



The Institute
of Law Clerks
of Ontario

LAW CLERKS' REVIEW



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President's Message

There is excitement in the air this time of year. A season of new beginnings. As you prepared your children for a new school year --buying new books, pencils and outfits -did you find yourself reflecting on where you are in your career and in your own learning? We invest so much time on preparing our children for their futures, but are we also investing in ourselves? Have you taken stock of where you are headed in your own career? Do you want to do more or less of something to get you there? As a parent we put a lot of energy into preparing our children for their future. We dedicate our resources to help them realize their potential. As a manager or colleague, we invest our energy to help others reach their goals. Let's take our energy and resources and dedicate a portion

of it to improving our own skills --after all, our own development is just as important. ILCO is excited to offer a great lineup of fall seminars to let you invest in yourself. We are here to help you improve your skills --the ones we know will make a difference in your workplace and career. We hope to see you participate in our great fall lineup!

Rose Kottis
President



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SAVE THE DATE!



Plans for ILCO’s 24th annual conference are well underway! Mark your calendar with next year’s conference dates and location - **May 28 to May 31, 2014** at Deerhurst Resort in Huntsville, ON

FAMILY & DIVORCE LAW CERTIFICATE ACHIEVEMENT COURSE



The Institute of Law Clerks of Ontario has approved a Family & Divorce Law Certificate Achievement Course being offered by Lorne J. Fine, Barrister & Solicitor, of Fine & Associates Professional Corporation – Family & Divorce Lawyers.

The course is an intensive, interesting, twelve session course that will run

from 6 pm to 9 pm every Tuesday

commencing on February 4, 2014

a total of twelve (12) sessions.

The course will be held at the ILCO's office (20 Adelaide Street East, Suite #502, Toronto)

The course will cover a wide range of Family & Divorce Law topics and will give you the necessary edge in the Family & Divorce Law field.

Space is limited. If you wish to enroll in the course, or for additional information, please call **Lorne Fine** at **416-650-1300** or see www.Torontodivorcelaw.com

Expanding your business through franchising is neither as hard or as easy as most people think. Myths and misunderstandings about franchising are plentiful and potentially very, very dangerous. It is not a “license to print money”, rather it is one of several distribution methods that businesses can employ to grow and prosper. It is not rocket science, but requires good planning, patience and careful execution.

Franchising is a distribution method which requires, in the final analysis, less capital, because the franchisees finance their own outlets. However, new franchisors will need to invest substantially in the early years to develop an effective franchise structure and the critical mass necessary to make it profitable. Often, a franchisor will not realize a profit until as many as ten franchise outlets are up and running.

A franchisor can leverage a much greater volume of business on a much smaller head office than in other business models. While this is true after the franchise system has grown to a sufficient size, at the beginning, the head office costs will be much higher in relation to the over volume of business in the system than with other distribution methods. A new franchisor must plan well and provide enough capital and resources to get through these early stages to realize on this leveraging benefit.

A business can grow more quickly through franchising than through almost any other distribution method. Again, while true, it is another benefit that comes later in the growth cycle of a franchise system. Growing too rapidly and not being able to service the franchises that are sold, is a recipe for disaster. Often, franchisors miss the fact that they must also take a break from rapid growth to consolidate, take stock of the situation and plan to accelerate growth even more rapidly thereafter.

In business, it is generally recognized that an owner will be more attentive than a manager. This is a central point which makes franchising so attractive. A franchisor can rest assured that the person operating his store will be “attending to business” much as he would. However, this requires much more than luck in selecting the right franchisees. Learning about franchisee recruitment from others is helpful, but the franchisor must ultimately become the expert about who is best suited to be a franchisee in the particular system. The right franchisees can be nirvana for the franchisor; the wrong franchisees can be nightmares.

And, there is strength in numbers. The successful franchisor can command incredible deals with suppliers of all sorts. The sometimes difficult to obtain mall locations will be in easy reach of a business that can assure a landlord of profitable and predictable tenants in all of its developments. Advertising budgets can be generous, and

there are often greater resources for research and development. In many systems, franchisees provide the greatest contribution to improving the business.

Today there is a wide variety of businesses that employ franchising as the distribution method of choice. However, all too often, the decision to franchise is made based upon the fact that the business is franchisable, without any consideration being given to the following questions:

1. What will the impact be on my existing business?
2. How will it change my activities and responsibilities?
3. What financing do I require?
4. Where will I obtain the various skills necessary in planning, implementing and administering a franchise program?
5. What alternatives exist to expansion through franchising and are these alternatives more attractive to me?

The early stages of your franchise system will require a considerable amount of your valuable time. Even if you decide to work with franchise professionals, you will be required to be part of the planning process because, after all, you are the original success story everyone is attempting to clone. You then must come to terms with the fact that you will not always be able to tend to the original business and others will have to take your place. If you cannot find and train the right people, you could seriously reduce your earnings and cash flow. As mentioned earlier, most franchise systems do not become profitable for the franchisor until a number of units, sometimes as many as ten or more, are up and running smoothly. Consequently, you may have to rely on the original business for some time to support you and provide the working capital necessary for the franchise expansion. The flagship business may also be jeopardized by the fact that your franchisees are using your trademarks, style of doing business and appearance. Disgruntled customers will direct their wrath at the system as a whole and you may not have a business to go back to, if the franchise expansion fails.



Edward (Ned) Levitt is a partner of Dickinson Wright LLP, Toronto, Canada, and chair of its franchise law practice group. He served as General Counsel to the Canadian Franchise Association from 2000 to 2007 and, as a member of the Ontario Franchise Sector Working Team, was instrumental in the creation of Ontario's franchise legislation. Among his many publications is Canadian Franchise Legislation published by Butterworths/LexisNexis. Mr. Levitt can be reached at 416-646-3842 or nlevitt@dickinsonwright.com.



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Effective April 2013, the method by which court reporting services are delivered throughout the province has changed dramatically: the Ministry of the Attorney General has implemented across-the-board digital recording of all proceedings.

Court reporting under the present (September 2013) regime:

- A monitor sits at a computer and logs in data as the digital recording is being created. The monitor will type in words, phrases, exhibit marking, etc. that will be synced to the electronic recording. It is important to note that this is not a transcript, but merely notes of the proceedings that are synced to the digital recording. So if the monitor typed “red car” at about the time a witness mentioned the “red car,” one could search for that entry in the notes, and click on the audio for a playback. It will be the monitor’s discretion that will determine what key phrases are typed, if any.
- The court will sell to approved parties (i.e. counsel) a disk of the digital recording and notes for \$22.00 per court day. There are currently protocols in place in order to receive a copy of the recording and notes.
- The digital recording is passive. There is no voice recognition software implemented, merely the notes of the monitor; the quality of the notes will depend on the monitor employed in court that day, the speed of the proceedings, etc.
- An official transcript may be prepared by the monitor in court, or by a transcriptionist on an approved Ministry list (details of how this will be implemented are yet to be released).
- If your trial took six weeks to complete, it is quite conceivable under this model that you may have multiple transcriptionists preparing the transcript, multiple sets of ears on your transcript and multiple versions of interpretation.
- All stenographic court reporters formerly employed by the Ministry have been told to leave their shorthand machines “at the door” and have now been forced to become monitors of the digital recording systems.

The bad news with regard to the new model:

- The court reporter who was present at the trial may not ultimately be the person who will prepare your transcript, leading to errors of syntax, spelling, context, etc.
- Review of the proceedings on a daily basis will be cumbersome without the aid of a proper rough draft transcript – if the monitor records the words you

think are important, you will be able to word search them; however, if he/she does not, your office will have to take on the task of locating sections of testimony by listening to the CD – when time is precious during trial, this will lead to higher costs to the client in time, manpower and efficiency

- Realtime court reporters have lost their place in the system; if they stay on as official court reporters, they must conform to the Ministry’s new model of digital recording.

The good news about the model:

- Parties may now provide for their own qualified court reporter in court. In the past, this was quite an onerous task and required approval of the court and numerous staff levels. Now parties may, upon agreement, contract with their own court reporting firm for the provision of services, including real-time, rough draft and certified transcripts.

The benefits of hiring your own court reporter:

- Parties will have the ability to achieve continuity from discovery to trial with the same reporter(s)
- Parties will be able to negotiate set fees for services in advance
- Parties will be able to set a timetable for transcript delivery, including appeal transcripts, in advance of the trial (no longer needing to wait months, and sometimes years, for an appeal transcript)
- Parties will have transcripts which can be used with ease in current litigation software
- Parties will be able to choose a qualified, competent service provider with a proven track record of consistency, timeliness and cost efficiency and be subject to less “hit and miss” in the official court reporter they would end up with under the old regime
- Parties may request that the private court reporter service be designated as the official court reporter, thereby bypassing the monitor/recording system altogether

Considerations when hiring your own court reporter:

- Do they have prior court experience? This is invaluable as court has its own procedures in place and it is important that the court reporter(s) you use understand their role and responsibilities.

- Does your court reporter have security clearance from the Ministry of the Attorney General?
- Will your court reporter bring enhanced services over and above those already provided for at the Ministry in court?
- Have you had a previous working relationship with the court reporter(s) and firm?
- Does the court reporting firm carry E&O insurance?
- Ensure you have a written contract outlining all service expectations and pricing so there are no surprises down the road.
- Ensure you have spoken with all parties involved, including the judge assigned to your case and the court reporters’ office at court once agreement has been reached (often it is a good idea at a case con-

ference to let the court know you would like to use your own reporter).

- Obtain a resume of all reporter(s) who may work on your trial and firm experience to have on hand to present to the judge and other interested parties to demonstrate core competence and experience.

Kim Neeson is a working court reporter and firm owner of Neeson Court Reporting in Toronto, Ontario. Ms. Neeson is also President of the Chartered Shorthand Reporters’ Association, and on the Technical Education Committee of the National Court Reporters’ Association. Ms. Neeson has experience in both the official and freelance court reporting worlds.

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Breaching one's professional obligations of confidentiality can have serious consequences to the person who can't – or won't – keep a secret, particularly if the person breaching the confidence is a lawyer.

This point was made clear in a recent news story involving J.K. Rowling, author of the immensely successful Harry Potter series. Her popular novels proved to be the top-selling book franchise in history, spawning the highest grossing movie franchise ever.

But when the Harry Potter series ended, she wrote a new crime novel, *The Cuckoo's Calling*, featuring a private investigator named Cormoran Strike. She wrote it under the pseudonym "Robert Galbraith." Described as a former plain-clothes military policeman who had left the British Army to work in the private security industry, it was "Galbraith's" first novel. Ms. Rowling, having sold over 450 million Harry Potter books, wanted total anonymity and confidentiality with respect to Galbraith's true identity. That's why she wrote it under a nom de plume.

The real author of *The Cuckoo's Calling* was revealed (and Rowling's cover blown) not by a publisher, a book distributor or anyone else in the book trade. Her cover was blown by her own lawyers.

She used the London firm Russells for her legal work, which describes itself as "one of the leading firms in the entertainment industry," adhering to "the highest standard of professionalism." Unfortunately, Christopher Gossage, a partner at Russells, disclosed Galbraith's 'doppelganger' to his wife, who subsequently bragged/gossiped/winked/nudged to her friend, Judith Callegari. And like wildfire, the secret escaped because Ms. Callegari seems to have disclosed it to a journalist through Twitter.

Said Ms. Rowling: "To say that I am disappointed is an understatement. I had assumed that I could expect total confidentiality from Russells, a reputable professional firm, and I feel very angry that my trust turned out to be misplaced. A tiny number of people knew my pseudonym and it has not been pleasant to wonder for days how a woman whom I had never heard of...could have found out something that many of my oldest friends did not know."

Russells went into reputation management overdrive to try to fix the damage when the source of the leak was uncovered to be Russells itself. The firm apologized, saying in a statement: "Russells Solicitors apologize unreservedly for the disclosure caused by one of our partners, Chris Gossage, in revealing to his wife's best friend...that the true identity of Robert Galbraith was in fact J.K. Rowling."

Russells agreed to pay an undisclosed sum to Ms. Rowling, who donated it to charity.

But the issue was never about money. It was about confi-

dentiality and having your confidentiality breached by your lawyers; a profession that is duty bound to keep client information confidential.

Clients should demand and expect total confidentiality from their lawyers. Breaches of client confidentiality by lawyers will have consequences to that lawyer's continued ability to practice law, notwithstanding any civil action a client might have against that lawyer for breaching confidences, and notwithstanding that lawyer's ability to keep existing clients and attract new ones.

An excerpt of the Code of Professional Conduct that Canadian lawyers must adhere to states: "A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless expressly or impliedly authorized by the client or required by law or a court to do so..."

The Rule includes the following commentary: "A lawyer should avoid indiscreet conversations and other communications, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shoptalk among lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened."

The J.K. Rowling story is a good reminder to lawyers and law firms that a breach of confidentiality can damage not only the reputation of one lawyer with loose lips, but the reputation of an entire law firm. I can only imagine what Russells is saying to its existing clients in the entertainment, media and publishing industry to keep them from moving their business away to other firms. And I can only imagine what other London firms might be thinking about doing to encourage "Russells Refugees" to move their business.

For Russells and Mr. Gossage, it's a reputation management disaster and they will have to weather the storm. Apologizing right away and paying a settlement was their only recourse.

But in a twist of fate, *The Cuckoo's Calling* sold less than 1500 copies before J.K. Rowling's cover was blown. Sales have since risen by 150,000 per cent.



Tony Wilson is a franchising, licensing and intellectual property lawyer at **Boughton Law Corp.** in Vancouver, he is ranked as a leading lawyer by Lexpert, he is an adjunct professor at Simon Fraser University (SFU), he is the author of two books: *Manage Your Online Reputation*, and *Buying a Franchise in Canada* and he

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A client has brought in an agreement to purchase an interest in mining claims located somewhere in Northern Ontario. Where do you start?

First, you'll have to determine what type of mining interest is involved. There are several options available: patented surface and mineral rights, patented mineral rights only ("MRO"), unpatented mining rights, mining lease, or mining licence of occupation ("MLO"). Each has its own requirements and in some cases the consent of the Ministry of Northern Development and Mines ("MNDM") must be obtained before the property can be transferred. In addition, various statutes, such as the Mining Act (Ontario), the Assessment Act (Ontario), the Provincial Land Taxes Act (Ontario) and/or the Local Roads Boards Act (Ontario), will affect the way in which land taxes are assessed against the property.

In addition to the unique requirements associated with mineral properties, there are also the additional challenges of determining what searches must be done to carry out effective due diligence on behalf of your client. A great number of mining claims are located in unorganized territory outside of any municipal boundaries, so who do you contact?

Realty/Provincial Land Taxes

If the property is located within an organized territory, the appropriate municipal authority can provide information regarding the status of the account on the property, including whether there are any current or outstanding taxes owing on the property. In addition to realty or provincial land taxes, a property may also be subject to local roads boards taxes or school tax assessments.

Provincial land taxes are not payable on patented mining lands in unorganized territory that are subject to the acreage tax under the Mining Act (Ontario), unless any part of the land is used for purposes other than mining or the property contains timber not reserved to the Crown or part of a Crown forest that has a value of more than \$2 per acre. Unpatented mining claims, MROs, mining leases and MLOs are not subject to realty or provincial land taxes.

Mining Land Taxes and Rents

Under the Mining Act (Ontario), mining land taxes generally apply on patented lands under the following circumstances: (i) if the lands were originally granted as mining lands (check the legal description on the property parcel

register for indications such as "mining claim" or "mining location"); (ii) if the lands were not originally granted as mining lands, but the mining rights only ("MRO") were subsequently severed from the surface rights, those mineral rights will be subject to mining land tax; or (iii) if the lands were not originally granted as mining lands but are now being used for mining purposes.

Mining rights granted by lease, unpatented mining claims and MLOs are not subject to mining land taxes. However, mining leases and MLOs are subject to mining rents. Also, the right to hold an unpatented mining claim is subject to the filing of specified assessment work, and any outstanding work and its due date should be noted to avoid forfeiture of the mining claim.

Patented Mining Claims and MROs

In the case of patented mining claims and MROs, the usual searches may or may not be required and it may also be necessary to conduct additional searches not generally required for residential or commercial properties.

While undeveloped mining lands with no septic system and/or no water well do not require searches with respect to same, in certain circumstances it may be advisable to submit enquiries to ensure there is no record of any septic system or well upon the lands. A water potability certificate is required only if a well is located upon the property. If a conservation authority has been established for the area that the lands are located in, a search enquiry should be submitted.

The Ministry of the Environment may register any orders, etc. against patented lands or MROs where environmental violations have occurred. However, the fact that there are no registrations against the parcel may not be a conclusive indication of whether appropriate approvals have been granted or whether there are outstanding action requests, charges or violations with respect to the lands. Also, the appropriate district office of the Ministry of Natural Resources should be able to determine whether there are any projects or planned projects that may affect the subject lands.

Unpatented Mining Claims

As property rights are not attached to unpatented mining claims, the searches usually conducted on patented mining claims where surface rights are held are not required. Liens or other encumbrances registered against unpatented mining claims will be recorded on the claim abstract records maintained by MNDM. However, the Crown may grant patents of surface rights only ("SRO") to third parties within the boundaries of an unpatented mining claim that may impact the mining rights underlying those surface rights. In that event, the underlying mineral rights can-

not be staked and are reserved to the Crown¹.

In addition, from time to time an order withdrawing mining rights may be issued for a specified area. If all or part of an unpatented mining claim falls within such a designated area, a copy of the withdrawal order affecting the claim area should be obtained to determine what restrictions have been placed on the area and how they affect the relevant claim(s).

Mining Leases

Mining leases may be registered in the land registry system but not all are. If a mining lease is registered in the land registry system, searches similar to those for patented mining claims should be conducted. Where a mining lease is not registered under the land registry system, enquiries should be sent to MNDM to determine if there are any liens/encumbrances registered against the mining lease.

MLOs

A mining licence of occupation is issued where unpatented mining rights are given for land located under water. As with unpatented mining claims, property rights are not attached to MLOs so the searches usually conducted on patented mining claims where surface rights are held are not required. However, unlike unpatented mining claims, liens or other encumbrances registered against MLOs are not recorded on the public MLO abstract records, so an enquiry should be made to MNDM for particulars of any such liens or encumbrances.

Conclusion

This article sets out some general steps to follow when searching title to a mining property in Ontario and is not intended to be a definitive guide on the subject. Each property must be carefully examined to determine the rights held by the claim holder and whether there are any encumbrances, such as royalty agreements, affecting the property.

¹ See Sections 29 and 30 of the Mining Act, R.S.O. 1990

Authored by **Sharon J. Hudson**, an associate member of ILCO and graduate of the ILCO law clerk program at George Brown College in 2005.



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| DATE | EVENT |
|------------------------------|------------------------------------------------------------------------|
| Friday, October 11, 2013 | Provincial Estates Alternative Exam Registration Deadline |
| Wednesday, October 16, 2013 | Lunch Seminar - Productivity and Profitability for Legal Professionals |
| Friday, October 18, 2013 | Provincial Corporate Alternative Exam Registration Deadline |
| Wednesday, October 30, 2013 | LinkedIn 101 |
| Saturday, November 2, 2013 | Provincial Estates Alternative Exam |
| Saturday, November 9, 2013 | Provincial Corporate Alternative Exam |
| Wednesday, November 13, 2013 | Half Day Employment Law Program |
| Wednesday, November 20, 2013 | Advanced Full Day Real Estate Program |
| Friday, January 3, 2014 | Provincial Real Estate Exam Registration Deadline |
| Tuesday, January 28, 2014 | Provincial Real Estate Exam |

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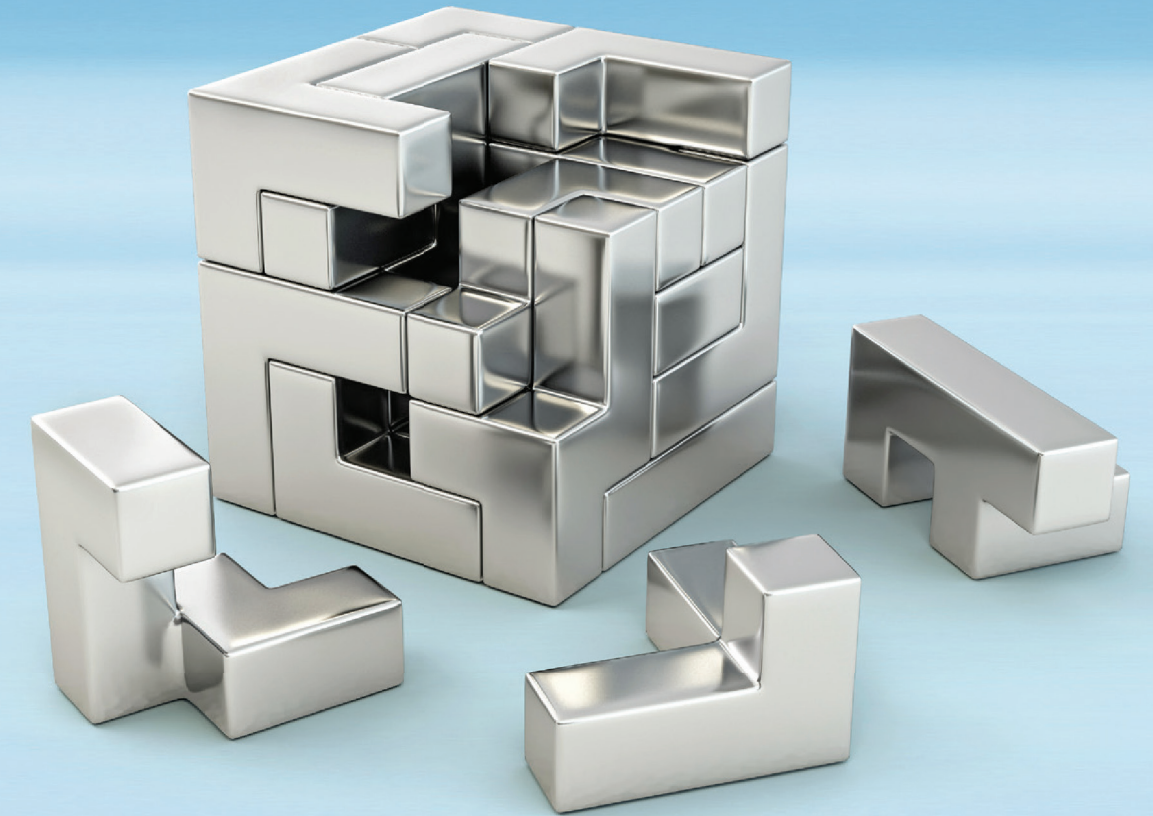
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