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Canadian Bar Association

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Looking Forward

With the new federal government taking office, there will be legislation tabled that will implement many campaign promises.

The CBA, through its National Sections, will take the lead, providing input to the new Minister of Justice, as well as other federal Ministers and departments. OBA Section members can provide input on these new legislative initiatives through their National Sections, as they are announced. Below are some highlights:

Transparency / Accountability Law

The first piece of legislation the Conservative government intends to introduce is an "accountability" law that will encompass sweeping changes to political contributions by corporations, trade unions and organizations; extend the prohibition time against former cabinet ministers, ministerial aides and senior public servants lobbying government; outlawing lobbyists from accepting "success" or contingency fees; and require ministers and political aides to record contacts with lobbyists and empower Canada's Auditor General to audit institutions, individuals or companies receiving funding under an agreement with the Government of Canada. It would allow members of the public to make complaints to the Ethics Commissioner and also give the Ethics Commissioner the power to levy fines.

The Conservative platform identified changes to the *Access to Information Act* as a priority. They propose to extend its mandate to cover "all Crown corporations, Officers of Parliament, foundations and organizations that spend taxpayers' money or perform public functions." It would permit exemptions only on the basis of the harm or injury that would result from disclosure. All exemptions would be subject to a public interest override and the Information Commissioner would have access to cabinet deliberations to determine if they are properly withheld. The Conservative platform also proposed strength-

ening whistleblower protection under the *Public Servants Disclosure Protection Act*.

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La clause nonobstant mal aimée

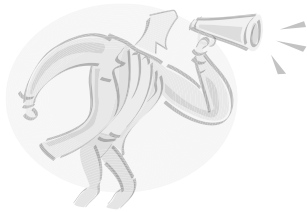
*Par David Leitch -
président du Comité des langues officielles*

La récente campagne électorale m'a laissé incertain que les chefs libéral et conservateur comprenaient le rôle d'une disposition importante de notre Constitution: la clause nonobstant.

M. Martin a prétendu que le seul droit protégé par cette dernière est celui des législateurs de tendance anti-Charte d'infirmier les décisions de tribunaux mettant la Charte en application et que, par conséquent, cette clause devrait être rayée ou, du moins, son usage devrait être défendu par voie de législation fédérale. M. Harper n'était pas d'accord mais il a aussi refusé de reconnaître qu'une loi destinée à abroger celle permettant le mariage entre deux personnes du même sexe ne serait point efficace à moins qu'elle contienne une clause nonobstant lui permettant de l'emporter sur les droits à l'égalité inscrits dans la Charte.

De toute évidence, M. Martin voulait dépeindre M. Harper comme étant un premier ministre qui n'hésiterait pas à utiliser la clause nonobstant comme arme dans une guerre contre les tribunaux

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Membership Has Its Awards

At the OBA's 31st Institute for Continuing Legal Education held at the end of January, many OBA members were honoured for their outstanding achievements and volunteerism.

- Former OBA President and long-standing volunteer, **M. Virginia MacLean** was the recipient of the Linda Adlam Manning Award for Volunteerism, which recognizes the outstanding volunteer commitment to OBA of a member who, through a significant event, achievement or contribution, has advanced the interests of the OBA's membership and promoted the role of the legal profession in Ontario.



Don Short, Linda Adlam Manning & award-winner, M. Virginia MacLean

- **James (Jay) McLeod**, former Associate Dean of the Faculty of Law at the University of Western Ontario was posthumously awarded the Mundell Award by the Attorney General of Ontario, Michael Bryant. Accepting the award on his behalf was his wife, **Justice Margaret McSorley**.
- **Laird Rasmussen** was the recipient of the 2006 Award for Excellence in Real Estate. This prestigious award was established to recognize exceptional contributions and/or achievements in real estate. The Mundell Award was established by the Ministry of the Attorney General and is presented every year at Institute to the Ontario writer on legal and professional matters who has made a distinguished contribution to law and letters.

The Insurance Law Section has created an Award for Excellence and named its first recipient. **Philippa G. Samworth**, a partner of Dutton, Brock LLP, will be honoured at a special dinner to be held on April 27, 2006 at the Ontario Club. Ms. Samworth is being recognized for her outstanding achievement in the field of insurance law and her contribution to the legal profession throughout her 26 years of practice.

The following OBA members were appointed to the bench by Irwin Cotler, Minister of Justice and Attorney General of Canada:

Gerald E. Taylor of Waterloo is appointed a judge of the Superior Court of Justice of Ontario. He replaces Mr. Justice J.A. Jenkins who has elected supernumerary status. Mr. Justice Taylor received a Bachelor of Laws from Osgoode Hall Law School in 1975.

Anne C. Trousdale of Kingston is appointed a judge of the Family Branch of the Superior Court of Justice of Ontario. She replaces Madam Justice M.F. Dunbar who has resigned. Madam Justice Trousdale received a Bachelor of Laws from Queen's University in 1976 and was admitted to the Ontario Bar in 1978. She is a former member of the Council of the Canadian Bar Association.

Allan R. Rowsell of Oshawa is appointed a judge of the Family Branch of the Superior Court of Justice of Ontario. He replaces Mr. Justice J.C.M. James who resigned. Mr. Justice Rowsell received a Bachelor of Laws from Osgoode Hall Law School in 1979 and was admitted to the Ontario Bar in 1981. He has been a frequent lecturer for the Ontario Bar Association and numerous continuing education programs.



Orlando Da Silva, former Chair of the OBA's Advocacy, Government Relations and Communications Committee and the Editorial Board of this very publication, has moved on to more litigious pastures. Orlando has taken on the role of Counsel in the Crown Law Office, where he will continue a commercial litigation practice for the Ontario government. We wish him all the best!



James C. Morton has joined the Canadian International Peace Project as a Governor. Mr. Morton is the Vice President and President Elect of the Ontario Bar Association and Chair of the Advocacy, Government Relations and Communications Committee of the OBA. Among his many important accomplishments, Mr. Morton is a graduate of the Ben Sutton School of Golf in Tampa, Florida.

The Canadian International Peace Project (CIPP) is a novel and unique non-partisan organization that has brought together diverse groups and individuals to work on issues and projects relating to local, national and international peace, security and development.



Unbillable Time

Book Review

Annotated Ontario Securities Legislation, 24th Edition, 2005, ed. by René R. Sorell and Sean D. Sadler, annotation by McCarthy Tétrault (Toronto, CCH Canadian Limited, 2005, 2739 pp., \$95)

As any securities law practitioner in Ontario can attest, it is a constant challenge of the field to stay abreast of the ever-changing array of rules, policies and notices, both provincial and national, that supplement the *Securities Act* (Ontario). In this context, the *Annotated Ontario Securities Legislation, 24th Edition, 2005* is a valuable practitioner's tool, as it offers a comprehensive consolidation of all applicable legislation, regulations and rules, with the added feature of annotations that provide the reader with interpretive guidance and cross-references. Practitioners will know that the Ontario Securities Commission (OSC) website does not provide consolidated versions of amended rules and policies, which makes consolidations such as this book, and the *Consolidated Ontario Securities Act, Regulations and Rules* published by Carswell, indispensable.

Annotated Ontario Securities Legislation reproduces the full text of the *Securities Act* (Ontario) and Regulation, National Instruments, Policies and Notices, and Ontario Rules, Orders, Policies and Notices implemented in connection with the reformulation of Ontario securities legislation, as well as those instruments that have not been reformulated, including National Policy Statements, OSC Policy Statements, CSA and OSC Notices, and OSC Blanket Rulings and Orders. The book also contains the OSC By-laws and Rules of Practice. This latest edition includes the text of amendments from Ontario Budget Bill 198 concerning secondary liability (which came into effect on January 3, 2006) and is dated current to July 1, 2005.

The key feature of this book is the cross-reference annotations for each section of the *Securities Act* (Ontario) to related provisions of the Act and rules. The annotations are fulsome and in a number of instances offer more precise references compared to those in the comparable consolidation published by Carswell. However, the annotations are generally not as comprehensive as those provided in the Carswell edition since they do not extend to the Forms or include cross-references to relevant definitions. Future volumes would benefit from broadened coverage in this regard.

Annotated Ontario Securities Legislation contains several unique features, the most useful of which is a topical index that can lead readers to specific paragraph references anywhere within the

entire consolidation. This enables the reader to isolate a reference within a given instrument, instead of being referred simply to the instrument as a whole, as is the case with the index for the Carswell consolidation. The book also includes tables of concordance to Canadian securities legislation for definitions and specific sections of the Act and Regulation. Other distinctive characteristics include references at the foot of each page to the name of the applicable instrument and a table of contents that usefully lists the names of both rescinded and current policies and rules.

All in all, *Annotated Ontario Securities Legislation* is an important resource for securities law practitioners and has a number of unique features to justify its place on a securities lawyers' desk alongside, but not in lieu of, the Carswell consolidation.

Jason Koskela
Associate
Blake, Cassels & Graydon LLP



"Call it 'legislating from the bench,' if you will, but on this occasion I should like to repeal the First Amendment."

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By/Par Heather A. McGee

Can You Say “Colleague”?

On the chalkboard in the kitchen, our family keeps a “word of the week.” The idea is borrowed from my Grade 4 teacher, from whom I learned the value of expanding one’s vocabulary. (Which I also learned from the guys at the back of the bus, but that’s another story.)

The kid who uses the word of the week most eloquently, gets to pick the weekend movie rental. We’ve had a number of exciting words over the years, but I have decided the word that my youngest picked last week is my all-time favourite: colleague.

What a cool word. And it’s quite wonderful to use. When speaking to a client you might say “I’m not certain, but surely one of my colleagues has had a similar experience. Let me get back to you.” To a neighbour you might add, “I’m supporting a community event this evening that a colleague of mine organized.” At an association meeting you could highlight that “our colleagues in northern Ontario need legal aid tariff reform more than ever.”

When we belong to a profession, none of us are alone, unless we choose to be. We have colleagues within our community, across the country and arguably throughout the world. We share a vision and common ideals: the rule of law, fair process, equality, transparency and accountability. As a profession, we are more than our individual efforts.

I would like to challenge each of our members to call someone who isn’t a member of the OBA - perhaps someone who hasn’t yet been engaged in the issues of the profession outside of everyday practice. Meet for a coffee, have lunch, share a precedent.

Most importantly, when the phone rings, or you run into a fellow lawyer, be a colleague. Make yourself available and for a few moments enjoy the best part of being a lawyer: your colleagues.



Employez-vous le mot « collègue »?

Sur le tableau de la cuisine, notre famille inscrit un « mot de la semaine ». J’ai emprunté l’idée à mon enseignante de quatrième année, de qui j’ai appris la valeur d’élargir son vocabulaire. (Je l’ai aussi appris des gars sur les bancs au fond de l’autobus, mais ça c’est une autre histoire.)

L’enfant qui emploie le mot de la semaine avec le plus d’éloquence peut choisir le film du week-end au magasin de vidéos. Nous avons utilisé plusieurs mots excitants au fil des ans, mais mon préféré, c’est sans doute celui qu’a choisi, la semaine dernière, mon petit dernier: collègue.

Quel mot *cool*! Et merveilleux à prononcer. En parlant à un client vous pourriez dire :

« Je suis presque sûr qu’un de mes collègues a vécu une expérience similaire. Je vérifie et je vous reviens là-dessus. » À un voisin ou une voisine, vous pourriez ajouter : « Je participe ce soir à une activité communautaire qu’un de mes collègues a organisée. » À une réunion d’association vous pourriez souligner que « nos collègues du Nord ontarien ont plus que jamais besoin d’une réforme des tarifs de l’aide juridique. »

Quand nous appartenons à une profession, nous ne sommes jamais seuls à moins d’en décider ainsi. Nous avons des collègues au sein de notre communauté, à travers le pays voire autour du monde. Nous partageons une vision et des idéaux communs de primauté du droit, de traitement équitable, d’égalité, de transparence et d’imputabilité. En tant que profession, nous sommes plus que la somme de nos efforts individuels.

J’aimerais mettre au défi tous nos membres : appelez un avocat ou une avocate qui n’est pas membre de l’ABO, peut-être quelqu’un qui n’a pas abordé les enjeux de la profession au-delà de sa pratique quotidienne. Prenez un café, un lunch ensemble, échangez.

Mais surtout, quand le téléphone sonne, quand vous rencontrez une ou un autre juriste, soyez vous-même une ou un collègue. Rendez-vous disponible et pour quelques instants, sachez apprécier ceux et celles qui rendent cette profession si agréable : vos collègues.

Misunderstanding the Notwithstanding Clause

The recent election campaign left me wondering whether either of the two leading politicians understood the role of an important provision in our Constitution: the notwithstanding clause.

Mr. Martin maintained that the only right protected by the notwithstanding clause is the right of anti-Charter legislators to reverse pro-Charter court rulings and that the clause should, therefore, be removed or, at least, its use renounced by the federal government. Mr. Harper refused to go along but he also refused to acknowledge that a law repealing the Liberals' same-sex marriage legislation would not survive court scrutiny unless it included a notwithstanding clause overriding the equality provision of the Charter.

Of course, Mr. Martin was trying to portray Mr. Harper as a Prime Minister who would use the notwithstanding clause in a war with the courts over Charter rights. But a Prime Minister with that inclination would discover that the scope of the notwithstanding clause is limited. It does not apply to all Charter rights. It can be used to override fundamental freedoms (of conscience, thought, peaceful assembly and association) as well as legal guarantees (habeas corpus, etc.) and equality rights. It cannot be used to override democratic, mobility or official language rights. Since aboriginal and treaties rights are reaffirmed outside the Charter, they are also not subject to the notwithstanding clause.

Even when the notwithstanding clause is available, most legal commentators think that it strikes an appropriate balance of power between the courts and the legislatures. As Peter Russell put it in 1991, the notwithstanding clause provides a method "more reasoned than court-packing and more accessible than constitutional amendment" for questioning the decisions of the judiciary. Those decisions can't *always* be right. Indeed, the judges themselves often disagree.

Ironically, given his other attacks on Mr. Harper's "un-Canadian" values, Mr. Martin was actually advocating the American constitutional model where the courts have the last word. Mr. Martin was also forgetting the historical fact that the notwithstanding clause gave the sovereignist government of Quebec in power in 1982 a legitimate way of protesting a Charter to which it did not and would not consent. Who knows what action it might have taken without that option? Five years later, le Parti Québécois was no longer in power and the override, which had to be renewed to remain effective, lapsed.

But is it nevertheless true that the electorate would punish a government which threatened to invoke the notwithstanding clause to override Charter rights, as Mr. Harper clearly feared? The results of a national public opinion survey conducted in February 2002 indicated that Canadians were actually fairly evenly divided on the question of whether or not governments should have this power. Moreover, in the context of heightened concerns about security six months after the September 11, 2001 attacks, a majority (55%) agreed that Parliament should overrule a Supreme Court decision that struck down anti-terrorism legislation on Charter grounds. In short, public opposition to the use of the notwithstanding clause may be overstated. It will probably depend more on the issue itself than on the question of whether or not the notwithstanding clause should, in principle, be used to override Charter rights.

**David Leitch is Chair of the Official Languages Committee*

Continued from Page 1

à propos de la Charte. Mais un premier ministre de cette inclination découvrirait que la portée de la clause nonobstant est restreinte. Elle ne s'applique pas à tous les droits inscrits dans la Charte. Elle l'emporte sur les libertés fondamentales (de conscience, pensée, réunion pacifique et association) ainsi que sur les garanties juridiques (*habeas corpus*, etc.) et les droits à l'égalité. Elle ne peut être invoquée contre les droits démocratiques, la liberté de circulation ou les droits rattachés aux langues officielles. La clause nonobstant ne s'applique pas non plus aux droits des autochtones, ancestraux ou issus de traités, car ils sont réaffirmés à l'extérieur de la Charte.

Et même là où la clause nonobstant s'applique, la plupart des commentateurs juridiques croient qu'elle établit une bonne balance du pouvoir entre les tribunaux et les législatures. Comme Peter Russell a observé en 1991, la clause nonobstant constitue une méthode « plus raisonnée que la nomination des juges partisans supplémentaires (court-packing) et plus accessible que la modification de la Constitution » pour questionner les jugements de la magistrature. Ces jugements-ci ne peuvent pas *toujours* avoir raison. En effet, les juges eux-mêmes sont souvent en désaccord.

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Dans la lumière de ses autres attaques contre les prétendues valeurs non-canadiennes de M. Harper, on doit constater avec ironie que le système envisagé par M. Martin ressemblerait au système américain où le droit du dernier mot appartient aux tribunaux. De plus, M. Martin semblait avoir oublié le fait historique que la clause nonobstant donna au gouvernement souverainiste du Québec au pouvoir en 1982 une méthode légitime de contester une Charte à laquelle il ne consentait et ne consentirait pas. Qui sait ce que ce gouvernement aurait fait sans cette option? Cinq ans plus tard, le Parti Québécois n'était plus au pouvoir et la clause nonobstant, dont l'usage devait être renouvelé pour rester en vigueur, s'est périmée.

Reste-il néanmoins vrai que l'électorat punirait un gouvernement qui brandirait la clause nonobstant pour l'emporter sur les droits inscrits dans la Charte, ce qui constitue évidemment la crainte de M. Harper? Selon les résultats d'un sondage public national effectué en février 2002, les avis de nos compatriotes étaient plus ou moins partagés sur la question à savoir si les législatures devraient posséder ce pouvoir. Et qui plus est, dans le contexte d'une prise de conscience accrue

du terrorisme six mois après les attaques terroristes du 11 septembre 2001, une majorité (55%) étaient d'accord que le Parlement devrait annuler une décision de la Cour suprême statuant qu'une loi anti-terroriste porte atteinte aux droits inscrits à la Charte. En bref, la réticence du public par rapport à l'usage de la clause nonobstant peut être exagérée. Elle dépendrait plus de la question débattue que de celle à savoir si la clause nonobstant devrait, en principe, être invoquée pour l'emporter sur les droits reconnus par la Charte.



Advancement of Legal Education and Research Trust *of the Ontario Bar Association*

AN INVITATION

You are cordially invited to
a Tribute Dinner for

The Honourable James M. Farley

on the occasion of his retirement from
the Ontario Superior Court of Justice

Thursday, April 20th, 2006
Toronto Marriott Eaton Centre
525 Bay Street
Grand Ballroom

Reception: (Cash Bar) 6:00 p.m.
Dinner: 7:00 p.m.
Tickets: \$140 each (GST Exempt)

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Criminal Justice

Criminal justice reform was one of the major pillars of the Conservatives' electoral platform. Some of the proposals they brought forward include:

- increased mandatory minimum sentences for drug trafficking offences, weapons offences, crimes committed while on parole and repeat offenders;
- removal of judicial discretion under s.742.1 of the Criminal Code to impose "conditional sentences" for serious crimes;
- under s. 753 of the Criminal Code, designating an individual convicted of three violent or sexual offences as a "dangerous offender";
- repeal s. 745.6 of the Criminal Code which allows individuals convicted of murder - serving a life sentence and not entitled to parole for 25 years - to apply to the court to have their ineligibility period lessened.

In order to enforce the law, the Harper government is planning to negotiate a new strategy between federal, provincial and municipal governments to employ 2,500 new police officers. One thousand of these new jobs will be allocated to the RCMP. Funding for this initiative is anticipated to come from eliminating the long gun registry.

The justice system and provinces should anticipate a huge boost, due to the Conservatives' promise of an additional \$100 million per year on criminal justice priorities.

The Conservative plan also recommended the appointment of a Director of Public Prosecutions.

Tax Reduction

The new government campaigned on reducing taxes. Some of its upcoming proposals include cutting the GST from 7 to 6%, then eventually lowering it to 5%. They also intend to support proposal by the former government to eliminate the current corporate surtax and reducing the general corporate tax rate by two percent in the next four years. Small business owners will soon enjoy a reduction in the small business tax rate, and employers will receive a tax credit for hiring apprentices. The amount of tax free pension income is also expected to rise. Currently, \$1,000 can be received tax free. This will be increased to \$2,000 and eventually to \$2,500

Environment

Steven Harper's foremost environmental policy during his eight-week campaign was to introduce a tax credit to encourage the use of public transit. The credit would equal 16 percent of the receipted costs of public transit passes and/or tickets. According to estimates by the Conservatives, the transit tax credit will be approximately \$400 million annually. Part of this money will then be allocated to funding climate change initiatives.

Infrastructure

The Harper government has no intention of changing existing infrastructure funding initiatives implemented by the Liberal government. All existing agreements between provinces or municipalities will still be honoured.

In addition, funding, equal to revenue from federal excise tax on gasoline, will soon be provided to municipal governments. These funds will be used for new ventures like road and bridge building and repair ventures, as well as existing projects like public transit and water treatment.

Domestic Security

The Conservatives have promised to protect Canadians by ensuring border guards have the necessary technology and equipment to secure the country. This includes appointing a new National Security Commissioner to coordinate law enforcement and government agencies currently responsible for safekeeping initiatives.

The foregoing review is not exhaustive. To learn about the complete Conservative agenda you may visit www.conservative.ca.

To learn about CBA's federal advocacy initiatives, visit <http://www.cba.org/CBA/Advocacy/LawReform/default.aspx>

The New Justice Minister At-a-Glance

- Vic Toews was elected to the House of Commons in 2000 and re-elected in 2004 and 2006
- Served as Justice Critic since January 2001
- In 1995, he was elected the Member of the Legislative Assembly for Rossmere and shortly thereafter, was appointed the Minister of Labour
- From 1997 until September 1999, served as the Attorney General and Minister of Justice for the Province of Manitoba
- Practised law with the provincial Department of Justice from 1976 to 1991
- In 1987, was appointed director of constitutional law for the Province of Manitoba
- Acted as legal counsel to the Premier of Manitoba at the Meech Lake Accord discussions in 1990
- Appointed Queen's Counsel in 1991
- Obtained his Bachelor of Arts at the University of Winnipeg, and his law degree at the University of Manitoba
- Mr. Toews is married to Lorraine and they have two children



Leaders Have Vision

"It's the vision thing."

That's what U.S. Vice-President George Herbert Walker Bush called it, somewhat dismissively, during the 1988 Presidential election campaign, as if he wasn't quite sure what vision was, or why it was important.

He eventually found out.

After four ineffectual years in the Oval Office, Bush lost the 1992 election to an underdog from Arkansas named Bill Clinton. Clinton talked vision.

So did Rudy Giuliani, who as Mayor of New York, transformed the metropolis. Such is the force of vision. Passionately created and steadfastly applied, it can re-make a city or a country, certainly a company.

So why is there such a lack of vision these days? Why do our leaders in politics and business so often fail to provide a clear, exhilarating image of where they'd like to take us, and why they'd like to take us there?

It's because they either have no clue, or, if they do know, decline to disclose the information for fear that few would fall in behind them. Yet there's no way around it – to be a great leader you need vision.

"I believe," U.S. President John F. Kennedy told a joint session of Congress in 1961 "this nation should commit itself to achieving the goal, before this decade is out, of landing a man on the moon and returning him safely to earth."

Kennedy's statement was met with incredulity by large numbers of the American public. Nevertheless, on July 20th, 1969, Neil Armstrong walked on the surface of the moon.

J.F.K. wasn't around to see it, of course, having long since been assassinated in Dallas. But his transcendent call to action survived him and became astonishing, science fiction reality. Kennedy had vision. The best leaders always do.

As a "motivational" junkie, I find the importance of vision a theme that's consistently emphasized in the tapes, DVDs and videos I adhere to.

My favorite phrase, with which I regale (or more likely bore) friends and clients, theorizes that vision is in fact the lynchpin of success. The phrase goes: You become what you think about.

It's been said that we can achieve virtually anything we choose, if only we could decide what that is. Buried under a surfeit of opportunities and challenges, insecurities and distractions, many struggle to determine exactly who it is they wish to become – in their careers and outside them – and what the outcome looks like in their mind. If they settled all that they'd be more than half way there.



Purpose brings clarity and clarity produces vision, a well-delineated blueprint for your life. When opportunities come along you're then able to evaluate them according to your plan and confidently make the right decision. If the opportunity fits with your vision, you take it. If it doesn't, you don't.

Once you've set in place a full, luminous vision, the world itself will seem to cooperate. Each day, you'll move closer to your objective, often without even realizing it. That's the stunning power of vision, as essential for entities as it is for individuals.

How do you create your vision? It starts with rigorous self-analysis, which can be disconcerting and frequently painful. It's also widely resisted in our syrupy, everything-we-do-is-fantastic world. We need to discover what we were put on earth to do, and then do it.

There's nothing sadder than to speak with elderly men and women who spent their lives in jobs they loathed. While many of them had few options, those who did, almost to a person, lament the fact they didn't take more risks and go after their dreams. Vision is many things – most of all, it's courage.

**Jim Gray teaches media and presentation skills in Toronto and is an occasional columnist for the Globe & Mail and the National Post*

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Law Day Reaches Out to Public

By Catherine Revoy

In light of recent public outcry against gun violence in Ontario, this is a critical time to facilitate communication between the legal profession and a confused and sometimes misinformed public.

The OBA and its partners are reaching out with a unique and effective program called Law Day. As many of our members know, Law Day was created by the Canadian Bar Association to mark the signing of the *Charter of Rights and Freedoms* in 1982, with the aim of promoting public understanding of the justice system and the role of judges and lawyers in guaranteeing the openness and independence of that system.

Law in the Mall, an annual mock trial held at a mall in a Toronto at-risk community, educates and informs the public with the assistance of local lawyers and judges who are willing to volunteer their time and efforts to bring a positive message to those who need it most.

“Law in the Mall takes the courts and the legal system to the streets. It involves everyday people,” says Rick Gosling, Coordinator. “It demystifies the courts, and gives judges, crown and defence lawyers more opportunities to help the broad community understand how the courts work for them.”

Law Day Committee member, Deidre Newman, has been involved with the program for nearly 20 years. As a criminal defence lawyer in the greater Toronto area, she is all too familiar with the pitfalls and difficulties many youth face. Yet, despite the recent media uproar, Deidre remains confident in the system. “Our courts are fair and equitable over time. They do not change because of public outcry,” she states. “Through Law Day, our intention is to show people that the justice system is here to serve them. The law exists to protect citizens.”

The Photography Contest, championed by Newman, is another program that strives to include youth from all walks of life. Through the generous donation of sponsors, disposable cameras are distributed to students across the province. All students are given the opportunity to take part in a competition that focuses on Law Day’s theme; this year, *Democracy, Diversity, Freedom*.

Another popular Law Day program geared to teens is the Secondary School Mock Trial Competition. Each year OBA invites all Ontario secondary schools to participate in a mock trial tournament, in which students are given a fact scenario that outlines an alleged criminal offence. The students learn how Canada’s laws guarantee rights and impose responsibilities on society’s members.

According to Gosling, through acting the role of lawyers and witnesses, the mock trial teaches students about the responsibility of supporting members within their community, a lesson that will help carry them forward as they make decisions as adults.

Other Law Day programs include the Grade 5 Poster Contest and the Mock Trial for elementary students; Court Tours and Charter Challenge (an online simulation) for secondary school students; a special citizenship ceremony for new Canadians and a special French language Law Day program.

Those who want to make a difference can volunteer with any of Law Day’s programs. To sign up, contact Catherine Revoy at the Ontario Bar Association by phone 416-869-0513 ext. 357, by email to crevoy@oba.org or visit the Law Day website at www.oba.org for more information.



Call for Volunteers Law Day – Province-Wide

Law Day is scheduled for Thursday, April 6, 2006 with activities planned across the province throughout the week of April 3 - 7. The OBA continues to develop and organize Law Day events across Ontario. The feedback from past events makes it clear that the students, teachers and adults who participate truly appreciate their interaction with volunteer lawyers. Equally clear is the fact that volunteer lawyers get as much satisfaction from the activities as does the public. Activities planned for 2006 include Opening Ceremonies, the Grade 5 Poster Contest, Elementary Mock Trials, High School Moot Competition, Phone-A-Lawyer, Citizenship Court, Photography Contest, Law in the Mall, Court Tours and an Awards Banquet. More information is available on www.oba.org - follow the Law Day links.

Most of the programs are volunteer-driven. If you are interested in volunteering for one or more of the Law Day programs, please contact Law Day Chair Kelly Smith at 416-594-4523 or kelly.smith@rogerspartners.com.

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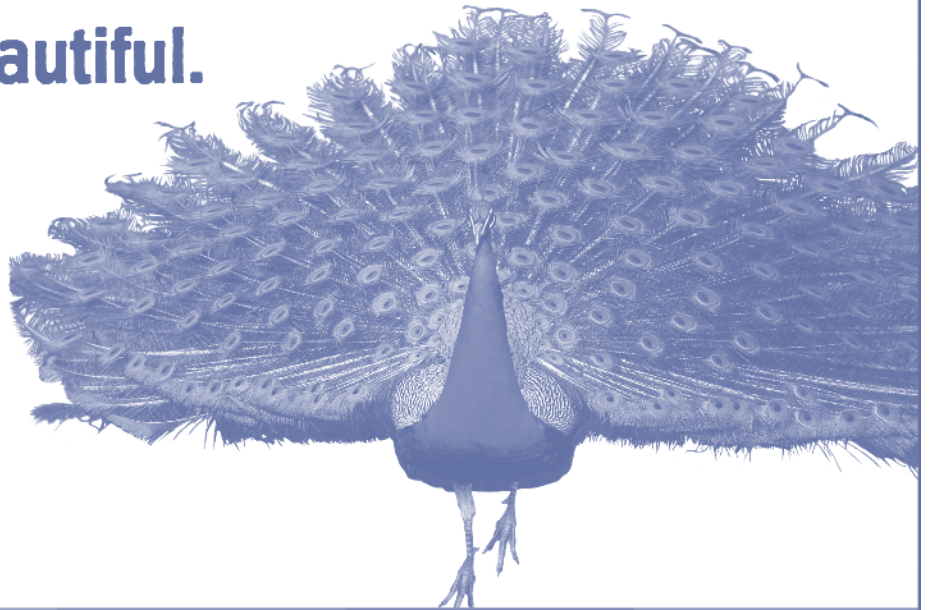
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THE SUPREMES' TOP TEN HITS: 2005

Eugene Meehan, Q.C.*

Introduction

The following is a far-too-brief summary of what I think are the top ten cases from the Supremes in 2005. In terms of the top ten, I have selected the cases that I think are most relevant to those of us practising law on a daily basis, or who are taxpayers (that'd be all of us), rather than the cases that got the most press or are the most constitutionally sexy.

To make the review below easier to read, I've embedded a "Summary of case", and "Why important" in each summary. I've also added the individual email link so you can go directly to the full text of each case. If you'd like this Top Ten List electronically, with each individual email address hyperlinked so you can simply click-n-go, email me at emeehan@langmichener.ca and I'll send it to you right away.

• No. 1 *Vaughan v. R.*, March 18, 2005 (Federal labour law)

Summary of case: A federal civil servant was laid off, and sued in the courts instead of grieving through collective bargaining. The S.C.C. held he had to grieve. Binnie J. (variously at pp. 1, 6, 7, 15-16): "Human resources personnel were recruited into the system, spend a career attempting to understand and die out of it. ...[W]here Parliament has clearly created a comprehensive scheme for dealing with labour disputes, as it has done in this case, courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts."

Why important: Greater clarity (?) as to when to grieve, when to sue.

http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/pub/2005/vol1/html/2005scr1_0146.html

• No. 2 *R. v. Canada Trustco; Mathew v. Canada*, October 19, 2005 (Tax)

Summary of case: These two cases are the two most important tax cases this year, maybe this decade, because of the S.C.C.'s clarification of the general anti-avoidance rule (GAAR) in s. 245 of the *Income Tax Act*. *Canada Trustco* bought trailers which were leased back to the vendors to offset revenue from leased assets by claiming a substantial capital cost allowance. In *Mathew* a 3-stage transaction permitted unrealized losses to be transferred in a non-arms length then an arm's length transaction. The taxpayer was upheld in the former case but not in the latter. See the Chief Justice and Major J. at paras. 1 & 78-80, in the former, and paras. 40, 43, & 58 in the latter.

Why important: Tells us what's permitted by GAAR (*Canada Trustco*) and what's not (*Mathew*) and why.

<http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/rec/html/2005scc054.wpd.html>

• No. 3 *H.L. v. AG of Canada*, April 29, 2005 (Sexual abuse)

Summary of case: H.L. sued S and the federal government for sexual abuse. The trial judge allowed the action against S and the federal government, the latter on the basis of vicarious liability, awarding damages for loss of past and future earnings. The S.C.C.: past allowed, future disallowed, on the basis evidence was presented for the former, not for the latter.

Why important: Greater clarity as to what is needed for (and what will exclude) a claim for loss of future earnings. See Fish J. at pp 43-47: "The finding that a person has had emotional and substance abuse problems which in the past have impacted on his earning capacity is not in itself a sufficient basis for concluding on the balance of probabilities that this state of affairs will endure indefinitely. To assume, without additional evidence, that H.L. will continue to suffer from substance abuse and emotional problems, will not upgrade his education or enter into rehabilitation, and will continue to have a reduced earning capacity, would be to do him an unnecessary and unwarranted disservice - particularly in the light of his own evidence that he had already at the time of trial taken steps to end his addiction to alcohol."

http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/pub/2005/vol1/html/2005scr1_0401.html

• No. 4 *B.C. v. Imperial Tobacco*, September 29, 2005 (Tobacco)

Summary of case: Is the B.C. *Tobacco Damages and Health Care Cost Recovery Act* constitutional? Yes. It's pith and substance is provincial on the basis of s. 92(13), property and civil rights.

Why important: Clears the way for provincial governments to recover health care costs from tobacco companies - you smoked us, we'll smoke you.

<http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/rec/html/2005scc049.wpd.html>

• No. 5 *Biolysse Pharma v. Bristol-Myers*, May 19, 2005 (Medicine)

Summary of case: The bark of the Pacific yew contained paclitaxel, an anti-carcinogenic, but the yew died when stripped of its bark. The multi-national company Bristol-Myers developed a drug containing paclitaxel, and took out patents, but not for paclitaxel. A small Canadian bio-pharma company independent-



ly discovered a different species (of Canadian) yew yielded paclitaxel, without killing it, and took out a patent on this. Goliath did everything in its litigation power to shut David down.

Why important: David won.

http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/pub/2005/vol1/html/2005scr1_0533.html

• **No. 6** *R. v. Grandinetti, January 27, 2005 (Criminal Law)*

Summary of case: Police officers posed as members of a gang, and said they could use corrupt police officers to help the accused. The accused confessed (to murder). The S.C.C. held: “When, as in this case, the accused confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt police officers, the state’s coercive power is not engaged. The statements, therefore, were not made to a person in authority.” (see Abella J. at pp. 14-16).

Why important: Does this encourage (undercover) police officers to lie through their teeth and tell bigger and better whoppers, or is it a recognition they really are after all undercover (itself a lie), so more lies don’t constitutionally matter?

http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/pub/2005/vol1/html/2005scr1_0027.html

• **No. 7** *Chaoulli et al. v. Quebec, June 9, 2005 (Health care)*

Summary of case: Quebec’s prohibition of private health insurance is unconstitutional per Quebec’s provincial *Charter of Human Rights and Freedoms*.

Why important: A flash in the constitutional pan or are provincial Charters now living breathing constitutional calibrators, against which provincial legislation is now to be calibrated for correctness. What’s the constitutional future?

Note: on August 4, 2005, the S.C.C. granted a partial rehearing, whereby the June 9, 2005 judgment was stayed for a year.

http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/pub/2005/vol1/html/2005scr1_0791.html

• **No. 8** *House of Commons et al. v. Vaid, May 20, 2005 (Employment Law)*

Summary of case: Vaid was a House of Commons employee. After his position was made surplus, he filed a complaint with the federal Human Rights Commission. The House took the position that their power to hire and fire employees was privileged, and immune to external review.

Why important: Parliament’s laws apply to Parliament – there’s no don’t-do-what-I-do, do-what-I-tell-you constitutional principle in Canada.

http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/pub/2005/vol1/html/2005scr1_0667.html

• **No. 9** *Pelland v. Federation des producteurs de volailles du Quebec, April 21, 2005 (Chickens: a federal or provincial jurisdiction?)*

Summary of case: The federal and provincial governments agreed on a chicken marketing scheme, and the federal marketing agency set a quota for each provincial board. The feds delegated their quota authority to Quebec. Mr. Pelland produced way more chickens than his quota, and challenged the constitutionality of the Quebec board (because it dealt with both intraprovincial and extraprovincial matters).

Why important: Marketing monopoly schemes are upheld, Quebec legislation is constitutional even though it has an intraprovincial aspect. What comes first, the constitutional chicken or the constitutional egg – the answer, including for Canada, is still to be answered, at the W.T.O. and internationally. If we internally, and across our own borders, reduce supply (hence price goes up), can we tell other nations not to? Don’t-do-what-I-do, etc.

http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/pub/2005/vol1/html/2005scr1_0292.html

• **No. 10** *Blackwater v. Plint, October 21, 2005 (Vicarious liability)*

Summary of case: The Federal Government and the United Church operated an Indian residential school, where Blackwater was sexually assaulted. The S.C.C. held the federal government and the United Church jointly and vicariously liable, setting aside the Court of Appeal’s “doctrine of charitable immunity” against the Church.

Why important: The S.C.C. clarified what’s needed for vicarious liability, including:

- “(a) the opportunity afforded by the employer’s enterprise for the employee to abuse his power;
- (b) the extent to which the wrongful act furthered the employer’s interests;
- (c) the extent to which the employment situation created intimacy or other conditions conducive to the wrongful act;
- (d) the extent of power conferred on the employee in relation to the victim; and
- (e) the vulnerability of potential victims...”

They also clarified joint vicarious liability: “In this case, the trial judge specifically found a partnership between Canada and the Church, as opposed to finding that each acted independently of the other. No compelling jurisprudential reason has been adduced to justify limiting vicarious liability to only one employer, where an employee is employed by a partnership. Indeed, if an employer with de facto control over an employee is not liable because of an arbitrary rule requiring only one employer for vicarious liability, this would undermine the principles of fair compensation and deterrence. I conclude that the Church should be found jointly vicariously liable with Canada for the assaults, contrary to the conclusions of the Court of Appeal...” As to joint and several liability, and indemnification: “Having found the Church

Paralegal Regulation is on Its Way

Bill 14, *Access to Justice Act, 2005*, (the “Bill”) was introduced by the Attorney General of Ontario on October 27, 2005. Since then, the OBA Paralegals Task Force and OBA Sections have undertaken an in-depth analysis of the provisions of the proposed legislation and are working to address issues that may require amendment as the Bill goes forward.

In his keynote address at the OBA’s Institute 2006, the Attorney General acknowledged that there will be clauses that concern some OBA Sections and stated that he is hopeful these can be addressed by agreement. The OBA has lobbied for the regulation of paralegals for decades and has worked actively with several Attorneys General to find a solution. We have been well served over the years. The OBA Paralegals Task Force’s, current membership is as follows: Chair, Steven Rosenhek, Vice-Chair, M. Virginia MacLean, Stephen Cameron, Selma Colvin, Andrew Kania, James O’Brien, Mary O’Donoghue, Margaret Rintoul, Martina Shaw, and William J. Simpson.

As this goes to press, we are anticipating that Bill 14 will be called for second reading debate and a vote during the legislative session that begins on February 13th. Following second reading, Bill 14 will be referred to a Standing Committee for public consultation and clause-by-clause analysis. The OBA intends to make formal submissions on behalf of its members and Sections during the Committee hearings.

Overview of the Bill

The Bill will amend the *Law Society Act* and provides regulation of “paralegals” (no longer described as such) by the Law Society of Upper Canada by the following means:

- The Bill prohibits “practising law in Ontario” or “providing legal services in Ontario” without a licence and states that a licensee is not to “practise law in Ontario or provide legal services in Ontario except to the extent permitted by the licensee’s licence”.
- The term “provision of legal services” is defined to include everything that a barrister and solicitor can do.
- Two distinct categories of persons can be licensed under the Bill namely,
 - (a) a person licensed to practise law in Ontario as a barrister and solicitor, or

(b) a person licensed to provide legal services in Ontario;

- A Legal Services Provision Committee is to be established by Convocation as a Standing Committee to be composed of 13 persons: 5 licensed to provide legal services, 5 elected benchers licensed to practise as barristers and solicitors and 3 lay benchers. The Committee “... shall be responsible for such matters as the by-laws specify relating to the regulation of persons who provide legal services in Ontario”.
- The classes of licences, the scope of activities authorized under each class of licence, and the terms, conditions, limitations and restrictions on each class of licence are to be set out in the by-laws to be passed by Convocation. Good character is a licensing requirement.
- Convocation has by-law making powers to prescribe classes of licences to be issued, the scope of activities authorized under each class of licence and the terms, conditions, limitations or restrictions imposed on each class of licence.
- Convocation’s by-law making powers include prescribing qualifications of the classes, providing for audits of financial records, and prescribing fees and levies and legal education.
- The Compensation Fund provisions are to cover both lawyers and paralegals, with funds received earmarked for barrister and solicitor licensees or for “paralegal” licensees.

In summary, the Bill enables “paralegals” to be licensed by the Law Society as a special class of persons entitled to provide legal services in Ontario. It is anticipated that the by-laws will limit the scope of the provision of legal services. The educational standards, qualifications (good character) and other requirements, including insurance, will be set by Convocation through by-laws. The Compensation Fund will cover losses as a result of dishonest “paralegals”.

Other Changes in the Bill

- The Bill permits the establishment of professional corporations for the purposes of practising law and for the provision of legal services.
- Although barristers and solicitors will continue to be members of the Law Society, which is a corporation without share capital, barristers and solicitors will be “licensees” and will no longer have the historically recognized status of “members” of the Law Society.

- The Advisory Committee will advise the Treasurer and will include the “presidents of the county and district law associations”, but not the OBA.
- The prohibition and offence provisions have been strengthened to include “holding out”, more substantial fines and prohibition orders by the Court.
- There is by-law making power to define who is a clerk, and governing the employment of clerks by barristers and solicitors licensed to practice.
- Corporations are prohibited from practising law unless incorporated or holding a valid Certificate of Authorization. This provision is to apply to the provision of legal services. The Bill authorizes the establishment of professional corporations for the purpose of practising law and providing legal services.

OBA Influences Bill 27

On January 16, three Section Executive members of the OBA’s Family Law, ADR and Feminist Legal Analysis Sections (**Kelly Jordan, Hilary Linton and Maryellen Symons**) made an oral presentation to the Ontario Legislature’s Standing Committee on General Government regarding the *Family Statute Law Amendment Act, 2005* (Bill 27).

The OBA supported the policy considerations that vulnerable parties require protection during family law arbitrations and that family law arbitrations should be conducted in accordance with Ontario/Canadian law. The Section representatives emphasized that family law arbitrations are important to separating couples because they are affordable, accessible, confidential and generally less adversarial than the court system.

The aspects of Bill 27 on which the suggested Sections had amendments are as follows:

- There is no quick enforcement mechanism, i.e. an Arbitration Award cannot be automatically enforced, as it is now under s. 50 of the *Arbitration Act*.
- Arbitrators should not be required to meet with parties prior to the arbitration to “screen” for power imbalances, abuse and violence, (as set out in 58(e) of proposed regulations) as it violates due process. Instead the lawyer who is providing independent legal advice (ILA) should perform screening.
- Financial disclosure should not be required as per s.56 (4) (a) and Section 46 of the *Arbitration Act* should have an added argument for setting aside an award.
- The definition of “secondary arbitration” (s. 5(10)) is not broad enough and may lead to parties who wish to settle a dispute pertaining to a provision in a separation agreement having to start all over again and obtain ILA.

The OBA was pleased with the government’s openness in discussing recommended amendments to the Bill. The government brought forward amendments with respect to the need for an appropriate enforcement mechanism for arbitration awards and with the process of domestic violence screening. The OBA’s submission was a strong factor in bringing forward these amend-

ments. In addition, the government proposed amendments to the Children’s Law Reform Act which will further protect victims of domestic violence in legislating that acts of self-defence will not be considered acts of violence or abuse. Although we did not make submissions on this point, we also supported this amendment.

OBA looks forward to a continuation of this co-operative working relationship.

A copy of Bill 27 may be found at: www.ontla.on.ca

Advocacy in Action Briefs

OBA Assists Deputy Judges Win Their “Day in Court”

Since July 2004, the OBA has been corresponding with the Attorney General’s office to express support for the Ontario Deputy Judges Association in their bid to have their remuneration level reviewed. Deputy Judges are currently paid \$232 per day, which rate has not changed since 1982. In July 2005 then President, **Ian Kirby**, on behalf of the OBA wrote:

How can the Deputy Judges feel or be seen as independent, or protect a self-assured image, when their payment is a pittance that has not been raised since 1982 and when they are given almost no administrative support, or resources with which to adequately perform their tasks? Their compensation and resource package quite frankly is an embarrassment for the profession and should be a particular embarrassment for your Ministry.

On November 16th, 2005 the Honourable Mr. Justice M. Dambrot released his decision in the Application brought by the Ontario Deputy Judges association in which he orders that the Attorney General is to provide a commission for determining judicial remuneration. The OBA’s support for the Deputy Judges was outlined in the decision and the above passage was specifically cited.

Business Law - Securities Law Reform

On December 1, 2005, the Honourable Gerry Phillips, Minister of Government Services (MGS), introduced for first reading Bill 41, the *Securities Transfer Act, 2005* (STA), the first statute of its kind in Canada. The STA constitutes Phase I of the government’s three-phase business law reform program first announced at an OBA program held in May, 2005. When brought into force (which is anticipated in the second half of 2006), the STA will bring to Canada a modern legal structure to support the indirect or tiered securities holding system. The STA also makes companion changes to the *Business Corporations Act*, *Personal Property Security Act* and *Execution Act*. The STA was more than a decade in the making and will make a critical contribution to the continued vitality and global competitiveness of Canada’s capital markets.

Continued on Page 16...

Continued from Page 15

In introducing the STA into the Legislature, Minister Phillips specifically acknowledged the contribution of the OBA and several of its members to the STA initiative along with the principal architects of the STA initiative, **Eric Spink** and **Max Pare**. Members of the OBA Executive, Business Law Executive, Corporate Law Subcommittee and PPSL Subcommittee contributing at various times to this successful project included **Heather McGee** (OBA Chair), **Howard Simmons** (Chair, Business Law Section), **John Cameron** (Chair, PPSL Subcommittee), **Wayne Gray** (Chair, Corporate Law Subcommittee), **Phil Anisman**, **Jennifer Babe**, **David Butler**, **Orlando Da Silva** (Advocacy & Government Relations), **Allen Doppelt** (MGS), **Elizabeth Ellis**, **Paul Harricks**, **Robert Scavone**, **Paul Wickens** and **Susan Zimmerman**.

Bill 210 - An Act to Amend the Child and Family Services Act

The proposed legislation identifies the importance of early assessments, planning and decision making necessary to meet a child's best interests when determining permanent plans, and recognizes the importance of placing children with extended family and community members when appropriate.

The Bill's new provision for the use of alternate dispute resolution (ADR) before and during proceedings are amendments the Family Law Section recognizes will be helpful to all individuals involved in child welfare proceedings.

After analyzing and discussing the proposed legislation, the Family Law Section has raised concerns with the addition of section 145.1 (Application to make an Openness Order).

Bill 210 has been referred to the Standing Committee on Social Policy. The Family Law Section has provided a written submission to the Committee for consideration during clause-by-clause analysis of the bill.

Electronic Discovery

A joint Ontario Bar Association/Advocates' Society Task Force on Best Practices in Electronic Discovery has been established. The Task Force will be chaired by **David Outerbridge** of Torys and will review and determine best practices for production of electronic documents in civil discovery. The Task Force will include representation from the Bench, the Bar and the Government. The production of documents kept electronically is becoming a greater and greater problem in large scale litigation. The test of "semblance of relevancy" is or can be highly problematic in such cases. **James Morton** founded the Task Force and is the OBA representative on it. Inquiry regarding the Task Force can be directed to him at james@smflaw.com.

E-Discovery Guidelines can be found on the OBA website: www.oba.org

Municipal Law Section

Representatives of the Municipal Law Executive met with Minister John Gerretsen on Tuesday, January 17, 2006 to provide input on Bill 51, *The Planning and Conservation Land Statute Law Amendment Act*, 2005, and future OMB reform. Following a very frank and open discussion, Minister Gerretsen suggested that policy discussions regarding OMB reform should also be on the agenda of the Attorney General, as it was now a responsibility mandated to his Ministry.

Pensions & Benefits - CAPSA

In June 2005, the Canadian Association of Pension Supervisory Authorities (CAPSA) released a consultation paper entitled Proposed Funding Principles for Model Pension Law, which contained 15 proposed principles and raised four questions regarding these proposed principles. This past December, the Pension and Benefits Section made a submission to the CAPSA Secretariat on the proposed principles, ensuring it represented the position of both the employee and employer.

Justice Policy Roundtable

A Policy Roundtable with senior members of the Ministry of the Attorney General is scheduled for February 8, 2006. This roundtable is an outcome of the Presidents' Meeting held in October 2005 with Minister Bryant. Three representatives from the OBA, CDLPA and the Advocates' Society were invited to attend. The Ministry of the Attorney General has proposed discussions on the *Access to Justice Act* (Bill 14), Family Law Amendments/Arbitrations (Bill 27) and commercial law reform.

MPP Reception

This year's MPP Reception is scheduled for March 1, 2006 in the Legislative Dining Room at Queen's Park. OBA Executive and Council members and Section Executives will attend. Prior to the reception, individual meetings will be held with key Cabinet Ministers, Justice Committee members, Opposition Leaders and Critics to discuss current justice issues.

Legal Organization Group

The OBA is participating as a member of the Legal Organizations Group. Membership consists of representatives from the Law Society of Upper Canada, Toronto Lawyers' Association, Ontario Trial Lawyers' Association, OBA, CDLPA and the Advocates' Society. The Group was formed to discuss the *Access to Justice Act, 2005 (Bill 14)*.

Alliance for Sustainable Legal Aid (ASLA)

At the end of December 2005, the Alliance for Sustainable Legal Aid, previously known as the Legal Aid Coalition, sent a letter to all four Federal Party Leaders in hopes of making Legal Aid an election issue. The OBA participates in this Alliance with the Advocates' Society, Association of Community Legal Clinics of Ontario, County and District Law Presidents' Association, Criminal Lawyers' Association, Family Lawyers' Association, Law Society of Upper Canada, and the Refugee Lawyers' Association.

Ministry of the Attorney General's Family Law Working Group

Persistence and determination by the OBA, through a targeted submission and follow up lobby efforts on Family Law reform, discussed at the Policy Forum in November 2004, led the Ministry of the Attorney General to form a Family Law Working Group. The OBA has two members actively participating in the Working Group. Concurrently, representatives from the Pension and Benefits Section are consulting with the Ministry of Finance about the distribution of pensions and benefits in family law cases. The MAG Family Law Working Group is hoping to have a policy paper by the late spring with draft legislation being crafted in the ensuing months.

Official Languages Committee

On behalf of the Official Languages Committee, Chair, **David Leitch** sent a letter to the Attorney General and Minister of Francophone Affairs regarding the appointment of bilingual and francophone members to Ontario's Agencies, Boards & Commissions

Criminal Justice Section

On January 6, 2006, the Criminal Justice Section President, **Cindy Wasser**, sent a letter to Official Opposition Justice Critic, Bob Runciman, MPP, regarding his proposal to amend the *Law Society Act* during the upcoming Bill 14 debate and hearing.

Federal Election

The OBA sent each federal candidate, from the three main parties in Ontario, a letter encouraging their support of access to justice issues and non-partisan co-operation between the federal and provincial levels of government to further those goals.

Continued from Page 13

and Canada vicariously liable (and Canada liable for breach of non-delegable duty), the trial judge found Canada to have been 75% at fault and the Church 25% at fault. Since he found them jointly and severally liable, the parties may recover full damages against either or both of them. However, the issue remains whether either of the parties to the joint enterprise that led to the loss is entitled to be completely or partially indemnified by the other..."

<http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/rec/html/2005scc058.wpd.html>

And one more case, because the issue of vicarious liability is an extremely important one:

• No. 11 *E.B. v. Oblates*, October 28, 2005 (Residential school litigation)

Summary of case: E.B. was sexually abused by a lay employee of the Oblates. The S.C.C. upheld the Court of Appeal's holding that the Oblates were not vicariously liable.

Why important: Indicates what's not enough to establish vicarious liability: "In summary, the appellant did not establish "a strong connection between what the employer was asking the employee to do ... and the wrongful act" (*Bazley*, at para. 42)...I would need clearer words from the trial judge before assuming that he intended his narrative of submissions to be taken as findings of fact. Be that as it may, my view, having read and re-read the reasons, is that while the residential school setting and the nature of the discipline at the school clearly contributed to the vulnerability of the children to abuse, there was no finding of a "strong connection" between the particulars of Saxey's employment and the outrages he committed by luring the appellant to his private quarters as is required by our jurisprudence. The fact that Saxey was permitted on occasion to ask children to do chores, and that children were inevitably in occasional contact with him, is not enough. The employment of Saxey as a baker, boat driver and odd-job man did not put him in a position of power, trust or intimacy with respect to the children. His job did not include regular or private contact with the children. He was not encouraged or required to develop any sort of personal relationship with the children. His role did not include supervising any intimate activities. I conclude that the Court of Appeal was correct that while the employment relationship in this case provided Saxey with the opportunity to commit the wrongful acts, his assigned role in relation to the students fell short of what is required to attract vicarious liability. An analysis of general "operational characteristics" is more properly undertaken in relation to the claim of *direct* liability."

<http://www.lexum.umontreal.ca/csc-scc/cgi-bin/disp.pl/en/rec/html/2005scc060.wpd.html>

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Modifications importantes à la *Loi sur les langues officielles*

Alain Roussy*

Peu avant la tombée du gouvernement Martin le 28 novembre 2005, un bon nombre de projets de loi ont reçu la sanction royale, comme il fallait s'y attendre. Dans le tumulte d'un début de campagne électorale, il n'est pas très surprenant que certains de ces changements législatifs n'aient été que très peu médiatisés. Cependant, une modification mérite l'attention particulière de ceux et celles qui œuvrent, entre autres, dans le domaine des droits linguistiques. Il s'agit de modifications importantes aux parties VII et X de la *Loi sur les langues officielles* (la « *Loi* »). Depuis longtemps déjà, la partie VII (« *Promotion du français et de l'anglais* ») cause des ennuis. Bien que l'article 41 de la *Loi*, le premier article de cette partie, indique que le gouvernement fédéral s'engage à favoriser l'épanouissement et à appuyer le développement des minorités francophones et anglophones du Canada ainsi qu'à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais, plusieurs s'entendaient pour dire que cet article était plutôt déclaratoire qu'exécutif. En d'autres mots, l'article 41 consistait de belles paroles ayant un certain effet politique et donc une certaine valeur normative, mais n'était pas porteur d'obligations positives concrètes susceptibles de pouvoir faire l'objet d'un contrôle judiciaire. Selon certains, la *Loi* elle-même semblait appuyer cette prétention puisque la partie VII n'était pas énumérée explicitement à l'article 76 de la partie X (« *Recours judiciaire* »), ce qui rendait impossible d'avoir recours aux tribunaux pour contester une loi ou une action au regard de la partie VII.

Ainsi, ce qu'il manquait à la *Loi*, c'était un peu de « mordant » et c'est précisément ce que réclamaient depuis quelques années plusieurs porte-parole des communautés de langue officielle du Canada, dont Dyane Adam, la commissaire aux langues officielles du Canada. En 2004, le sénateur Jean-Robert Gauthier (maintenant à la retraite) déposa, et non pour la première fois, un projet de loi au Sénat ayant pour but de clarifier la *Loi* en y apportant un renforcement important. C'est l'ancien député libéral Don Boudria qui se fit le promoteur du projet de loi à la Chambre des communes. Le projet de loi S-3 a reçu la sanction royale le 25 novembre 2005. À l'article 41 de la partie VII viennent donc maintenant s'ajouter les paragraphes suivants :

41 (2) Il incombe aux institutions fédérales de veiller à ce que soient prises des mesures positives pour mettre en œuvre cet engagement. Il demeure entendu que cette mise en œuvre se fait dans le respect des champs de compétence et des pouvoirs des provinces.

41 (3) Le gouverneur en conseil peut, par règlement visant les institutions fédérales autres que le Sénat, la Chambre des communes, la bibliothèque du Parlement, le bureau du conseiller sénatorial en éthique et le commissariat à l'éthique, fixer les modalités d'exécution des obligations que la présente partie leur impose.

De plus, l'important article 76 de la partie X a lui aussi été modifié pour donner explicitement le droit à quiconque ayant saisi la commissaire aux langues officielles d'une plainte visant une obligation ou un droit prévus à la partie VII de former un recours devant la Cour fédérale. Dyane Adam s'est réjouie de l'adoption du projet de loi qu'elle qualifia d'« *étape historique* ».

Les modifications ont déjà eu des répercussions dans l'arène judiciaire. L'affaire *Forum des maires de la péninsule acadienne c. Canada (Agence canadienne d'inspection des aliments)*, 2004 CAF 263, devait être entendue le 9 décembre 2005 par la Cour suprême du Canada. Ce litige est né au Nouveau-Brunswick lorsqu'une plainte a été déposée à la suite de la décision de l'Agence canadienne d'inspection des aliments de transférer quatre postes d'inspecteur saisonnier de Shippagan, sur la Péninsule acadienne, à Shediac, dans le sud-est de la province. Les demandeurs ont allégué que cette décision avait été prise par l'Agence sans prendre en considération les obligations que la *Loi* lui imposait et qu'elle avait été faite au détriment des régions d'expression française du nord-est du Nouveau-Brunswick. Suite à des décisions divergentes de la Cour fédérale et de la Cour d'appel fédérale, les demandeurs avaient interjeté appel à la Cour suprême qui devait finalement trancher la question.

Malgré le fait que toutes les parties à la cause, à l'exception du gouvernement fédéral, ont tenté de faire valoir que les modifications à la *Loi* ne réglaient pas toutes les questions soulevées par ce litige, la Cour suprême a conclu que l'affaire était devenue théorique et qu'il ne valait donc pas la peine de procéder. Pour les résidents de Shippagan, les modifications à la *Loi* sont donc arrivées un peu trop tard.

La *Loi* a certainement plus de « mordant » qu'elle en avait auparavant. Le gouvernement fédéral ne peut plus ignorer la partie VII de la *Loi* car il a maintenant clairement l'obligation de prendre des mesures positives pour favoriser l'épanouissement et appuyer le développement des minorités francophones et anglophones du Canada. De plus, les tribunaux ont maintenant explicitement un droit de regard sur la question. Il est difficile de prédire l'impact qu'auront les modifications à la *Loi*. Ce qui est clair, cependant, c'est que le libellé de l'article 41 de la *Loi* invite désormais les organismes et les individus à présenter des demandes novatrices devant les tribunaux. Il sera donc intéressant de garder un œil sur les développements juridiques dans ce domaine.

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Tuition, Debt and the Call of Bay Street: Reality or Myth?

Within the last decade the price of a legal education in Ontario has greatly risen due to the provincial government's 1997 deregulation of tuition for professional programs. But has this been demonstrated to be a pressing hardship for Ontario law students? Furthermore, to what extent can cost be linked to decisions to enter the program as well as choice of employment upon graduation? Pre-deregulation tuition at the University of Toronto Law School was approximately \$3,800. Today, less than 10 years later, that number has more than quadrupled to \$16,000. Currently, the only schools with fees lower than \$9,000 per year are Ottawa and Windsor. Furthermore, there is evidence of a concerted push among Ontario schools to match U of T's tuition levels.

Playing Catch-up with Toronto?

In a letter to the provincial government obtained by The Globe and Mail in December of 2005, five law school deans urged that the "tremendously uneven" resource gap between their institutions and U of T be addressed once the current two-year tuition freeze is lifted in 2006. The deans have no objection to the very high fees charged by U of T, they simply want to ensure that their institutions have the right to charge fees on par with those at U of T. Since it is unlikely that the province will choose to set an upper limit on tuition that is lower than U of T's current levels, it is likely that we will be paying significantly more money in the near future, as institutions scramble to "level the playing field."

Accessibility to a Legal Education

This development comes on the heels of a 1997 to 2004 study partially funded by the Law Society of Upper Canada, examining post-deregulation accessibility to Ontario law schools. In addition to urging an increase in OSAP disbursement maximums and improvements to provincial debt-relief programs, the study also addresses a number of prevalent myths regarding not only access to, but also the end product of, a legal education. To the critics of deregulation the increasing levels of tuition will succeed to attract and to accommodate an increasingly elite segment of Ontario's population. The study points out however, that law schools have *always* enrolled a disproportionately high number of middle and upper class students. Therefore, the post-deregulation 4.7% increase in upper and middle class student enrolment is nothing more than a slight change to the status quo.

Debt Levels and Doing "Good Work"

A common myth that is debunked by the report holds that debt-burdened graduates are prevented from practising in the name of social justice due to their financial predicament. The notion is that they must obtain high-paying 'Bay Street' jobs to pay down their OSAP and lines of credit. This misconception is countered by the study finding that 20% of law students in Ontario graduate *without any debt whatsoever*, and the number of graduates who accrue an overall debt in excess of \$70,000 hovers around 13%. In any case, the study's authors assert that jobs in legal aid clinics and jobs with NGOs are very desirable and very scarce, and tend to be filled by more experienced lawyers. This in turn means that "very few law graduates will have the opportunity to work in these fields whether they were prevented by their debt load or not." Therefore, while issues of deregulation and increasing tuition necessarily carry with them questions of accessibility, they do not change the fact that historically the law school status quo has been skewed towards more affluent members of society. Furthermore, while debt load associated with increasing costs may influence some students' post-graduation choices, we should be wary of making overly facile assumptions regarding those choices.

Seeking Articles 2006

Rubaiat Mashraq

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Articling Student (2006/2007)

Correction

In the last issue of *Briefly* in the piece entitled "An Innovative Program in Legal Ethics" we erroneously stated that Western is the only Canadian law school with a mandatory course in legal ethics, when it should have stated that it was the only law school *in Ontario*. Many thanks to all the sharp-eyed Dalhousie-trained lawyers for pointing out that their alma mater also has a mandatory course in ethics.

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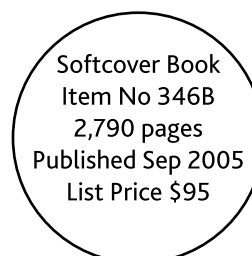
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The 2006 Institute was a smashing success! We are tremendously proud of this year's Annual Institute, which drew over 2,100 registrations for its 19 CLE programs and 10 special events. Programs featured more than 275 speakers, some coming from as far away as British Columbia, New York and Michigan. The distinguished faculty included practitioners, members of the judiciary, government representatives, academics and experts in a wide variety of fields offering their time and expertise so we can all practise a little smarter, not harder, in the coming year. Feedback both at the event and since has been exceptional.

The Institute was created 31 years ago to bring together lawyers from across the province for the latest updates in law and practice. New this year was an expanded Trade Show that featured 40 sponsors and exhibitors, without whom the Institute would not achieve the levels it has. A Cyber Café was added, so attendees could stay in touch with their offices and check e-mail throughout the day. Unfortunately, no one checked with us when they decided to hold the federal election! To accommodate this unexpected development, we had televisions set up at the Trade Show, so attendees could tune in to the most exciting program on television this year!

If you were unable to join us, here are some photographs of what you missed.



Publications of the CLE programs can be purchased via www.oba.org. Mark your calendar for next year! The 2007 Institute will be on Monday, February 5 and Tuesday, February 6 at the Metro Toronto Convention Centre.



The Lawyer's Desktop

You may recall that in last issue's column, I introduced the idea of using blogs, wikis and RSS in your day-to-day practice. At that time, I discussed blogs in depth, so now let's turn to wikis.

If a blog is essentially a monologue with the functionality for others to comment back, a wiki is a fully fledged web-based conversation. Law often involves collaboration – especially on Bay Street, we work in teams. So if your e-mail inbox currently contains messages that are conversations about a specific project you are working on, version of a document you are working on with others, or messages of ideas from a group project, a wiki is something that you should be exploring.

A wiki is a website that is updatable by visitors, who can collaborate in sharing ideas or jointly author a document – basically an online whiteboard. Wikis are designed to facilitate the exchange of information within and between teams. Depending on the wiki, users can add, change, or remove any content from the site – for lawyers concerned about control, that feature alone is unnerving. The best known example of global collaboration is an encyclopædia which is now larger than the Encyclopædia Britannica, known as the wikipedia <http://www.wikipedia.org>. Anyone, anywhere can contribute. Simon Fodden, a retired Osgoode Hall professor who's the impresario of the Canadian legal collective blog <http://www.slaw.ca> comments "I've been using Wikipedia, and am really impressed by the quality of the entries, although I don't know how the quality can be so high."

While the Legal Information Institute has just started "a collaboratively built, freely available legal dictionary and encyclopedia" called Wex, interestingly, it will only be open for contributions from accredited experts. They don't want to surrender quality. The most promising uses for legal wikis may be within firms or with clients, collaborating on major document-intensive transactions or jointly authoring model documents. Google your way to Basecamp, SocialText and Jot Spot for ideas.

Finally RSS. This is a way to stream content out to clients or others who want to receive information from your website or blog. There is a new Google service, called Google Reader by which users can customize the feeds from blogs or RSS-enabled websites they wish to receive. If your practice focuses on a particular industry segment, you'll want to use this to give you customized updates.

So that's at the receiving end. If you're trying to get information out to clients or potential clients, how do you do it? You'll have to learn about syndication.

When your website is updated with new content, an XML file is updated with a reference to the new stuff. That file sits on the Internet in a single location. A news aggregator that you either download locally to your computer or have an account with, pings that file regularly, and then pushes out content to subscribers.

Syndication means that your information is accessible through news reader or aggregator software, which automatically delivers new posts to the reader's desktop. This is done by adding small strips of code that render the site accessible to news reader software. Fortunately, this is much easier than it sounds. Major blogging software such as Blogger and Movable Type enable you to activate the necessary code through a user-friendly software interface.

So why does this stuff matter? Because you shouldn't be relying just on "surfing" to get people coming to your firm website. Osler in Toronto and Clark Wilson in Vancouver are pioneering the use of RSS in Canadian law firms. How do I know? Well I read it on our blog. See you there.

**Simon Chester is a partner in Heenan Blaikie LLP, in the Toronto litigation and business law groups, with special emphasis on knowledge management, research and legal opinions. He has been a pioneer over the past twenty-five years in the application of technology to the practice of law.*

Correction - Thanks to a keen-eyed reader in London, Ontario, we noted that a line-break in last month's column about blogs added a stray hyphen to a web address. Readers interested in Bill Freivogel's blog on conflicts of interest can find it at <http://www.freivogelonconflicts.com>



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Professional Development

Section Executive Nominations for 2006-2007

It's that time of year again when Sections staff are busily preparing for nominations and elections for the 2006-2007 Sections year.

According to the Model OBA Section Constitution, Clause 9 (j) "Elections shall be completed by June 30 in each year". If you are an OBA Section member in good standing and a member of one or more Sections, please look out for your nominations package being mailed or faxed to you before April 1, 2006.

Being a member of a Section Executive offers you the opportunity to contribute to your profession in many ways. You can organize and host timely programs. (Sections produced 165 programs last year!) You can have input on legislative reform (Bill 27 – *Family Statute Law Amendment Act* 2005, and Bill 14 – *Access to Justice Act* 2005 being just two recent examples where Sections were listened to by government). You can also help in providing substantive legal and practice related information through the more than 100 newsletters produced each year.

If you have any questions about this election process, please send an e-mail to pd@oba.org.

Spring 2006 CLEs - Hold the Date!

Construction Delay Claims: Following the Critical Path	Thursday, March 2, 2006
Technology in Bloom 2006: New Developments in Technology Law	Monday, March 27, 2006
Insurance Law: Prognosis Guarded	Wednesday, March 29, 2006
Sharpening the Sword: Tactics and Strategies for Lock n' Load Litigation	Thursday, March 30, 2006
Pension and Benefits Hot Spots: Essential Updates on Key Legal Issues	Monday, April 10, 2006
Your First Collection: Deadbeat Dilemmas - How To Get Paid (YLD)	Tuesday, April 25, 2006
Hot Topics in Litigation and Advocacy (joint CBA-OBA)	Friday, April 28 & Saturday, April 29, 2006
Litigating Under Business Corporations Legislation –	
A Review of the Rights and Remedies	Monday, May 1, 2006
Fundamental Figuring: An Income Tax Primer for Family Law Practitioners	Thursday, May 4, 2006
Income Determination in Family Law	Thursday, May 4, 2006
The Constitution in Regulatory Practice: Investigations and Proceedings	Friday, May 5, 2006
Government Procurement II: Innovations in Outsourcing	Monday, May 8, 2006
Fourth National Symposium on Charity Law (joint CBA-OBA)	Thursday May 11, 2006
Current Issues in Employment Law: 2006	Friday, May 12, 2006
Matters of Real Trust: Trusts & Estates Issues <i>with</i> Real Property	Monday, May 15, 2006
Cross Country Expedition:	
Probate and Incapacity Planning and Administration across Provincial Boundaries	Monday, May 15, 2006
Workers' Compensation: When is an Accident Really an "Accident"	Thursday, May 18, 2006
Dialogue with the Bench and Bar (YLD)	Wednesday, May 24, 2006
Avoiding Conflicts of Interest: A Comprehensive Overview	Friday, June 2, 2006
Health Care Litigation: Trial Advocacy	Wednesday, June 7, 2006
Privacy Nine by Nine: Hot Topics in Privacy Law	Thursday, June 8, 2006
Kissing Cousins II: Family Law and Estates Law	
- Keeping up with the Joneses: A Case Study	Monday, June 12, 2006
Clients, Clients Everywhere: Essential Tips for Aspiring Rainmakers (YLD)	Wednesday, July 12, 2006



OBA • ABO

Regional Roundup

by *Tannia Belvedere*
Regional Services/Sections Coordinator

If you have not registered yet for the Annual Central East Advocacy Conference, there is still time! *Preparation for Success* takes place on Saturday, March 4, 2006 at the Hilton Suites Toronto/Markham Centre & Spa in Markham. This year's program is not about what counsel do *during* trial. Rather it shows how to do the work *leading up* to a trial. This year, attendees will break out into one of two sessions during lunch. Attendees can select a break out session on criminal or another on civil and family law topics. Featuring a faculty of over twenty experts and chaired by The Honourable Mr. Justice Bruce A. Glass, the program is sure to be a sell-out again this year! Please visit the Lawyer's Edge to register now!

The Municipal Law Section will be presenting a great dinner program in Hamilton on March 27, 2006 at the Sheraton Hamilton. Jointly presented by the Association of Municipal Managers, Clerks and Treasurers of Ontario, this program will feature **David Mullan**, Integrity Commissioner, City of Toronto and **Greg Levine**, lawyer and professor at the University of Western Ontario. The program will focus on ethics in municipal government and the Toronto Integrity Commissioner model and beyond with time for questions. Please visit the Lawyer's Edge to register.

Upcoming Video Replay Programs in March/April

To book a replay in your area, contact Tannia Belvedere or your Local Law Association.

Piloting a Civil Action: From Take-Off to Landing –
Kingston, March 2, 2006 and Chatham, March 29, 2006

Dead, Gone, But the Fight Goes On ... Or Does It? –
Kingston, March 6, 2006

Toronto CSI: Forensic Evidence in the 21st Century –
Kingston, March 9, 2006

Recent Developments in Real Property and Conveyancing Law –
Kingston, March 20, 2006

Family Law from Beginning to End -
Kingston, March 27, 2006 and Chatham, April 26, 2006

If you have an idea, if there is a hot topic in your region or if you would even like to chair a live program in your region, contact Tannia Belvedere, Regional Services/Sections Coordinator at tbelvedere@oba.org or Shem Singh, Manager of Regional Services at ssingh@oba.org at 1-800-668-8900.

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