, sharing the value of Law Clerks and gave some valuable tips for what's next to the dedicated students as they embark on their journey in the Law Clerk field.

Following the awards ceremony, award recipients and their guests were treated to a delicious lunch sponsored by Cartel, Inc., a legal recruiter and Emond Montgomery Publishing, a leading supplier of resources.

On behalf of ILCO, the Education Committee, we congratulate the 2015-2016 award recipients and wish them the very best of success as they embark in their future endeavours.

Zadiha Iqbal and Rupri Ahuja
Co-chairs Education Committee





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PRESIDENT'S MESSAGE

2016 has started out to be another very busy year for ILCO.

One of my favourite events is the annual Education Awards where ILCO recognizes members that have successfully completed one or more of the ILCO courses offered at the community colleges who have achieved the highest mark in the course or honours in all four courses.

This year's event was on February 6th. The members had some very positive comments about their journey to become a law clerk and we wish them continued success in their careers.

The annual general meeting was held on February 3rd and we had several members attend the meeting including a large number attending it for the first time. The continued support of ILCO by its members is greatly

appreciated by the staff and board of directors.

Lots of great things are being planned for 2016, some of which are in this edition.

Keep visiting the website for updates and as always, if there is something you want ILCO to try to do for our members, let us know and we will try to make it happen.

Lisa Matchim
President

ILCO EXPERT CERTIFICATION



Apply to become an ILCO Certified Expert in your area of law and join a distinguished group of professionals. For those who meet the requirements, you will be permitted to use the ILCO Certified Expert title and logo.

This is an opportunity for those with at least ten years of experience to be recognized for their excellence in their chosen area of law. The application is available on ILCO's website.

ILCO'S 26th ANNUAL CONFERENCE – MAY 11-14, 2016



Don't miss ILCO's 26th annual conference, Just for Law, at Fairmont the Queen Elizabeth in Montreal, Quebec - it promises to be a fantastic event! We hope you can join us for the pre-conference golf tournament on May 11 at Golf Île des Soeurs. Take this opportunity to learn, network and connect with old friends and colleagues. Please see the ILCO website for the conference brochure and registration form.

The ILCO Conference Committee

ILCO Newsletter Update – New Members and Articles Wanted

ILCO is pleased to welcome Michelle Crabb to the Newsletter Committee, together with Clint Savary and Shaneen Laity. We hope to continue providing ILCO members with information about our profession and articles of interest. If you have written an interesting article or know of an article that would be of interest to law clerks which ILCO can re-print with permission, please contact ILCO at reception@ilco.on.ca.

Rana Mirdawi and Anna Traer Co-Chairs, Newsletter Committee

ILCO CLE PROGRAMS

Don't miss out. Please check the website www.ilco.on.ca for our upcoming CLE courses. Some of the past programs are listed below.

ADVANCED LITIGATION LAW PROGRAM held September 16, 2015

This advanced program was designed to offer our members the opportunity to step up their level of knowledge and expertise, as well as to engage our members who have more than ten years of experience within this practice area.

This program produced highly substantive discussions and materials. We hope to offer this program again next year.

ADVANCED CORPORATE LAW PROGRAM held November 4, 2015

This advanced program was designed to offer our members highly engaging topics and speakers. Many speakers in this program were regarded as experts in their field.

Following the Advance Corporate Law Program ILCO also had a social event sponsored by Cox by Palmer which was successful and everyone enjoyed themselves after a long day.

ADVANCED FAMILY LAW PROGRAM held on November 25, 2015

This advanced program was designed to offer our members the opportunity to step up their level of knowledge and expertise, as well as to engage our members who have more than ten years of experience within this specialized practice area.

Chris Poirier and Zadiha Iqbal
Co-Chairs, CLE



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ASSOCIATE AWARDS

REAL ESTATE Balfour Award Excellence in REAL ESTATE

In 1971, David Boakes (founding member of ILCO) expressed a wish to donate an award for excellence in Real Estate. In honour of David's father Balfour Boakes, this award is presented to an ILCO member who attains the highest mark on the real estate provincial exam.



Balfour Award
Honors Certificate
Finuzza Baracuhy

LITIGATION James Bristol Award Excellence in LITIGATION

ILCO has been donating an award for Excellence in Litigation since 1995 to recognize the hard work and dedication of James V. Bristow to ILCO. This award is presented to an ILCO member who attains the highest mark on the litigation provincial exam.



James Bristol Award
Valerie Lafleur

ESTATES David Boakes Award Excellence in ESTATES

Since 1995, ILCO has donated an award for excellence in Estates in commemoration of David Boakes (founding member of ILCO). This award is presented to an ILCO member who attains the highest mark on the estates provincial exam.



David Boakes Award
Claudia Tsui

CORPORATE Victor Award Excellence in CORPORATE

In 1971, James Bristow, founding member of ILCO, expressed an interest to donate an award for excellence in Corporate law in honour of his father Victor Bristow. The award is presented to an ILCO member who attains the highest mark on the corporate provincial exam.



Victor Award
Angela Rudd

FELLOWSHIP AWARDS

ILCO Fellowship Award for Excellence - ESTATES

The award is presented to a member of ILCO who attains the highest mark in a Fellowship course.



ILCO Fellowship Award
Amanda Hope



ILCO Fellowship Award
Evelyn Thompson

HONORS CERTIFICATES

ILCO has been presenting honour certificates to students that have taken the 4 provincial exams since 2002. These certificates are presented to the student members that achieve an honours standing (80%) or higher on each of the four (4) provincial examinations (Real Estate, Litigation, Estates and Corporate).

From left: Zadiha Iqbal (Co-Chair, Education Committee), Joyce Marsden-Oliver, Anna Bernecka, Finuzza Baracuhy, Rupi Ahuja (Co-Chair, Education Committee).



ILCO EDUCATION AWARDS

Jim Sweetlove – Keynote Speaker



“Legal education is a process that should continue throughout one’s career in the legal world.”

Mr. Jim Sweetlove began his association with ILCO in the late 1980’s as an instructor in Estates Law. He has set and marked exams and revised the syllabus since 1990. He also teaches the Fellowship course in Estates Accounting and has found this to be a rewarding and stimulation experience.

“I would like to offer my congratulations to all award winners-as a person involved in setting and marking exams at the Associate and Fellowship level, I recognize the high level of achievement that these awards, represent-you are to be commended and should be justifiably proud of your awards.”

He maintains that Law clerks are increasing invaluable to law firms as they strive to provide excellent, cost efficient service to clients in a very competitive legal market and that many tasks are capably performed by a law clerk who has received the requisite training and education-such as the drafting of complex documents and pleadings. The knowledge of practices and procedures at a comprehensive level by a law clerk with respect to the courts, administrative tribunals, government office and elsewhere, such as financial institutions greatly enhances the quality of legal services provided by a law firm.

“ILCO is recognized by the legal profession as the organization that provides high quality education for law clerks and high quality accreditations and has from my observation, consciously worked to respond to the “market” by providing new and varied courses and course content that are of real value to law clerks and the firms that employ them.”

Mr. Sweetlove believes that legal education is a process that should continue throughout one’s career in the legal world and he commends the use of Lunch and Learns as he believes that they are “another example of innovative ways that ILCO is providing a broader scope of valuable educational offerings”.

2015 AWARD RECIPIENTS



From Left: Claudia Tsui, Valerie Lafleur, Angela Rudd, Evelyn Thompson, Finuzza Baracuhy. **Absent:** Amanda Hope.

ILCO EDUCATION AWARDS

Finuzza Baracuhy – Balfour Award for Excellence in Real Estate and Honours Certificate



I am very honoured and proud to receive the Balfour Award in Real Estate and the ILCO Honours Certificate. I would like to thank ILCO for the Award and would like to say that I am very pleased to be a member of the institute. ILCO courses are very intense and in depth, however, I believe, they fully prepare students for a successful law clerk career.

I want to express my gratitude to my family for their support, especially my two children for their understanding when mommy needed to take time away from them to study and attend classes; to my real estate instructor Valerie Cain for her constant orientation and availability every time I needed her guidance; she really goes above and beyond to help her students out; thank you to my colleagues and friends for encouraging me and supporting me in pursuit of the ILCO designation. On that note, I would like to acknowledge my employer The Region of Peel for investing in the career development of its employees. Above all, I am always very grateful to God who is always with me, giving me strength and wisdom to make the right choices in my life, or more importantly, helping me through the more difficult times.

My career started in Brazil where I studied Psychology and Law. As soon as I graduated from law school I moved with my family to Canada. I was advised that my law

school education was not transferable to Canada and being a new immigrant with two young children, going back to law school was too much to ask for at that time. Determined to adapt to my new life, I enrolled in the paralegal program where I graduated in 2008, becoming a licensed paralegal in 2009.

I worked for five years as a legal assistant for a private law firm providing mainly family law and real estate services. Since 2013, I have worked as a legal assistant at the Region of Peel providing real estate services. Eager to grow in my career at the Region and becoming a law clerk, I enrolled for the ILCO preparatory courses, but loving a challenge and always pushing myself to the limit,

I was able to finish in one year. In the spirit of seeking another good challenge, I have recently been accepted to the Canadian Common Law LLM at Osgoode Hall and I have no doubt that the ILCO law clerk certification courses gave me the foundation and knowledge to achieve this next step in my career.

The Balfour Award in Real Estate and the ILCO Honours Certificate is reassurance that determination and hard work always pays off. This is the example that I want to set for my children, and I will try my best, for my entire life, to deserve this honour.

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Valerie Lafleur – James Bristow Award for Excellence in Litigation



I am honored to be the recipient of the prestigious James Bristow award and greatly appreciate the recognition. 2015 and 2016 have been exciting years for change.

I successfully completed the Associate Level program which is one of my greatest accomplishments and something I honestly was not sure I was capable of achieving while working full time. Great support and encouragement from my family coupled with excellent guidance from all my teachers played a significant role in my success and I am very grateful. I would like to particularly thank my husband who was and always is my greatest source of support.

I would also like to thank my teacher Rose Plue who was always more than happy to go above and beyond to help her students. She also did an excellent job of preparing us for our exam from day one.

After 12 years of working in a law firm environment, I used my newly acquired academic achievement and knowledge to try my hand at an in-house position, which has provided great opportunity for professional growth along with a different perspective from a clients point of view which is very interesting.

Most importantly, after years of trying, my husband and I will welcome our first child into the world at the end of March.

I cannot predict what the future holds, but I do know that the Associate Level program has opened many doors of opportunity and I sincerely thank ILCO for offering such a wonderful course. ILCO is an invaluable, integral part of the legal community which we are very lucky to have and I genuinely wish the organization great continued success. Thank you.

Claudia Tsui – David Boakes Award for Excellence in Estates



I am extremely grateful and honored to be receiving this award. I would like to take this opportunity to offer my sincerest gratitude to the Institute of Law Clerks of Ontario, Seneca College and in particularly, my teacher, Barbara O’Gorman.

I was lucky to be one of Barbara’s students and had a lot of fun learning and laughing in her class. She inspires me a lot. Thank you Barbara.

I would also like to thank my three daughters, who took care of me while I was taking my course. Without their support and encouragement, I would not be able to get

through all those late night studies, college exams and the provincial exam. I’m so grateful.

I have been a legal administrative assistant for more than 15 years. I never had an opportunity to upgrade myself when my children were younger and after struggling the last several years, I finally managed to overcome my fears and worries by going back to school.

This award means a lot to me. It has not only recognized my achievement but it also encourages me to finish the rest of my ILCO courses. It gives me the confidence and inspiration to further pursue my career development.

Amanda Hope – ILCO Fellowship Award for Excellence – Estates



I would like to thank the Academy for this great honour....

In all seriousness, I began my career in the field of law almost 11 years ago. At the time I had just returned from working overseas as an archaeologist, and wasn’t sure that working as a legal assistant was something I wanted to do. I was used to digging up artifacts in the field and couldn’t really picture myself sitting in an office at a computer all day, but I needed a job so figured I would give it a go. Eleven years ago I started with Rene Larson Law Office as a legal assistant and now I am a law clerk and have achieved the highest mark in the Estates Fellowship Course.

The documents prepared for every estate file are generally the same, but the clients’ life story and their set of circumstances are uniquely different. I went from digging up and examining archaeological artifacts to searching and examining bank records, documents (sometimes provided in shoeboxes) and people’s lives, for the necessary information to prepare the file, during one of the most challenging and emotionally draining experiences in a person’s life. The Estates Fellowship course has already provided me with invaluable material that I can use to help prepare the documents necessary for the loved ones left behind. I love what I do, and I am honoured to have won this award.

Angela Rudd – Victor Award for Excellence in Corporate



I began my career in law as a high school co-op student in the firm of a sole practitioner, David Starr. Before my co-op ended I had been offered a full-time position as a receptionist and assistant. Over the years I learned so much and gradually I took on more duties and responsibilities. Mr. Starr has always been so encouraging and supportive; always pushing me to expand my world. After procrastinating for long enough I finally decided to go back to school to begin the law clerk program.

I was extremely nervous about the whole process, especially since the entire course outcome relied on one exam. However after meeting my fellow classmates and my instructor for the first two courses, Michael Morris, I became excited to start this new experience.

Mr. Morris was thorough and approachable. I definitely expanded on what I had learned in my work environment and I was able to understand the background of the work I had been doing.

For my remaining courses I was again intimidated since I was on a new campus and my instructor, Colleen Broderick, seemed to be quite tough. She was working for two firms and teaching and yet she always made sure we had plenty of homework and study material. She is such an inspiration. Colleen made things clear and helped me understand the resources available to me. There have

been many files I've been working on since completing this program where I read an entire section of the Rules to get things done right the first time.

After writing my third exam I understood why Colleen pushed us so hard; she really cared about the success of her students. Her dedication to her students and my desire to finish on a high note paid off. When I received my final mark I was so excited but when I received the e-mail that I was receiving this award I felt so proud of what I had been able to accomplish with the help of Mr. Starr, Mr. Morris and Mrs. Broderick. Their support has meant so much to me.

It feels so wonderful to have my Certificate hanging above my desk and being able to place this award next to it will encourage me everyday.

Thank you ILCO for organizing this event and for providing this award, it is such an honour. Thank you to Michael Morris and Colleen Broderick for helping me understand the course material and being so supportive of their students. Lastly, thank you so much to David Starr, for your belief in me, for your understanding on those days when I came to work exhausted because I had been up late studying and especially for your financial assistance throughout this process. I couldn't have done this without your help, support and encouragement.

Evelyn Thompson – ILCO Fellowship Award for Excellence – Estates



I was first welcomed to ILCO as an Ordinary Member 1989. After my 12 year absence from the legal field to enjoy my new career as a mother, I thought it necessary to enrol in the Associate Level courses in 2001 when I returned to work in a law firm. In 2002, I completed the last of my four courses and renewed my membership, this time as an Associate.

I have had the privilege of working with Barrie Hayes at Barriston LLP (formerly Bugar Rowe PC) for over 9 years. With Barrie's support I achieved my goal of upgrading my membership once more to Fellow.

It is said, "A job well done is its own reward". I am, however, both honoured and delighted to be presented

with ILCO's Award for Excellence in Fellowship. I cannot express enough gratitude to the Institute for its on-going commitment to education which has allowed me to excel in my legal career. As I live and work outside the GTA, I especially appreciate the ability to participate in programs in person and by webcast.

I also wish to thank Jim Sweetlove for generously sharing his knowledge in Estate Accounting and for being available during and after the program to answer my questions. This achievement is the result of your skill in teaching what you described as a pretty dry subject. Who knew math could be so engaging?



Anne Marie MacIntosh
Education Coordinator



Lisa Matchim
President

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WHAT IS PROPORTIONALITY, ANYWAY?

The Honourable Colin L. Campbell, Q.C.

Proportionality has become the buzz-word of the decade. But beyond the dictionary definition and the reference to it in the Rules of Civil Procedure, many lawyers, a great number of clients and even some judges are unaware of what it means in practice.

As a noun, “proportionality” means “corresponding in size to something else.” According to Wikipedia, proportionality [law] is a concept “used as a criterion of fairness and justice in statutory interpretation processes. ...” The problem is that no objective standard exists for its application in a particular situation: Given the same set of facts, people will apply the principle of proportionality in various ways.

I will try to provide some focus on this rather elusive topic by looking at the rules of proportionality; providing some useful tools for implementing those rules; and sharing a few “smarts” to help apply the principle most effectively.

RULES

In many common-law jurisdictions, the word “proportionality” appears at least once in the applicable rules of procedure. Ontario accepted the need for a reference to proportionality in the Rules of Civil Procedure only after considerable debate. For many, Rule 1.04, which mandates the “least expensive” and “most expeditious” process,” was sufficient. Rule 1.04(1.1) was added in 2010 specifically to require proportionality in all aspects of civil litigation. At the same time, Rule 29.2, Proportionality in Discovery, was added to deal with the most expensive and time-consuming process of civil litigation.

Many of the Civil Rules are aspirational rather than prescriptive. Some lawyers fail to appreciate the difference between the two concepts and take only one approach to applying the Rules. Matters become difficult when one side to an action approaches proportionality in a relaxed, laissez-faire manner and the other insists on a rigid, black-letter style.

The addition of the proportionality concept to civil rules in most common-law jurisdictions signalled the need for a culture change that is now under way in most courts where litigation has become too time-consuming and too expensive. Beyond Canada, the amendments to the United States Federal Rules of Civil Procedure, which will come into force in 2016, contain specific direction for proportionality in discovery.

The two pre-trial areas in which proportionality can be difficult to achieve are discovery

(particularly documentary discovery) and interlocutory motions (particularly when judges’ lists are long and resources are scarce).

On the surface, the wording of Ontario Rule 29.1, dealing with the discovery plan, looks prescriptive in that the plan is to be in writing and, in the normal course, completed within 60 days after the close of pleadings. In practice, however, only a few lawyers report actually completing a written plan and fewer do so within the time specified. This is not to say the Rule doesn’t work to achieve its intended purpose. Most competent counsel reach informal agreement on the ingredients for applying proportionality in discovery – as noted, the title of Rule 29.2 – in a reasonable time.

More problematic for the application of proportionality is Rule 30.03, the Affidavit of Documents, which requires the disclosure “to the full extent of the party’s knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party’s possession, control or power.” One can understand the dilemma faced by an inexperienced lawyer who sees the requirement for proportionality in Rule 29 and the requirement to list all relevant documents in Rule 30. Which Rule to honour?

In many Ontario actions, the Affidavit of Documents is never complete. In others, the insistence on completion adds significantly to the cost and time extension of the process. In short, to balance reasonableness and requirement, rules can provide guidance, direction and, where necessary, compulsory compliance. Proportionality involves knowing how to apply the rules to achieve the intended result.

TOOLS

In today’s environment, rules are not enough to achieve proportionality. They tend to be “one-size-fits-all,” yet each type of case and each civil action has its own needs and requirements. Here are four examples of tools that can be used to supplement rules for achieving proportionality.

CASE LAW

The leading case, at least for the moment, in the area of proportionality is the decision of the Supreme Court of Canada in Hryniak v. Mauldin. The decision itself dealt with the Ontario summary judgment rule, but perhaps more important in the long run is the court’s statements on the need for the application

of the proportionality principle throughout the civil litigation process. *The headnote summarizes the point:*

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

A shift in culture is required. The proportionality principle is now reflected in many of the provinces’ rules and can act as a touchstone for access to civil justice. ...

PRACTICE PRINCIPLES

The growth of digitally stored information has, in a few short years, significantly increased the volume of potentially relevant documents for production. The idea of principles for discovery of electronic information was first considered in the Discovery Task Force Report in Ontario in 2003 and then more broadly in the Sedona Canada Principles in 2008 to allow them to be complementary with Rules in Ontario, other provinces and the United States. Rule 29.1 in Ontario requires the completion of a Discovery Plan that takes into account the 2008 Sedona Canada Principles.

A revision to the Sedona Canada Principles will be issued in its final form by the end of 2015. In addition to updating the case law in the area of electronically stored information, the revised principles will emphasize several important aspects of discovery associated with civil litigation and provide practical examples and notes on their application. The term “meet and confer,” used in the first edition to signal the need for lawyers and clients to address issues of production early on in a proceeding, will be replaced with the term “co-operation and collaboration.” The change will emphasize the importance of reaching agreement not just on the preservation of documents, but throughout the production process.

As well, Principle 4 will spell out a number of considerations for achieving proportionality in the discovery process. The revision will also note the growing use of technology to refine the location, preservation and review of documents, particularly the review for privilege. Frequent references will be made to those tools that, with co-operation, can lead to cost and time reductions - in other words, to proportionality.

Continued on page 14

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WHAT IS PROPORTIONALITY, ANYWAY? CONTINUED

The Honourable Colin L. Campbell, Q.C.

BEST PRACTICES AND PROFESSIONALISM

Two recent publications of The Advocates' Society provide a framework for individuals – including members of the judiciary – who are willing to shorten the trial process and lessen the costs. These goals are the hallmarks of proportionality.

The first publication, *Best Practices for Civil Trials* (2015), focuses on four areas: case management, trial planning and management, use of documents and technology at trial, and expert advice at trial. Each area emphasizes co-operation and recognizes that the civil litigation process cannot be sustained if the old “scorched-earth” approach were to prevail. One could in fact say that proportionality is nothing more than the application of common sense – the reasonable accommodation of all interests in the case, including that of the court. The second Advocates' Society publication, *Best Practices from the Institute for Civility and Professionalism*, draws on the Society's Principles of Civility and Professionalism and is particularly useful for young lawyers. Among the most helpful elements of these Best Practices are guidelines on dealing with lawyers who are less inclined to be co-operative.

Some will say that such tools and best practices are nothing more than statements of the obvious. Those who take that view, however, miss the importance of what is happening in the community. The legal culture and changing market forces are demanding more efficient and less costly legal services. Courts, rule makers and professional bodies are leading the way. One way or another, those who try not to follow will be left behind.

The development of best practices is, of course, not confined to Ontario. One of the inspirations for the two Advocates' Society publications noted above was the work carried out by a joint task force of the American College of Trial Lawyers together with the Institute for the Advancement of the American Legal System. In its 2009 report, the joint task force recommended the development of pilot projects using principles developed for improvements in discovery. Those principles include many of the best practices for the management of civil litigation referred to above.

In a 2015 report, *Reforming Our Civil Justice System: A Report on Progress and Promise*,

the joint task force updated the 2009 principles and reported on some of the pilot projects in the United States spawned by the 2009 report. Two of the revised principles are especially worth noting. Principle 13 states that “[p]roportionality should be the most important principle applied to all discovery.” Principle 15 recommends that, “shortly after the commencement of litigation, each party should produce all known and reasonably available non-privileged, non-work-product documents and things that support or contradict specifically pleaded factual allegations.” The latter principle does not in any way diminish the obligation under the Rules. It simply allows for a much earlier assessment of where the action is heading through an early exchange of key documents.

EARLY MEDIATION

Rule 24 provides for mandatory mediation and applies to the cities of Ottawa and Toronto as well as Essex County. While not all mandatory mediations take place at an early stage, early mediations are part of a growing feature of civil litigation, by which lawyers and clients alike can take advantage of the opportunity to assess the strengths and weakness of their cases up front. If the matter settles, a good deal of time and money is saved. For most clients, this is a much more satisfactory result than a costly forced settlement on the eve of trial.

If counsel co-operate to the extent envisaged in the Report of the American College of Trial Lawyers and exchange essential documents, then, even if the action doesn't settle, they can achieve an early and informed response to where the action is going.

SMARTS

In the now dark ages of the 1960s, most lawyers who practised civil litigation personally knew the lawyer on the other side of an action. As well, the responses of institutional clients (banks, insurers, governments) were generally predictable, making it much easier to plan a litigation strategy.

With the growth in the number of practising lawyers, the merger of insurance companies and other large clients and, significantly, the reliance on in-house counsel, it has become increasingly complicated to predict the response of those on the other side. However, the basic premises for achieving proportionality in dealing with one's client and with the lawyer and client on the other side, still remain the same.

Know your client. At the earliest point in the retainer, begin to ascertain the client's ultimate goal. Many plaintiffs would be content to take

half of what might ultimately be recovered if it could be obtained in half the time and at half the cost. Knowing the outcome that a client really wants and the amount the client is willing to see spent can be the keys to deciding how to proceed.

Know the lawyer and/or the client on the other side. If you don't know the lawyer or client on the other side by reputation, try to find out about them and their attitude as soon as you can. Knowledge that an insured defendant will be strongly or fiercely represented – in even the least meritorious case – allows for planning. In such a situation, proportionality may have a different application than it otherwise would. Even those clients opposite or their lawyers with reputations for fierce representation can be persuaded to accept a reasonable timetable (sometimes with judicial help) when they know they will obtain all the information necessary to proceed with proportionality.

The word zealous was once associated with good advocacy. That adjective has now been replaced because, in the world of high costs and scarce judicial resources, disruptive tactics have no place. They will be seen by judges not to be proportional.

Proportionality is what the participants in the civil justice system make of it. Let us hope it will foster change.

NOTES

1) The US federal rules present the same problem – balancing proportionality with the requirement to disclose – but in reverse. The requesting party is entitled to obtain copies of all potentially relevant documents it requires that are in the possession of the opposing side.

2) 2014 SCC 7.

3) Task Force on the Discovery Process in Ontario: Report (Toronto: Ontario Ministry of the Attorney General/Superior Court of Justice, 2003) (Chair the Honourable Mr. Justice Colin Campbell), online: <<http://www.ontario-courts.ca/scj/news/publications/discoveryreview/>>.

4) The Sedona Conference Working Group 7, Sedona Canada, The Sedona Canada Principles (2008), online: <http://www.canlii.org/en/info/sedona-canada/2008principles_en.pdf>.

5) Best Practices for Civil Trials (Toronto: The Advocates' Society, June 2015), online: <<http://www.advocates.ca/assets/files/pdf/news/The%20Advocates%20Society%20Best%20Practices%20for%20Civil%20Trials%20-%20June%202015.pdf>>.

6) Best Practices (Toronto: The Advocates' Society Institute for Civility and Professionalism, 2013), online: <<http://www.advocates.ca/assets/files/pdf/publications/Best%20Practices.pdf>>.

7) Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (Denver, CO: IAALS and ACTL, 2009), online: Social Science Research Network: <<http://ssrn.com/abstract=1362072>> or <<http://dx.doi.org/10.2139/ssrn.1362072>>.

8) *Reforming Our Civil Justice System: A Report on Progress & Promise - A Joint Project of the American College of Trial Lawyers Task Force on Discovery and Civil Justice and IAALS - the Institute for the Advancement of the American Legal System* (Denver, CO: IAALS and ACTL, 2015), online: <http://iaals.du.edu/sites/default/files/documents/publications/report_on_progress_and_promise.pdf>.

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A Paperless Courtroom: Embracing the Use of Electronic Trials

By James Bunting, Chantelle Spagnola and Anisah Hassan
Davies Ward Phillips & Vineberg LLP



Although electronic trials (also known as “e-trials”) continue to be the exception in Ontario, the tipping point is fast approaching, if not yet upon us. As technology advances, we as litigation counsel are provided with an increasing array of tools that can be used to efficiently and effectively manage the trial process. With the incredible volume of electronic documents (such as emails) that have become the norm in civil litigation, these tools assist the court, counsel and litigants in reducing the time and expense of litigation, which is of particular importance in complex commercial cases.

In this article, we discuss a number of innovative practices that were adopted by the parties and the Court in the *Husky v. Schad et al.* trial heard in the Ontario Superior Court (Commercial List) in late 2015, and how the adoption of those practices allowed the parties to effectively and efficiently bring this large and complex piece of commercial litigation to trial on an expedited schedule. Of particular note, the procedure adopted by the Court and the parties included the use of: (i) iPads by both counsel and the Court; (ii) the “chess clock” method of allocating each party’s time at trial; (iii) evidence-in-chief by way of affidavit; (iv) cloud storage and transfer technology; and (v) real-time transcription. The *Husky v. Schad et al. Trial – A Paperless Courtroom*

The case of *Husky v. Schad* involved Husky Injection Molding Systems Ltd., one of the world’s leading manufacturers and suppliers of injection molding equipment to the plastics industry, as the plaintiff, and Husky’s founder, Robert Schad, and his new company Athena Automation Limited, as defendants. This case involved allegations by Husky that the defendants, among other things, misused Husky’s confidential information in the process of manufacturing injection molding machines. The trial took place over four weeks, from November 23 to December 23, 2015, before The Honourable Justice Newbould.

This matter progressed on a highly accelerated timetable for a case of its size and complexity. The claim was commenced in May 2013 in the Ontario Superior Court. Given the “real time” nature of the allegations raised, the amounts at issue (in the hundreds of millions of dollars) and the sophistication of the parties and experience of counsel, the defendants were granted a request to have the matter transferred to the Commercial List. It became clear to the defendants at an early stage of the proceedings that it would be essential for the parties and the Court to adopt innovative practices in order to effectively and efficiently bring the case to trial. This was particularly apparent not only from the substantive content of the documents produced by the parties in discovery (the vast majority of

which related to highly technical engineering matters), but also from the volume of documents produced, which amounted to more than 31,000 records in total.

Proceeding by way of e-trial allowed the parties to proceed from the documentary discovery phase through to the completion of trial in 14 months. This included extensive examinations for discovery, with nearly 16,000 questions asked over 24 days of discovery and more than 2,000 answers to undertakings provided. This would have been extraordinarily difficult, if not impossible, to do using the conventional “paper trial” method.

The parties requested and were assigned a case management judge to assist them in maintaining the aggressive trial schedule, including being available to deal with preliminary motions. The case management judge, who quickly became familiar with the case, was able to provide the parties with direction when there was disagreement regarding scheduling, and was able to facilitate the efficient resolution of preliminary motions, such as a motion on refusals brought by Husky during the discovery process.

The parties were also fortunate to make use of Courtroom 8-1 at 330 University Avenue in Toronto, which was equipped with all of the equipment necessary to conduct an e-trial, including monitors and large screens for projecting materials for His Honour, the witnesses, counsel and observers.

The Honourable Justice Newbould directed that no hard copy materials be used during the course of the trial. Opening submissions were done orally and were accompanied by PowerPoint presentations. No written motion materials were filed for motions that took place during the trial, and there were no hard copy “witness binders” put to the various witnesses on cross-examination. Rather, all materials were displayed electronically on screens in the courtroom and, as elaborated on below, were accessible by the Court on an iPad.

During the approximately four weeks of trial, over 3,000 documents were put to witnesses on examination. In a traditional paper trial, at least 7 printed copies of each of these documents would have been needed for distribution to His Honour, the court reporter, the witnesses and each of the parties. While e-trials offer benefits in all kinds of trials, the sheer volume of documents involved in this case made the electronic approach particularly beneficial.

Continued on page 16

A Paperless Courtroom: Embracing the Use of Electronic Trials

By James Bunting, Chantelle Spagnola and Anisah Hassan
Davies Ward Phillips & Vineberg LLP

The efficiency and seamlessness of the paperless courtroom was facilitated by a trial protocol agreed to by all parties which documented the processes and procedures to be used. For example, all parties agreed to, and ultimately did, prepare, serve and file their evidence-in-chief by way of affidavit, which provided for considerable time savings in a trial involving evidence of a technical nature heard from 17 fact witnesses and six independent expert witnesses. The use of affidavits in this manner resulted in a substantial “front-end loading” of the preparation required for trial, and was critical in allowing the trial to be completed in only four weeks.

While viva voce direct examinations were still conducted for each witness, the duration of each examination was considerably reduced.

At the suggestion of counsel for Mr. Schad and Athena, and as approved by the Court, the parties also used the “chess clock” method for allocating time during the trial. Under this method, parties are allocated a fixed amount of time in which to present their case. This places a premium on good advocacy, forcing parties to hone in on the issues of central importance to the case. The Canadian Competition Tribunal is one of the first adjudicative bodies in Canada to have employed this method, and the method is recommended as a Best Practice by the Advocates’ Society. While use of the chess clock method is not new, it has rarely been used in the Ontario Superior Court.

In the *Husky v. Schad* case, the total amount of time allotted for the trial was divided between the parties based on percentage allocations that were negotiated between them in advance. Pursuant to the trial protocol, time was debited from a party’s total allocation for each of opening submissions, direct examinations, cross-examinations, re-examinations, closing arguments, and any motions lost during the course of the trial (for all motions brought during trial, the total time used for the motion was debited entirely from the time of the party that lost the motion).

While the plaintiff initially expressed concerns that the negotiated time allocations might be insufficient, all parties concluded their case with time remaining. This trial also prominently featured the use of tablet technology, as both the parties and the Court made use of popular iPad tablets. iPads were used in place of printed

copies of the trial documents, examination briefs and briefs of authorities. In particular, documents were viewed in the “GoodReader” application, which provides a similar look and feel to a physical document and contains extensive annotation and editing functionality (including the ability to highlight and create mark-ups of documents).

The use of iPads was highly effective for dealing with such a complex case in real-time, and eliminated the need for parties to allow additional time for printing and assembly. It also allowed for the use of technological tools to navigate the vast evidence more efficiently. This made it possible to easily navigate the entire case, which in paper could have filled several rooms, on a single iPad the size of a thin notebook.

Finally, the parties used a cloud sharing service supplied by Davies to upload and share materials. For counsel using iPads, the iPads were set up to easily synchronize with the cloud sharing site so that they could be fluidly updated as new files were added. This made the act of sharing files highly efficient, as there was no need to deliver physical USB keys (as the size of many of the documents and materials made sending them by email impossible).

CONCLUSION

While the advantages of e-trials are particularly evident in large, electronic document-intensive cases like *Husky v. Schad*, they can make any size of trial more efficient and cost-effective. While conducting an e-trial may seem like a daunting proposition, successful execution involves the same essential skills as a conventional trial: organization, preparation and effective communication between the parties and the Court. While e-trials may currently be the exception in Ontario, from the perspective of the authors, the efficiency and seamlessness with which technology can be incorporated into litigation means it is only a matter of time until these practices are widely adopted. Indeed, at the conclusion of the *Husky v. Schad* case, the trial record (which includes thousands of documents and thousands more pages of testimony, in the form of affidavits and transcripts) is stored on the court file on a single USB key the size of a thumb.

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2) The only exception was the use by each witness of a hard copy version of his affidavit during the course of his examination.

3) See e.g. the decision of the Canadian Competition Tribunal in *B-File Inc. v. The Bank of Nova Scotia*, [2006] C.C.T.D. No. 36 (QL).

4) *B-File Inc. v. The Bank of Nova Scotia*, [2006] C.C.T.D. No. 36 (QL).

5) The Advocates Society, “Best Practices for Civil Trials”, online: (June 2015) at p. 5 <<http://www.advocates.ca/assets/files/pdf/news/The%20Advocates%20Society%20-%20Best%20Practices%20for%20Civil%20Trials%20-%20June%202015.pdf>>

6) Notably, the chess clock method was mandated by the Joint Trial Protocol in the highly publicized cross-border trial in the matter of *Nortel Networks Corporation (Re)*, 2015 ONSC 2987.

1) Mr. Bunting, Ms Spagnola and Ms Hassan are all lawyers in the Litigation Department at Davies. They acted together with Kent Thomson, the Head of Davies’ Litigation Department, as counsel to the defendants Robert Schad and Athena Automation Limited. The authors would like to thank the exceptional clerks, litigation support personnel and assistants involved in this matter for their tireless efforts in bringing this electronic trial to life. In particular, enormous thanks are due to Debra Bilous, Tanya Barbiero and Michelle Lee for keeping counsel organized and the trial running smoothly.

Why Law Firms Participate By Running and Donating for Kids with Cancer - Camp Ooch

LET'S RUN FOR OUCH

IT'S THE EASIEST WAY TO MAKE A DIFFERENCE



Giving kids with cancer what they need – the chance to be a kid!

It's that time of year again when the city of Toronto starts training for the annual Sporting Life 10K. We know from past runs that many law firms and individuals will sign up to participate and raise funds that send kids with and affected by childhood cancer to Camp Oochigeas (Ooch).

Funds raised at this event support camp-style programs that happen 365 days a year at the Hospital for Sick Children (SickKids), Ooch Downtown, various healthcare centres across Ontario and at the residential camp located in Muskoka. Programs are provided at no cost to families and are supported by individual and corporate donors. Without events like the Sporting Life 10K, programs would cease to exist.

Ooch is much more than a summer camp. It is a philosophy, a movement that transcends geography to give kids with cancer in the province of Ontario what they need – the chance to be a kid!

A Letter from an Ooch Parent

Dear Ooch,

I know you know you put smiles on kid's faces but I'm not sure you understand all you do for families like ours. I'm saddened to say as parents I'm not sure we always vocalize it.

Camp Ooch is not just made up of individuals who pass through our children's lives. It is made up of individuals that become part of their lives.

The cancer journey has so much darkness around it, so much pain and so much loss. Where I have memories from my childhood of camping, play dates, trick or treating and Christmas mornings around a tree,

most of my children's memories have a dark cancer cloud covering them.

Then there is you guys. You are always a bright ray of sunshine breaking through the clouds. No matter how sick, how scared, how nervous, how isolated our son felt, Ooch gave him something to look forward to each day he was in the hospital, at an Ooch Downtown program or at overnight camp. Time spent with Ooch staff were pretty much some of the only times our son was able to be a kid.

Not a cancer kid, just a kid.

I want you to know you are a very large part of what got us through those years. You helped mould many of our children's happy childhood memories. You brought sunshine on days of pure darkness. Thank you. Thank you. Thank you.

How You Can Make a Difference

Participating in the Corporate Challenge and fundraising for Camp Ooch means you have the opportunity to qualify for a team promo code to cover your race registration fees. It is the responsibility of the team to raise \$100 per promotional code used. Each team has until 5:00 p.m. on May 10th, 2016 to raise \$100 per runner in order to Run for Free.

If your team of 10 or more people raises \$3,500 online by April 22nd – we will mail you your race kits (bibs and t-shirts) directly to your office during race week!

To get involved in this year's Corporate Challenge, please contact Megan Ellison at mellison@ooch.org.

Register today at SportingLife10K.ca

Learn more about Camp Ooch at OOCH.org



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ILCO is pleased to welcome the following new ILCO Certified Experts in their area of law as of February 24th, 2016.

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CANADA'S ANTI-SPAM LEGISLATION: CONSIDERING CASL IN BUSINESS TRANSACTIONS

By Anne-Marie Naud, Kirsten Thompson and Nicolas Bertrand, McCarthy Tétrault LLP

Since coming into force on July 1st, 2014, Canada's Anti-Spam Legislation ("CASL") has created new concerns and risks that must be addressed in business transactions. This post reviews those concerns in the context of asset acquisitions, specifically the risks associated with the transfer of CASL consents for the purposes of sending marketing messages to business customers. Given the volume of marketing and customer contact conducted by retailers and consumer products distributors, this may be of particular concern in acquisitions of consumer facing businesses or businesses that manufacture consumer products. A retailer or distributor that fails to address these issues at the time it obtains CASL consents, or prior to the transaction, could find a significant portion of the transaction value eroded by its inability to transfer customer contact lists.

COMMERCIAL ELECTRONIC MESSAGES

CASL deals primarily with "commercial electronic messages" or "CEMs".^[1] A CEM is an electronic message that has, as one of its purposes, the encouragement of participation in a "commercial activity". This encompasses e-mails sent to the electronic addresses of customers for promotions, contests and advertisements, as well as instant message alerts or some types of social media messages used to market to and communicate with existing and/or potential customers. Importantly, the commercial aspect does not have to be the sole, or even dominant, purpose of the message – the context matters and links, footers and logos may be sufficient to turn an otherwise non-commercial message into a commercial one.

Many businesses send CEMs using customer distribution lists. The transfer of these valuable marketing tools in the context of an asset acquisition presents certain risks to purchasers, as it is subject to strict consent requirements, both privacy consent requirements (i.e. to collect, use and disclose personal information such as an email address) and CASL consents (i.e. to send CEMs to the email address that has been collected). If customer distribution lists, or any form of personal information used to send CEMs, are transferred in violation of CASL or privacy legislation, a purchaser could expose itself to significant penalties after closing.

TRANSFERRING CONSENTS

Pursuant to CASL, all businesses are required to obtain the consent of recipients in order to send them CEMs. Consents may be express (e.g. check here to receive CEMs) or implied on the basis of there being a qualifying relationship. One of these types of relationships which grounds implied consent is an "existing business relationship". An existing business relationship arises, for instance, where a person has purchased a product or service from the sender within two preceding years of receiving the CEM, or has made an inquiry to the business within the preceding six months, and in either case has not unsubscribed from receiving CEMs.

CASL further stipulates that if a business has an "existing business relationship" with another person, and the business is sold, the purchaser of said business is considered to have assumed the same "existing business relationship", allowing the purchaser to continue sending CEMs to individuals until they expressly opt-out or the relationship reaches the time limit specified in CASL.

While CASL provides for the existing business relationship to be transferred following the sale of a business to a purchaser, it does not specifically state the consents that flow from that relationship and held by the business may be transferred as well. Therefore, a significant CASL issue to be addressed when dealing in an asset acquisition involves obtaining and maintaining the consents of customers to receiving CEMs on this basis. When purchasing private information used to distribute CEMs, the purchaser must ensure that the consents being purchased from the seller are validly held and transferrable under CASL (and privacy laws).

Industry Canada's Regulatory Impact Analysis Statement ("RIAS") states that (emphasis added) "express consents will transfer upon the sale of a business, should the contract of sale include a provision transferring these as a business asset." It must be noted, however, that the RIAS only represents Industry Canada's interpretation of CASL and is not the law. In addition, the RIAS only provides guidance on the transfer of express consents; the direct transfer of implied consents (such as those arising from an existing business relationship) is not addressed.

The Canadian Radio-television and Telecommunications Commission's ("CRTC") Guidance on Implied Consent (the "Guidance") adds a further layer of interpretation (emphasis added):

"When a business is sold, the purchaser can rely upon express consents obtained by the seller if the contract of sale of the business includes a provision transferring the list of email addresses for which consents have been obtained as part of all its assets. Therefore, the new owner will be able to continue sending CEMs to the recipients that gave express consent, as long as the other requirements of CASL are met. CASL also specifically indicates, at section 10(12) that, with the sale of a business, any existing business relationships (EBR) are considered to now be with the new owner of the business."

The foregoing, however, still does not explicitly address the transfer of implied consents.

An example given by the CRTC in the Guidance seems to suggest implied consents do not transfer per se, but rather the exemption from consent created by a valid existing business relationship may be relied upon by an acquiring business. However, the onus is on the purchaser to ensure such underlying business relationships are, in fact, valid.

An important consideration here will also be which entity gets the benefit of the existing business relationship – the Guidance states that "with the sale of a business, any existing business relationships (EBR) are considered to now be with the new owner of the business". In other words, Guidance suggests that such relationships are not divisible, creating an all-or-none situation.

VALIDITY OF CONSENTS: KEEPING TRACK OF THEM ALL

Assuming that consents to receive CEMs are transferable, issues may arise with respect to the way that such consents are documented. A purchaser should conduct proper enquiries to ensure that the seller has kept detailed records of how, when, and for what purpose the

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consents were obtained and whether it has sufficient tools to keep track and identify them all. If the consents have not been validly obtained in the first place, no transfer of consent in fact occurs.

There are also particular issues that may arise when purchasing the assets comprising a division of a company. Where consent has not specifically been given to the division, but rather to the company operating said division, express consent will likely need to be obtained by the purchaser in order to continue distributing to and benefiting from the customer distribution list of the business. If both the division and the overall operating company have been relying on different types of consents arising from different types of transactions (e.g. online transactions are with the operating company, but in-store transactions are with the division) and such consents are not separated out on a customer list, distinguishing between the two can become virtually impossible.

One possible solution to this issue is for the vendor to send an e-mail on behalf of the purchaser asking customers to explicitly accept that as of the date of closing, they agree to receive CEMs from the purchaser. The e-mail must offer the option to the customer to unsubscribe at any time. Consent may even be obtained in conjunction with a contest or discount offer, provided that consent is not a condition of receiving the discount

or entering the contest and the language is clear and understandable in terms of what is being consented to.

PREVENTION: AVOIDING EXPOSURE TO LIABILITY

As mentioned previously, Industry Canada and the CRTC both tend to suggest in their respective guidelines that express consents may be validly transferred if the purchase agreement includes specific language to that effect. Purchasers should therefore include a provision that express consents are transferred upon closing of the transaction, and carefully consider how they will validate and transfer implied consents.

Purchasers should also conduct proper due diligence to identify potential CASL liabilities that may arise. This should include an examination of how and for what purpose consent was obtained by the business, as well if proper consent management tools are in place. The potential liability of a purchaser may be further limited by including specific representations and warranties with respect to CASL in the purchase agreement, specifically regarding the validity of the consents held.

Lastly, risk may be limited by including CASL related indemnity provisions in the purchase agreement.

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DATE	EVENT
Thu March 31, 2016	ILCO Spring Social, CN Tower, Toronto
Thu March 31, 2016	Intellectual Property Fellowship Exam
Tue April 5, 2016	E-Discovery Fellowship Exam
Wed April 13, 2016	Intellectual Property CLE Program (full day)
Wed May 11 to Sat May 14, 2016	ILCO's 26th Annual Conference, Fairmont The Queen Elizabeth, Montreal, Quebec
Fri May 13, 2016	Estates Provincial Associate Exam Registration Deadline
Tue May 31, 2016	Estates Provincial Associate Exam
Fri June 3, 2016	Corporate Provincial Associate Exam Registration Deadline
Wed June 22, 2016	Corporate Provincial Associate Exam

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