HCLA News

Newsletter of the Halton County Law Association

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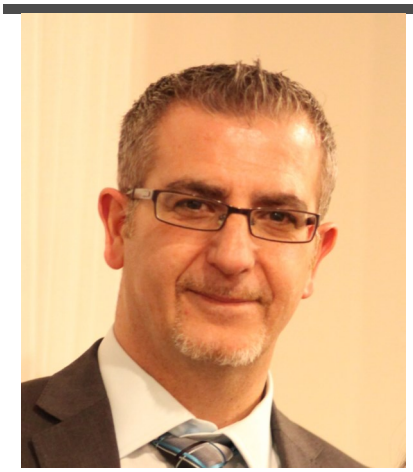
Spring 2017

HCLA Golf Day

This issue:

Deadline for Next Issue:



President's Report by Sam Misheal

It is an honour and privilege to serve as your President for the next two years! We held our Annual General Meeting and Judge's Night on March 2, and we were pleased to have 11 judges from the Superior and Ontario Court of Justice. I would like to extend my gratitude to our past president Rachel Pulis, the exiting board members, and welcome our new executive for the 2017/2018 year.

I attended the 2017 Spring Plenary of FOLA (Federation of Law Associations in Ontario), which was held in Ottawa from Wednesday May 10 - Friday May 12.

The Honourable Beverly McLachlin, Chief Justice of the Supreme Court of Canada, was the keynote speaker at the opening dinner, and emphasised her speech about access to justice.

Among other issues of concern to the profession, we discussed the Bonkalo Report. FOLA and Justice Bonkalo hold opposing views on Justice Bonkalo's recommendation to expand the scope of paralegal practice to include family law practice, in certain regards.

Justice Bonkalo's report entitled "Family Legal Services Review" reviewed the provision of family legal services by persons in addition to lawyers. The recommendations in the report include expanding the scope of paralegals into the practice of family law. Justice Bonkalo recommends that paralegals be able to provide family law services in areas such as: custody, access, restraining orders, child support, enforcement and simple divorce.

The reason for this proposed extended scope of practice is to improve access to justice for unrepresented litigants, and to provide more affordable legal services. In order to implement this expanded scope of practice, Justice Bonkalo proposes paralegals take part in a twelve month education program (in addition to the standard paralegal education requirements). FOLA counters this recommendation stating that this will not improve access to justice, asserting that the expanded scope of paralegal practice will (inadvertently) set up a two-tiered family law system.

This is due to issues such as that paralegals would not be able to handle family cases involving property because they are dealt with in the Superior Court of Justice, but will be able to handle matters of custody. FOLA also notes a lack of empirical evidence to back up Justice Bonkalo's proposal.

Furthermore, FOLA recently submitted to the Access to Justice Committee, Law Society of Upper Canada that the Report is seriously flawed and many of the recommendations are dangerous and costly to the public and the justice system.

The HCLA has hosted many successful CPD events this spring, and many more are planned for the remainder of the year. We will be hosting "Coaching for Success in your Law Practice" in the Law Library on Tuesday June 6, 2017 from 4:30-6:00 p.m. with speaker Stephen Ahad, Counsel from the Coach and Advisor Network of the Law Society of Upper Canada. This program is free to attend and has been accredited for one professionalism hour. I would like to remind everyone of our Annual Charity Golf Tournament, which is quickly approaching. This year's tournament will be held on Wednesday, June 14, 2017 at Crosswinds Golf Club located at 6621 Guelph Line in Burlington and is in support of Home Suite Hope.

I look forward to seeing you there!

Lastly, I would like to send a special thank you to our departing Librarian Karen Kennett; we will miss you, but realize that exciting opportunities and challenges await you. It has been an honor to have you with us the past ten years and wish you every success on your career path.

"Coaching for Success in your Law Practice"

Law Library, Milton Court House

June 6th, 2017

Speaker: Stephen Ahad

(Counsel Coach and Advisor Network from the Law Society of Upper Canada)

*The Halton County Law Association invites you to a **FREE** CPD program with 1 hour Professionalism credit to learn about how you can benefit from or offer your services as a Mentor and Coach for the program.*

Come and hear about this program designed to connect those lawyers and paralegals who would like to volunteer as a coach or advisor, with licensees looking for assistance with skills development, practice management, and/or substantial or procedural issues on particular files.

Library News by Karen Kennett

Spring is in the air!! I feel a sense of excitement and also great sadness as I write this, what will be my last column for the HCLA News.

I will be leaving the Halton County Law Association, with my last day being Friday, May 26th.

I am leaving just shy of my ten year anniversary with the Halton County Law Association and have very much enjoyed my time here in Halton and will cherish the great memories.

I am blessed to have worked along side so many dedicated individuals who have worked tirelessly in making the HCLA a much better and stronger organization

This work experience has given me a wonderful opportunity to development many new skills and I will truly miss working with you all!

I have accepted a position with the Hamilton Law Association and will look forward to the many challenges ahead!

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

Family Law News by Dorothy Kosinksa

On Friday, April 28, 2017, the Halton County Law Association's Annual Family Law Seminar took place at the Oakville Golf Club.

An enlightening day unfolded as the Spring weather warmed Halton lawyers arriving in the early morning.

The morning's proceedings began with an overview of important caselaw developments of 2016, presented by Messrs. Brian Burke and Adam Prewer. Some surprising and shocking recent decisions roused the sleepy family law bar that morning.

Ms. Fareen Jamal and Ms. Laura Oliver then discussed some interesting ways in which to impute and attribute income to payors or recipients.

Ms. Oliver also provided her insight on vocational assessments.

Mr. Trevor Hood was up next with the first power-point presentation of the day. His invaluable knowledge on reading corporate financial statements in order to determine income available for support filled the room. This less understood field of knowledge that creeps into family practice from time to time can be difficult, especially for young lawyers, to engage with effectively. We were especially thankful for the annotated example Corporate Balance Sheets and Income Statements included in the materials – I can speak for myself, at least.

I can safely say that few who attended will dispute that Mr. Shmuel Stern charismatically stole the show with his talk on the recalculation of child support, including the new FRO/ MAG Recalculation Service. Just before the lunch break, when one might expect the energy in the room to run low, Mr. Stern gave a lively and entertaining take on the new Recalculation Service, its drawbacks, strengths, and all its room for improvement.

I also spoke at this event, but Mr. Shmuel was tough to follow. I spoke about some of the new developments regarding the Ontario Disability Support Program (ODSP) as well as the Act and its Regulations. Most importantly, Regulation 222/98 has been changed early this year to exclude child support from counting as income to dependent adult children. I am happy to answer questions if anyone has any to ask.

Mr. Stanley Jaskot provided a thoughtful paper on support clauses in domestic contracts - releases, insurance, variation, review, and ADR. His talk was focused and brought out the key issues and concerns in this area of law.

Ms. Ann Stoner gave an important presentation on the difference in approaching Motions to Change when the operating document is either a domestic contract or a final order.

Ms. Rachael Pulis and Charanjit Gill led an engaging discussion on lump sum support awards in a way as to involve their audience and get feedback from the room.

There was also a detailed presentation lead by Ms. Christine Montgomery on how to more effectively use DivorceMate. With live examples, Ms. Montgomery went over a number of scenarios and explained some of the lesser known inputs that DivorceMate allows, and their effects on the calculation of child and spousal support. This was the last topic of the day before the judges' panel took the stage.

The Honourable Justices Czutrin and Coats lead the discussion on the Family Law Rules. The Honourable Justices Kurz, and Starr then joined as well to form the Advocacy and Professionalism Panel and discuss various topics, amongst which were tips for lawyers both in terms of written and oral presentation, a discussion on the scope of paralegal involvement in family law, and new practise directions surrounding the booking of Case Conferences at the Milton Courthouse.

The Seminar was an invaluable source of information and all Halton lawyers are encouraged to attend next year and, better yet, join the Halton County Law Association to get perks such as a discount on tickets to attend the seminar and other great programs regularly organized in Halton.

Estates News by Suzana Popovic-Montag

FERTILITY LAW CONSIDERATIONS FOR ESTATE LAWYERS

Technology now allows cryopreservation of sperm, ova and embryos, which can be used to conceive a child after the donor's death. However, Canadian legislation requires the prior written consent of the donor in order to posthumously use his/her genetic material. Thus, in the context of estate planning, it is appropriate to inquire whether the testator or potential beneficiaries have banked genetic material and, if so, how children born through the use of such material are to be treated in one's estate plan.

Consent

The *Assisted Human Reproduction Act*[1] regulates the donation of genetic material. Pursuant to section 8 thereof, donor consent is required before any materials can be removed from the body or used for any specific purpose.

If sperm, ova or embryos have been stored, the client should address whether he/she consents to the posthumous use of banked genetic material. Also, a solicitor may inquire whether genetic material can be retrieved (upon death or after becoming incompetent) in the event no sperm or ova were previously banked.

Providing for Children Conceived after Death

The right of a child, conceived prior to but born after a parent's death, is clearly established at law. However, the rights of children conceived after the death of a parent are less clear; some experts argue that the contingent interest of a child conceived posthumously is equivalent to that of a child conceived prior to a parent's death[2].

Regardless, preserved genetic material has the potential to create delays in estate administration. Assuming consent, without instructions regarding a time limit for use of genetic material, the estate trustee must decide whether to distribute the assets and exclude the potential unborn child, or to suspend distribution until the stored materials have been used or destroyed. Some clients may wish to specify a time limit. While a short window will provide certainty, a longer time period will provide a greater opportunity to achieve a successful pregnancy[3]. The client may wish to provide the estate trustee with discretion to withhold assets until receiving notice from the authorized party that they no longer intend to use the decedent's genetic material. If the will stipulates a fixed time limit for use of genetic material, the will should also require the estate trustee to notify the spouse of any time limitation forthwith.

Another potential issue in estate administration is when the testator's beneficiaries have stored genetic material. For example, a grandparent may not know that their beneficiary-child stored genetic material and consented to its use. Solicitors may inquire of the testator whether any of the testator's children (or other beneficiaries) have stored genetic material and, if so, how these potential biological grandchildren (or children) are to be treated. Otherwise, class gifts to "my issue" or "my (grand) children" will generally include individuals who are born following the death of the testator. Accordingly, class gifts made in a will should specifically limit a class to individuals conceived before the death of a biological parent – if that is the testator's intention.

Donated Genetic Materials

Increasingly, people seek assistance conceiving a child through the use of donated genetic material. In terms of the rights of a biological child conceived from a donor's sperm or egg, most jurisdictions have consistently denied inheritance rights to a child conceived with genetic material from an anonymous donor. In addition, there is currently no mechanism in Canada for individuals conceived with the use of anonymous genetic material to learn the identity of their donor parent. As such, anonymous donors of sperm or ova are generally isolated from the rights and obligations between parents and their children. In addition to the potential for family law obligations, there is the possibility of dependant support applications[5]. If the donor develops an actual relationship with the child, then both family law obligations and dependant support obligations may accrue. However, again, where a child has not been close to a biological parent and has not historically received financial support from him/her, it is unlikely that a court will order dependant support by an anonymous donor[4].

1. SC 2004, c. 2.

2. See *In Estate of K*, 1996 WL 1746080, 131 FLR 374 (Tasmania SC). See also Clare E. Burns & Anastasija Sumakova, *"Mission Impossible: Estate Planning and Assisted Human Reproduction"* (2010), 60 ETR (3d) 59 at 9.

3. See Benjamin C. Carpenter, "*Sex Post Facto: Advising Clients Regarding Posthumous Conception*" (2012), ACTEC Law Journal, Vol. 38:187, at 219-220.

4. See *Pratten v British Columbia (Attorney General), et al,* 2012 BCCA 480.

5. Part V of the *Succession Law Reform Act,* RSO 1990, c. S.26.

Suggested Checklist for Drafting Solicitors
In light of these new developments in estate matters, the following questions may assist drafting solicitors:

Stored Sperm/Ova	
Any sperm, ova or embryos stored (for example at a fertility clinic)?	
If sperm, ova or embryos stored, for what purpose?	
Was consent to the use of sperm, ova or embryos authorized to anyone other than the client and, if so, to whom and for what purpose specifical-	
Was consent to the use of sperm, ova or embryos authorized post-mortem?	
If so, should any time limitations apply to this use?	
Should a surviving partner be required to provide the fiduciary with notice of intent to use sperm/ova and, if so, should there be a time limitation on this requirement?	
Any limits to fiduciary liability?	
What effect, if any, should marriage or remarriage have?	

Donated Sperm/Ova	
Whether sperm/ova ever donated to a fertility clinic?	
If so, whether this was done anonymously?	
If yes, was the intention that children conceived after death or children conceived with donated sperm/ova be included within will?	
Whether sperm/ova donated outside fertility clinic?	
Any relationship with children conceived using genetic materials?	
Was the intention that children conceived with donated sperm/ova outside fertility clinic be included within will?	
If yes, was the intention that children conceived after death with donated sperm/ova be included within will?	

Avoiding complications when Parents Advance Monies to Adult Children by Katherine Batycky

Avoiding complications when Parents Advance Monies to Adult Children: An instructive decision from Milton Superior Court

Submitted by:
Katherine Batycky,
Associate Lawyer,
Haber & Associates,
Burlington

With the ever growing cost of housing, it is getting more and more difficult for young couples to break into the housing market; this fact can create an incentive for a young adult to seek assistance from his or her parents. However, as some relationships suffer a breakdown, this giving of funds to an adult child may cause possible unintended consequences if not done properly.

In the case of *Barber v. Magee* heard in the Superior Court of Justice in Milton, Mr. Justice Fitzpatrick dealt with this very problem. This case clearly showed the difficulties that a senior can get into when potential ramifications of advancing funds to his/her adult child are not fully considered.

In this case, the husband's parents had given the husband a total of $157,000; $90,000 for the down payment towards the purchase of the couple's matrimonial home, and an additional $67,000 to help their son and wife pay for expenses. After the parties separated, the issues arose as to whether any of these funds were given by the husband's parents as a gift, or a loan that must be repaid.

In his decision, Mr. Justice Fitzpatrick outlined that the issue as to whether the money given by the Husband's father was a gift or a loan required an analysis of the facts as to whether a Resulting Trust existed; that is, whether the recipient(s) of money were holding the money in trust for the giver of the money, or whether the money was intended as a gift, not to be repaid. Justice Fitzpatrick quoted the Supreme Court of Canada in the case of *Pecore v. Pecore* and stated that, when a parent makes a gratuitous transfer to an adult child, the presumption is that the adult child is holding the property in trust for the parent. In other words, the parent is presumed not to have intended a gift - but this presumption can be rebutted by the evidence.

After reviewing the jurisprudence, Mr. Justice Fitzpatrick outlines the factors that are to be considered: (1) Whether there were any contemporaneous documents evidencing a loan; (2) Whether the manner for repayment is specified; (3) Whether there is security held for the loan; (4) Whether there are advances to one child and not others or advances on equal amounts to various children; (5) Where there has been any demand for payment before the separation of the parties; (6) Whether there has been any partial repayment; and, (7) Whether there was an expectation or likelihood of repayment.

After reviewing the evidence he then concluded that, based on the totality of the evidence, the presumption of resulting trust had been rebutted, and the monies were not advanced as loans and were in fact gifts. The facts that persuaded Mr. Justice Fitzpatrick to come to this conclusion included that (1) no mortgage was registered against the Matrimonial Home to secure any of the monies advanced by the husbands father (2) there was no evidence of any security for the monies whatsoever (3) the Husband did not produce any Promissory Note, loan agreement, written repayment schedule, or any writing of any kind to corroborate his statement that the monies advanced were loan(4) the Husband did not produce any evidence of any repayment, or any evidence of interest calculation; and (5) there was no evidence of any demand for repayment. The end result for the senior parent advancing the funds was to lose the funds.

The reasoning in this decision has been followed, including by Mr. Justice Broad in his decision rendered in the 2016 Motion for summary Judgement in *Chao v. Chao.* In that case, the predominant property issue was the characterization of money advanced by the husband's parents over a span of 37 years. Over the years, the husband's parents advanced to their son and wife a substantial amount of money, including at least half of the purchase price of the matrimonial home, and a large portion of the investments owned by the couple prior to the separation.. The wife took the position that all funds received from the Husband's elderly parents should be classified as gifts; at no time was there an expectation of repayment. The husband took the position that the monies were advanced as loans totalling $99,582 and that the monies were put in investments in joint names with the wife because he was ill. The elderly mother of the husband stated in her Affidavit that she and her husband advanced the funds understanding they would be paid back, but they did not consider it necessary to write down and loan agreements because they loved and trusted the couple and that this was the same practice for loans to their other children.

In his decision, Mr. Justice Broad reiterated principles enunciated by Justice Fitzpatrick in *Barber v. Magee*, as follows:

(1) the presumption of resulting trust applies when a parent makes a gratuitous transfer to an adult child;

(2) the presumption if that the adult child is holding the property in trust for the parent; that is, the parent holds an interest in the asset;

(3) the parent is presumed not to have intended a gift, but this presumption can be rebutted by evidence;

(4) the actual evidence necessary to rebut the presumption is dependant on the specific facts of each case;

(5) admissible evidence to be considered can include evidence of the parent's post-transfer conduct, so long as it is relevant to the parent's intention at the time of the transfer; and

(6) a valid *inter vivos* gift is one that is intended to take effect during the lifetime of the donor, consisting of a voluntary transfer of property to another with the full intention that the property will not be returned. To establish a gift, what must be proven is the intention to donate, sufficient delivery of the gift and acceptance of the gift.

In this case, Mr. Justice Broad. reiterated the 7 factors that ought to be considered when deciding whether the parent intended the advances to be a loan or a gift, outlined by Mr. Justice Fitzpatrick had outlined following a review of the case law and made the following finding of facts: (1) there were no contemporaneous documents evidencing a loan, (2) there was no evidence of any oral statements or representations made by either of the husband's parents prior to the couple's separation that would characterize the monies being advanced; (3) there was no evidence of a demand for repayment by the husband's mother until after the couple had separated; (4) a demand for repayment made by the husband's mother was triggered by the withdrawal of funds from a joint account by the wife after the couple had separated; (5) there was no evidence of any partial repayment to the husband's mother prior to the couple separating; (6) none of the income earned on the investments that were created from funds advanced by the parents of the husband was paid to the parents; (7) there was no evidence that, during the marriage, the husband's parents had sought any accounting of the investments made from the monies advanced; (8) there was no evidence that the parents of the husband had reported income or capital gains on the investments created by the funds in their income taxes; (9) there was evidence that the monies were advanced by the husband's parents to help out the couple; and (10) the advancement of the monies being sought to be characterized as a loan ($99,582) was "old" in that the advancements were made some time ago, and there was no evidence of any realistic expectation of repayment of that specific money by the husband's mother.

Mr. Justice Broad concluded that the presumption of resulting trust had been rebutted and, further, that the advances made by the husband's parents cannot be characterized as loans to the husband. He found that, based on the evidence there never was any expectation, prior to the parties' separation, on the part of the husband's mother that either party would be required to repay any of the funds she had advanced to the couple, and that it would be unfair within the concept of the equalization process between the husband and the wife, to permit a deduction of the value of monies if characterized by loans, when it was not expected in reality.

The important question for the senior parent that comes from these cases is: how does one avoid the risk of losing the monies to a classification of a "gift"?

Other than not provide any funds or other property to a child, the best way to avoid the risk of the funds being lost altogether was suggested by Mr. Justice Fitzpatrick in the *Barber* case where he stated that the closer the advance is structured to an arm's length transfer for consideration, the more likely it will be recognized as a loan:

If at all possible, the lender should retain counsel to prepare documentation confirming the loan amounts, the applicable interest rates and the repayment schedule or a stipulation that the loan is repayable on demand, along with any other material details. If the loan repayment is held in abeyance then that too should be documented. The borrowers should have their own counsel and if the loan is to one spouse alone then each spouse should have independent counsel. It remains a mystery to me why parties would fail to undertake the modest efforts required to document and thereby secure monies advanced if they are truly meant to be in the form of a loan, especially where the amounts advanced are significant.

In summary the best steps for a senior to take to ensure he/she does not lose the money leant to a child is:

each of the parent and the adult child have his/her own lawyer document the loan, whether by way of a promissory note, or formal loan agreement, including details of loan amounts, applicable interest rates, repayment schedule or a clear statement that the loan is repayable 'on demand" seek security for the monies advanced, such as a mortgage on the home.

It is easier to forgive a debt that clearly exists, should the parent choose to do that ultimately whether during his/her life or in a Will, than it is to seek repayment of an advance that may ultimately be declared a gift. Following the suggestions by Mr. Justice Fitzpatrick in the *Barber* case would go a long way to clear up issues that could arise.

Katherine Batycky, Associate Lawyer, Haber & Associates, Burlington

2015 ONSC 8054

, 2007 SCC 17, [2007] 1 S.C.R. 795 (S.C.C.), at paras. 24-26 *" The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended…. This is so because equity presumes bargains, not gift. The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust*.

Byrne v. Byrne, 2015 BCSC 318, 57 R.F.L. (7th) 215 (B.C. S.C.)., which decision referenced the factors adopted by the B.C. Court of Appeal in *Kuo v. Chu*, 2009 BCCA 405, 180 A.C.W.S. (2d) 903 (B.C. C.A.), citing *Locke v. Locke*, 2000 BCSC 1300, [2000] B.C.J. No. 1850 (B.C. S.C.).

2015 ONSC 8054, at paragraph 42

2016 ONSC 7911

2016 ONSC 7911, at paragraph 76

2016 ONSC 7911, at paragraph 81

2016 ONSC 7911 at paragraph 85

at paragraphs 72 - 74

On-line Use of Trademarks by Ryan Smith

Trade-marking a Geographical Place

By: Ryan Smith, April 2017

People, businesses, and marketing companies always consider choosing the easiest trade-mark for a brand. "Easy" trade-marks are those that are clearly or somewhat descriptive of the goods or services they are meant to brand such as "Jim's Landscaping". When considering the "easy" trade-marks, using only or including a geographical location is appealing such as "Buffalo chicken wings". A geographical place can have all sorts of meanings in the minds of consumers. Businesses like to take advantage of all the meanings associated with a geographical place, so they often use that place name to brand goods or services.

That's where the trouble begins. When someone asserts exclusive rights to a geographical place (and those words used as a trade-mark) in association with certain goods and services, in turn they attack (and are forced to attack to maintain their rights of exclusivity if any) identical or similar goods and services that either want to similarly use the geographical place to brand their goods or services or that want to use the geographical place in connection with the goods or services: consider the problems that would arise if someone were to have the exclusive right to use the word CANADA (as a trade-mark) to brand "maple syrup".

The Federal Court of Appeal recently had to rule on whether a trade-mark that is merely the geographical place where the branded goods originate is permitted under our trade-mark law.

The Case – MC Imports Inc. v. AFOD Ltd., 2016 FCA 60

The Federal Court

A business called MC Imports branded food products under the trade-mark LINGAYEN. Lingayen is a city in the Philippines known for shrimp paste products characterized by their distinct aroma and flavour. MC Imports sued AFOD for trade-mark infringement of LINGAYEN. AFOD had sold shrimp paste products marked with the trade-mark NAPAKASARAP with "Lingayen Style" in smaller script underneath the trade-mark. The Federal Court ruled that the trade-mark for LINGAYEN was invalid because it was clearly descriptive of the place of origin of the food products. MC Imports appealed the ruling.

The Federal Court of Appeal

At the Federal Court of Appeal MC Imports argued that its trade-mark LINGAYEN was not clearly descriptive and as a result the trade-mark was not invalid. At the heart of the appeal was how to interpret the test for determining whether the trade-mark was clearly descriptive of the geographical place where the goods or services originate. Former case law has looked at whether an ordinary consumer would consider the trade-mark a geographical place whereas other case law considers the perspective of the ordinary consumer irrelevant, asking only whether the trade-mark clearly describes the actual place or origin of the goods or services.

The Federal Court of Appeal ruled that the appeal should fail for the following reasons. The court said that no party should be able to maintain a monopoly (via a trademark registration) over the use of words that describe the origin of goods or services as it would unduly deprive potential competitors of the opportunity to so describe their own goods, even if the ordinary consumer might not be previously familiar with the place.

The court also clarified how a trade-mark should be analyzed when determining whether a trade-mark is clearly descriptive of the place of origin of goods or services. The court enunciated a three (3) part test:

determine whether the trade-mark is a geographic name as a matter of fact; this should only be considered from the perspective of the ordinary consumer of the goods or services where a trade-mark has multiple meanings some of which are geographic, for example, Sandwich; in such a case it must be determined which meaning of the trade-mark predominates;

determine the place of origin of the goods or services; if the goods or services originate in the place referred to by the trade-mark, then the trade-mark is clearly descriptive of the place of origin; referring to the place of origin by its name is the pinnacle of clarity – this is why the perspective of the ordinary consumer is unnecessary and an applicant should not be allowed to benefit from a consumer's lack of knowledge in geography; and

determine whether the trade-mark, despite being clearly descriptive of the place of origin of the goods or services, is distinctive and therefore registrable; in order to prove distinctiveness, a trade-mark owner will need to show prior use of the trade-mark and that the relevant trade-mark has acquired a dominant secondary or distinctive meaning in relation to the goods or services from the perspective of the consumers of the product.

In the LINGAYEN case, the court said that: (i) LINGAYEN refers to a city in the Philippines and there was no other evidence that it had any other meaning; (ii) the goods originate from Lingayen City so the trade-mark is

clearly descriptive of the place of origin of the goods; and (iii) the appellant only provided evidence of the prior use of the LINGAYEN trade-mark, but did not file any evidence to show that the trade-mark had acquired distinctiveness from the perspective of the people who actually use the goods or services in question; therefore the trade-mark was not registrable.

Conclusion

In this ruling the court has provided clear commentary and a test to help people considering the adoption of a trade-mark that contains a geographical place. The judgement will be of assistance to those filing trade-marks with geographical places, as well as for the Trade-marks Office in assessing the applications filed with them.

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

Law Society caps Referral Fees!

Many of us tend to specialize in a particular area of legal practice. If a new client contacts us with a problem or issue that is outside of our area of expertise, we will generally refer that client to a lawyer who has experience in the area where the client needs help. As I am a personal injury lawyer, I therefore refer out all clients who have contacted me seeking help with family law issues, criminal law issues, corporate/commercial matters, wills and estates, contract disputes… you get the picture. I never receive, or expect to receive, a referral fee for sending these clients to lawyers who are able to help them with their particular concerns.

But personal injury cases are different. As we generally work on contingency fee agreements with our clients, we usually are not paid for years for our work, but when we are finally paid, often our accounts are substantially sufficient to allow us to acknowledge the lawyer who sent us the file by way of a referral fee. The practice of paying a referral fee is thereby rooted in practical, common sense, as it allows the client to be delivered into the hands of a lawyer with proper expertise to handle the file, but at the same time credits the referring lawyer for having found the client in the first place.

Until last week, the regulation of referral fee payments did not exist. Personal injury lawyers were unfettered in their ability to pay whatever percentage of their fee they wished to the referring lawyer. Unfortunately, as a result of this unregulated practice, some law firms essentially ceased to practice law, and instead, became marketing machines that functioned primarily as a brokerage that farmed out clients to satellite lawyers who were in turn obligated to pay referral fees (sometimes as high as 33.3%) to the law firm broker.

There are numerous difficulties with the law firm as broker model, not the least of which is that the client who contacted the law firm broker was often being referred to law firms quite independent of the law firm broker, without understanding how or why they were now meeting with lawyers who were not employees of the law firm they originally contacted. There was very little or no transparency to the public as to the business

arrangement between the broker law firm and the lawyer receiving the client.

On Thursday April 27, 2017, Convocation passed a motion that places new limits on the extent of referral fees that can be paid, and in addition, the motion adds new reporting requirements to all lawyers charging and paying referral fees.

Referral fees are now capped at 15% of the total legal fee being charged for the first $50 000.00 paid to the referring lawyer, and 5% of all additional legal fees paid to the referring lawyer, up to an absolute cap of $25,000.00.

In addition, the Law Society has now implemented transparency requirements, which are as follows:

both lawyers must sign a Referral Agreement that will be provided by the Law Society;

The account to the client must clearly indicate the amount paid as a referral fee from the legal fees charged;

The client must sign an acknowledgement of the referral payment at the time that the payment is made;

The books and records of both the referring and receiving lawyer must record all referral payments made and received. Lawyers will have to report referral fees paid and received in their annual reporting to the Law Society;

Payment of up front referral fees is now prohibited;
Payment of referral fees to lawyers who licenses have been suspended is prohibited.

The motion passed by Convocation also provides a transition provision stipulating that the new referral fee rules will not apply to referral agreements already in existence prior to the effective date of the new rules (April 27, 2017).

The measures taken by the Law Society should go a long way towards promoting transparency and clarity to all situations involving the payment of referral fees when a client is referred from one lawyer to another.

Congratulations!!

Congratulations to Claire Wilkinson, who became President of the Ontario Trial Lawyers Association on April 28, 2017. The Ontario Trial Lawyers Association (OTLA) was formed in 1991 by lawyers acting for plaintiffs and now has a member of 1600. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating strongly for safety initiatives.

Community Foundation of Halton North

For Good For Ever

The Community Foundation of Halton North (CFHN) , www.cfhn.ca, provides an opportunity for people to donate to their favourite cause or causes, numerous times, with only one donation. Gifts made to CFHN are placed in endowments. The principle amount is never disbursed or depleted. The endowment generates revenue and from that revenue, grants are distributed into the community each and every year.

Donors can give to a specific charity or choose to support a desired area of interest including health and social well-being, art and culture, the environment and/or sports and recreation. Donors can even support several charities at the same time.

Individuals can make a gift today or can choose to make a gift as part of their estate plan. A bequest to CFHN will not affect one's current lifestyle and donors can direct their bequest to a particular charity or area of interest. Making a bequest has many tax advantages and will benefit the community in a significant way.

Consider a gift to the Community Foundation of Halton North. A gift made today will have an impact for generations to come. Community Foundation of Halton North – for good for ever.

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