



### Mission Statement

The establishment and operation of a professional association of barristers and solicitors for the purpose of:

- a) Uniting members of the legal profession of Windsor and Essex County and protecting the character and status of the profession, promoting ethical practice, settling questions of professional usage and courtesy among members of the profession;
- b) Maintaining and improving the qualifications and standards of the profession;
- c) Establishing, operating and maintaining in the City of Windsor a law library, reading and writing room and reference library for the use of the members of the Corporation or such other persons as the Corporation or the Law Society of Upper Canada may allow and to furnish and provide the same with books, magazines, newspapers and other publications or periodicals;
- d) Sharing and promoting educational and social programs among the members of the Corporation;
- e) To administer the barristers' lounge and archives for the use of members of the Corporation and such other complementary purposes not inconsistent with these objects.

### About the Association

The Association has existed since 1884. Its first president was Charles R. Horne, later Judge Charles R. Horne. From a handful of lawyers in 1884, our membership has grown to over 500 in 2008.



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Windsor, ON N9A 1J2

*We're on the Web!*  
See us at: [www.essexlaw.ca](http://www.essexlaw.ca)

### ESSEX LAW ASSOCIATION

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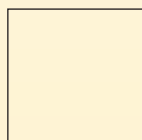
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- The CAVEAT shall be described as "News and Views of Interest to the Legal Profession."
- Members are encouraged to contribute articles, but all submissions must include the author's name and address.
- Not all submissions will be published. The publisher reserves the right to edit or to refuse to publish any submission.
- There will be a separate section for articles containing the opinions of the author or being editorial in nature and content.
- The editorial section shall contain a disclaimer stating that the views and opinions therein do not represent the views and opinions of the Association.

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### ESSEX LAW ASSOCIATION

2009 Volume, Issue 2

December 2009

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## President's Message

It has been a busy few months for the ELA. We celebrated the Association's 125th anniversary with the unveiling of a plaque on the grounds of the Superior Court of Justice. In attendance for the unveiling were special guests Michael Drake, Janice Busch, Justice Terry Patterson, Derry Millar, Malcolm Heins and Joe Comartin. Special thanks to Dean Bruce Elman who threw the support of the law school behind our celebration.

On Saturday April 18, 2009 we held our AGM with attendance in excess of 300. Harvey Strosberg did a fantastic job as our emcee. He kept the attendees interested (which can be difficult as people tend to chat with others around the table) and more importantly kept the program on schedule.

Attending from out of town were Madame Justice Leitch, Regional Senior Justice, Superior Court of Ontario, Derry Millar, Treasure of the LSUC, Randall Bocock, Chair of CLDPA, and Janet Whitehead, Southwest Ontario CLDPA rep, Jamie Trimble, President of the OBA. It was such a success that the executive is considering having another 125th for next year's AGM.

Thank to all who helped organize the 125th anniversary weekend, with special thanks to Mike Drake, who had the vision to recognize the importance of such an anniversary and who spearheaded the organizing committee, Pat Brode who wrote a book on the history of the ELA for the event and Jeff Hewitt who entertained us with his version of ELA Jeopardy.

Ilias Kiritsis, 2nd V.P. and I attended the CDLPA spring plenary in Toronto May 11, - May 13, 2009. You will find a report on the plenary elsewhere in this edition of Caveat.

Justice Scott Campbell, has been appointed to our Superior Court Bench. The vacancy he filled originated in Stratford. Due to the increase in criminal and family matters in Essex County, primarily a result of our economic situation, Justice Patterson and Justice Leitch were able to have the vacancy transferred to Essex County.

The OCJ Family Bench Bar committee is up and running, chaired by Justice Phillips. There has been a good dialogue on improvements that can be made to the systemic bottlenecks arising from a combination of a heavy caseload and a vacancy in the Court. It will take some time as well as trial and error, but we're heading in the right direction.

Our Past President, Janice Busch, has taken on the task of updating and expanding the ELA website. Our plan is to have a website where the public can search for lawyers by field, where the lawyer's directory will be published and therefore always up to date, and a private forum for ELA members to exchange information and decisions issued locally. If you have any ideas as to what you wish to see on the website, let Janice know.

Thanks to Jason Howie for the work he put into organizing this year's golf tournament, held at Pointe West Golf Club on June 25, 2009. The ELA has made a \$1500 donation to the Canadian Mental Health Association

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# CDLPA Report

Ilias Kiritsis and I attended the CDLPA spring plenary in Toronto May 11 -13, 2009. There were many interesting topics:

**Information Exchange Platform** - This is what CDLPA is calling its website. It should be up and running this June, perhaps even by the time you read this. There will be a public area that anyone can access. It will contain links to the websites of the local law associations, an interactive map for each county and district on which buildings such as courthouses, jails, registry offices, law libraries, police stations and other law related buildings will be located so that if you have to go out of town, you can determine your destination beforehand. Local customs such as motions days and assignment court days as well as employment/articling opportunities will be posted by each association. There will also be a private discussion forum area accessible only to practicing lawyers where we can participate in surveys and exchange ideas.

**Maternity/Parental Leave Benefit** - The benefit plan established by the LSUC is now in place. Lawyers of either gender in firms of five or fewer lawyers is eligible to receive \$750 per week to a maximum of 12 weeks to allow them to stay home with their new children and not have to forego all revenue to do so. Check the LSUC website for more information.

**Locums** - The LSUC has established a locum registry where lawyers who do not wish to work full time or year round can be added to an approved list to fill in for lawyers who wish to take some time away from their practice to be with their children, take an extended vacation or a mental health break. We know that doctors have been doing this for decades, but it is also being done with lawyers in British Columbia, with success, we're told. If you or someone you know is interested in working as a locum, either check out the LSUC website or contact me at tedELA2009@hotmail.com.

**Civility** - the LSUC reported that the number of complaints relating to lack of civility between lawyers has risen from 11% of all complaints last year, to 30% this year. In response, the LSUC is trying to set up a mentoring program aimed at improving the behavior rather than having it lead to a formal complaint and more bad blood between lawyers.

The complaints are not just in regard to litigators - corporate/commercial and real estate lawyers are also getting into the rudeness game. As lawyers, we are retained to represent our client's interests, but this does not mean that the lawyer on the opposing side of the action or deal is the enemy. He or she is also representing his or her client's interests. Treat others as you expect to be treated, especially in court or in the presence of clients. We should not be engaging in conduct that casts a cloud over the integrity of the profession.

**Real Estate Lawyers** - the latest landmine for you are transactions involving Powers of Attorney being used by someone you do not know. Please be wary and ask more questions about the donor and the drafter of the PoA. If in doubt, do not participate in the transaction.

Did you know? - pursuant to the "two lawyer rule", to sever a joint tenancy involving three parties, three lawyers are required.

As more counties and districts move to electronic registration, more versions of documents are popping up. If you go to www.lawyersworkinggroup.com, you will find a package of standard form documents endorsed by CLDPA and the OBA.

**Ontario Lawyers Assistance Program** - Practicing law is not as glamorous (if glamorous at all) as depicted on television. The OLAP is an initiative of the LSUC to provide counselling and/or assistance to lawyers who are experiencing stress, depression, alcohol or drug abuse, marital difficulties or other symptoms from the pressure of practicing law. The OLAP is looking for lawyers who have successfully worked their way through such problems or who have some education or training in these areas to volunteer to assist our colleagues in the profession who are suffering with such problems. If you, or someone you know may be interested, please contact the OLAP at www.olap.ca or contact me at tedELA2009@hotmail.com.

*Ted Crljenica*

## Legal Aid Applications (New Location)

### Reminder/Notice

Legal Aid Ontario  
Is Taking Applications For  
Legal Aid At The Ontario  
Court Of Justice



The Courthouse Application Office Is Open  
Monday To Friday  
9-12

Clients Need To Bring Identification, Verification Of Income  
And Court Papers, If Available

The Priority Is Clients That Have Court That Day,  
But All Are Welcome

Applications Can Be Taken For Criminal, Family And CFSA

If The Application Officer Is Not Available

or

If The Office Is Closed  
The Clients Can Go To

Legal Aid Ontario, 185 City Hall Square  
Monday To Friday

9-4

(Applications Taken Until 3:30)



## Notes From the Middleground

OPINION

by Peter K. Hrastovec

I recently attended Superior Court on a motion. Big deal, eh? Well, I had to start this out somehow so it bears repeating to some extent. I recently attended court. Though I go to the Courthouse from time to time, I don't always have to gown up. Pretrials, case management conferences and assessments allow me, like most of my brethren, to wear my rumpled best. When I have to, I can make a new suit look six months old in less than half a day.

My last trial was in September. So, the night before, I had to scour the house looking for my gown and waistcoat, a shirt that still fits, my ever-elusive tabs (I wrote about these years ago) and the world's cheapest pair of cuff links. With my application and factum in hand and my court gear in a bag, I trundled off downtown, ready for my appearance in the weekly motions court of the Superior Court.

Arriving at the Courthouse, I made my way past the security and up the stairs to the Lawyer's Lounge ...or what I thought had once been the Lawyer's Lounge. When I got there, I was certain that I took the proverbial wrong turn at Albuquerque. I was sure that I was on the stage of some avant-garde theatre or a set for a science fiction movie and not the Lawyer's Lounge. Dangling light bulbs, four walls of lockers, open rafters and, virtually no furniture. I paused to take it all in. "Hmm, someone is staging a Samuel Beckett play", I thought. Theatre of the Absurd. The lighting was spot on—macabre, sinister but somewhat inviting in a twisted but delicious way.

Now, unlike many other lawyers, I don't have a personal locker at the Courthouse—never have and never will. When the lottery was arranged several years ago to give out lockers, I didn't step up to make a bid for one of the old, ramshackled metal closets. Though I am a litigator and probably should have gotten one, I remembered at the time that I had been playing the same Lotto 649 numbers since 1983 and, never having won more than five bucks at a time (less than partial indemnity costs!), I figured that I probably would not be lucky enough to "win" a locker in the gowning room. So, whenever I have to gown up downtown, I bring my outfit from home, pull up a chair in the middle of the lounge area and dress there. It's no big deal. It's not like I have to get naked. And truly, there is no audience or, at least, a willing audience for that matter.

My latest foray into the gowning area was a bit of a shock to me. There was one chair (lucky me, as I claimed it). The mirror was still there. The one land phone that was available was resting on top of one of the lockers. With no place to sit to make or receive a call, any user would have to squat down on the floor and hope for good blood circulation in their legs. "I have to hang up, I'm cramping up!" Out of necessity, the lounge had become increasingly uncomfortable. Not that it was ever a showpiece for Canadian Home or Office Monthly magazine.

I know that the look of the lounge is only "temporary". It is part of the revamping of the courthouse, the seemingly endless renovations

that will make this historic facility better for the public, the courts, administration and the lawyers. Occasionally, I have been known to heave a sigh of great regret over the \$20 million or so that the province took out of the Justice Facility budget for the new facility that was built across the street. I mourn the fact that we could have all had one-stop shopping in a grand building for everyone. But, I digress.

I got to thinking. The law association is always looking for ways to make some money for its own purposes. Why not rent out the lounge for theatre? As I was ostensibly alone, I thought I would try it out. I walked into the centre of the lounge, looked up into the sparse but dramatic lighting and began to address a phantom audience. "Let me not to the marriage of true minds admit impediments..." Wow, Shakespeare never sounded better. Well, not really. Sir Laurence Olivier or William Hutt would have been preferable. But they were both dead and I had a pass card to get into the lounge. No harm, I thought, so I continued to finish the sonnet. I took my bow in front of no one in particular and then decided that we could never get enough people in there to make it economically feasible.

Then I thought we could stage cage matches for lawyers to settle their differences: trials, motions, who will pay for lunch—you know, the important stuff. With the lockers in place on all sides, lawyers can contest their cases in "death matches" (no, no one has to really die—it just sounds cool!), with the winner taking all. Imagine lawyers wrestling in their gowns and bouncing off the lockers. Spectators could sit on top of the lockers and make bets on their favorite contestants. With the phone located there, they can easily make calls to their bookies. We could even get Michael Vick, he of dog fighting fame, to act as the Honourary Commissioner in an organized league. We can have out-of-town lawyers participate as well. This may encourage them to visit more often.

People would pay for the spectacle of it. Lawyers as modern gladiators—just think of the possibilities! But then, I know the outcome of this. Our success would be short-lived. Like most of our vices, the province would take it over, institutionalize it and, well, you know the rest.

Standing there, alone, I realized then that I was becoming a little carried away, a little too over the top. Theatre. Cage matches. Humph. Sometimes we can take this frustrated actor thing a little too far.

Some of us, anyhow. Then again, a revival of A Man for All Seasons in Charlie Clark Square! Or lawyers break dancing in their gowns! Or the world's biggest contested motion/application set to music, with multiple guest judges like Simon Cowell and Paula Abdul and tag-teaming arguments and a big Broadway style finale featuring a music and dance inspired oral judgment.

I realize that few (very few) are interested in any of these things. Many are curious, but few are really interested.

So, I slipped off my gown, put on my wrinkled suit, straightened my tie and disappeared into the morning.

Exit...stage right!

The views and opinions herein are the opinion of the author and do not represent the views and opinions of the Association.

# The Art of Art

By Avril Farlam

In his personal study at his home, Arthur Barat had a piece of modern artwork on his wall based on the words “Justice, Justice Shall Thou Pursue”. I saw it there for years and never inquired about its origin. Ever the teacher, and no doubt dismayed by this apparent lack of intellectual curiosity on my part, near the end of his life Arthur made a point of explaining to me the origins of these words in the Old Testament and played for me a piece of modern Israeli music containing the same words.

The lesson that day wasn't just about these words. It was of course that these words represented Arthur Barat's life work and his intellectual passion. At the end of a day of practising law, whether the results had been successful or not successful, he always wanted me to answer the question: “What did we learn from what happened today?”



**For Rent**

Please email information to  
Kemala Vranjes  
kveranjes@lawontario.ca

Members who have office space to rent may now submit this information for publication in the Caveat. Only members may submit this information. Please provide particulars of location, amenities included, rent, time deadlines, and contact information. Content may be edited for clarification and space availability.

LOCATION	AMENITIES	ADDITIONAL INFO	CONTACT
518 Victoria Ave. Windsor Ontario	Well decorated lawyer's office. Furnished secretarial space, filing cabinets, telephone system, storage, working library, kitchen etc. Some receptionist services. Parking included.	Tenant will share space with four senior level lawyers who will assist with client referrals. Ideal for a lawyer seeking to establish a practice in a collegial environment.	Tom Costaris Phone: 519-258-3091
1451 Ouellette Ave. Windsor ON N8X 1K1 Downtown Windsor; Close to the Courthouse, Registry office, expressway, highway 401, bridge, tunnel and University of Windsor.	Furnished office, 11 X 10 feet with two large windows. Use of Boardroom, high speed photocopier, deluxe fax machine, internet, kitchenette and library.	The boardroom is oak walled with fireplace. The reception area is oak paneled and spacious. There is onsite parking.	Enzo M. DiGioia 519-252-6969 Fax: 519- 252 3991 e-mail: advocate@mnsi.net
Canada Building, Suite 400	1 or two offices.	Space can be let furnished. Pleasant work environment.	Malcolm Kirsch 519-256-9626
333 Wyandotte Street East	Multiple office space. Walking distance to the Registry Office and Court House.	Free on site parking. Possible Referrals	Frank Fazio 519-258-5030 e-mail: ffazio@fazioandassociates.com
2510 Ouellette Ave. at Eugenie, 3rd Flr	3 individual finished offices. Use of reception, boardroom, photocopier, fax, kitchenette. Plenty of free on-site parking.	Tenant will share east side of the 3rd floor with lawyers at Shibley Righton LLP; pleasant work environment; possible referrals	Paul Howard 519-969-9844 e-mail: paul.howard@shibleyrighton.com

I loved answering that question because it was the fact that there was an answer, not the content of the answer, that mattered. Point is, we learned *something* that day.

How fortunate Arthur Barat was to have spent his life toiling in the tireless pursuit of justice. Precious few people in the world get to do what they love every day. How fortunate I feel that I got to participate in this tireless pursuit of justice. For me it was 31 years of priceless education, intellectual collaboration and jokes for which I will always be grateful.

However, one does not pursue justice in a vacuum. It is not possible without the judiciary, other lawyers, the court staff and many others. I would like to thank all of you for your kind words and condolences and the many who took the time out of their busy schedules to attend the funeral, send notes, flowers, fruit baskets and expressions of sympathy to me personally, to Bob Millson and to our firm.

We still get to carry on with the pursuit of justice. I know what Arthur would say now: “Enough already – let's get back to work!”

LOCATION	AMENITIES	ADDITIONAL INFO	CONTACT
606 Devonshire Rd. (Walkerville) Windsor Ontario N8Y 2L8	One or two offices available. Use of boardroom, signing room, reception, photocopier and fax.	Free on site parking.	Jay Armeland 519-971-8108 E-mail: jay@armeland.com
Security Building 267 Pelissier, Suite 400 Windsor ON N9A 4K4	Multiple finished and unfinished office space	Ideal for litigators	Alfredo Gatti 519 258-1010 Fax #: 519-258-0163
1316 Ouellette Ave. Windsor ON N8W 1J9	Former law firm office. House with 8 parking spaces. Main floor has waiting room, 3 offices and 3pc bath.	Second floor has 1 bedroom apartment, kitchen, dinette area and living room.	For information or viewing call 519-796-6980
528 Victoria Ave. Windsor Ontario	Downtown office space available. Perfect for sole practitioner: one office, secretarial space, use of boardroom and other facilities.	Parking available.	Joel Wright 519-974-9748
1310 Ouellette, Unit 1 Windsor ON N8X 1J8	Shared office space with other lawyer. Semi-furnished. \$375 per month, utilities included. No lease required.		John Semaan 519-977-8764
1310 Ouellette, Unit 1 Windsor ON N8X 1J8	Full suite, 950 sq. ft. Semi-furnished. \$775 per month plus utilities. No lease required.		John Semaan 519-977-8764
111 Riverside Drive East Windsor Ontario	Downtown office, across the street from Court House. One office. Secretarial space.		Maria Fernandes 519-977-8414
380 Ouellette Ave. Windsor ON N9A 6X5 Scotia Bank Building	Office space available		Robert Dipietro 519-258-8248 Fax 519-255-7685

# Helmets on Kids

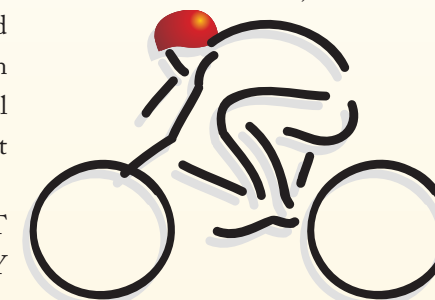
By Melanie Gardin

The Brain Injury Association of Windsor/Essex County has joined forces with local lawyers and the Windsor–Essex County Injury Prevention Coalition to provide area children with bicycle helmets in the program Helmets on Kids.

The goal of the program is to purchase bicycle helmets for children who come from families that cannot afford bicycle helmets or that do not place importance on the purchase of a helmet for their children. This is the first year that Windsor has participated in the Helmets on Kids program. Helmets on Kids is an initiative started by the Ontario Trial Lawyer's Association and is growing throughout the province.

HELMETS ON KIDS SEEKS TO PUT HELMETS ON THE HEADS OF EVERY CHILD WHO NEEDS ONE.

I have approached some of you for donations towards helmets and you have responded!! So far we have been able to purchase 275 helmets to kick off Road Safety Challenge Month. These helmets are already being distributed by the local health unit at elementary schools. Future events are planned to distribute the helmets at community events.



I would like to raise \$6,500.00 to buy another 1,000 helmets and you can help make that happen.

Cheques can be made payable to the “Brain Injury Association of Windsor/Essex County” and a charitable receipt for the entire amount is available.

In 2004, the Ministry of Health reported that in Ontario, during the height of biking season [April through September], there were 352 emergency room visits for brain injury related to pedal cycle use. Of the total, helmet use was not known for 102. Of the balance of 250 injured children, 156 or 62% were not wearing helmets.

Brain Injury is the leading killer and disabler of people under age 45. In Windsor and Essex County there are a reported 2,400 cases of acquired brain injury each year. It is estimated that there are 13,000 people living in Windsor and Essex County with brain injuries.

Helmets make a difference.

For more information contact:  
Melanie Gardin, Chair of Helmets on Kids and President of the Brain Injury Association of Windsor/Essex County  
519-259-1802 (direct work line)  
mgardin@ducharme.com

# President's Message

Continued from Page 1

from money raised at the tournament.

In collaboration with the local SCJ judiciary and the local family law bar, the ELA has organized an SCJ Family Law Liaison Committee. This committee has been meeting monthly since September and has developed a plan to reduce the waiting time for the initial case conference required by the Family Law Rules. Additional information is available inside this edition of Caveat. Special thanks to Jennifer Suzor who has taken on the role of Committee Secretary. Jennifer was also instrumental in establishing the process by which members of the family law bar were elected to sit on this committee, a process that will be followed for new appointments to the OCJ family law bench-bar committee.

The Ontario Lawyers Assistance Program is a non-profit organization whose mission is to provide effective and timely assistance,

based on the principles of confidentiality and voluntary access, to members of the legal profession and their families dealing with issues such as addictions, stress/burnout, work and family pressures and mental or physical health. Assistance is provided through one-on-one peer support, assessment, referrals to services, counselling, links with related services, education, and information. Don Iatzko has volunteered to be the OLAP representative for Essex County. More on the OLAP to follow.

We have two new appointments in the OCJ. Mitch Hoffman, formerly of the Crown's office and Barry Tobin, from the London area, have been appointed to fill the vacancies left by the retirement of Justices Harry Momotiuk and Sam Zaltz.

Ron Reaume organized a CLE program held on November 5, 2009 to introduce local civil (and uncivil) litigators to the amendments to the new rules and the increase in the

jurisdiction of the Small Claims Court to \$25,000, effective January, 2010. Following the CLE, the ELA honoured Deputy Judge John Whiteside and Justices Momotiuk and Zaltz on their retirement. We were surprised by the unannounced visit of Kanye Lloyd Dean West who interrupted Justice Momotiuk's speech by snatching the microphone from his hand. These rappers just don't know where to draw the line.

Finally, on December 8, 2009, the ELA in collaboration with the LSUC will be holding a forum on Civility in the Practice of Law. The format will be a short presentation from panel members, a discussion of fact scenarios, and questions from the attendees. Following the Civility Forum, we will be holding our annual Christmas Party. Members will be asked to donate a toy or money to help brighten Christmas for children in need.

Ted Crljenica

# Searching for Trash: The Supreme Court Weighs

By Kenneth W. Golish

This commentary concerns the latest search and seizure case out of the Supreme Court of Canada, *R. v. Patrick*, 2009 SCC 17 (CanLII). Trash left for municipal collection may be searched without warrant, according to the majority opinion of the court.

We start by remembering that s. 8 of the Charter simply says: "Everyone has the right to be secure against unreasonable search or seizure." Before its enactment in 1982, the Canadian Bill of Rights in a limited way provided some individual rights and freedoms, but did not specifically provide for this protection against unreasonable search or seizure, except to the extent set out in s. 1 (a) "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law."

The Charter drafters had their model for s. 8 in the United States Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

However, the drafters must have drawn heavily from the seminal 1967 decision of *Katz v. United States*, 389 U.S. 347. *Katz* taught us that the right to be secure against unreasonable search and seizure is a concept that is not confined to visible spaces. The government could not place a bug, a listening device, on a public telephone because users had reasonable expectation of privacy in those circumstances. Users did not give up their right to privacy even in a public location. As Justice Stewart put it:

For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as



private, even in an area accessible to the public, may be constitutionally protected....

The authority of the police to obtain information without warrant from trash left for municipal collection was also reviewed by the Supreme Court of the United States in *California v. Greenwood*, 486 U.S. 35 (1988). Justice White for the majority, accepted that the parties in that case did not expect the contents of their trash to become known to the police or the public. Nonetheless, he said that "[a]n expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable." From there, he concluded that the act of the leaving trash exposed for possible public perusal was conclusive of the party's reasonable expectation. Interestingly, the majority relied on the fact that numerous lower courts had come to the same conclusions regarding trash.

Justice Brennan, in his dissenting opinion, likened trash left out to the delivery of mail:

The Framers of the Fourth Amendment understood that "unreasonable searches" of "paper[s] and effects" - no less than "unreasonable searches" of "person[s] and houses" - infringe privacy. As early as 1878, this Court acknowledged that the contents of "[l]etters and sealed packages . . . in the mail are as fully guarded from examination and inspection . . . as if they were retained by the parties forwarding them in their own domiciles." *Ex parte Jackson*, 96 U.S. 727,

733. In short, so long as a package is "closed against inspection," the Fourth Amendment protects its contents, "wherever they may be," and the police must obtain a warrant to search it just "as is required when papers are subjected to search in one's own household."...

A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like riffling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the sanctity of a man's home and the privacies of life," which the Fourth Amendment is designed to protect.

The majority opinion in *Patrick* was written by Binnie J., while Abella J. concurred in the result, her reasons for doing so are starkly different. The majority opinion seems to go in different directions, but it essentially relies on a theory of abandonment, along the very lines found in *California v. Greenwood*. Once the homeowner places trash outside the perimeter of his or her property, the loss of control of the property becomes a statement of the expectation of privacy:

[22] In *R. v. Dyment*, 1988 CanLII 10 (S.C.C.), [1988] 2 S.C.R. 417, La Forest J. treated abandonment as fatal to a reasonable expectation of privacy. He held that when an accused abandons something, it is "best to put it in Charter terms by saying that he [has] ceased to have a reasonable expectation of privacy with regard to it" (p. 435).

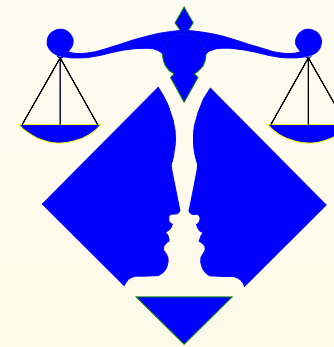
[23] In *R. v. Stillman*, [1997] 1 S.C.R. 607, 1997 CanLII 384, McLachlin J., in dissent, but not on this point, stated that "[t]he purpose of s. 8 is to protect the person and property of the individual from unreasonable

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## Family Law Liaison Committee

By Jeffrey J. Hewitt

On June 29, 2009 Alf Mamo and Justice Harper attended a meeting in Windsor to encourage the local family law bar to develop a Family Law Liaison Committee for the Superior Court of Justice. At that meeting a small group of people volunteered to steer the process forward, and by July 27, 2009 an election process produced two



senior representatives, two intermediate representatives and two junior representatives. The steering committee proposed that the two Justices who had indicated interest (Justices Nolan and Patterson), these 6 family law lawyers, a representative from legal Aid as well as representation from Administration, Trial coordination and the Registrar's office form

a Superior court of Justice Liaison Committee. The Committee has sought input from the family law bar by having a general meeting to get their input into ideas for moving forward as well as sending out a survey to gather their input.

The Committee has met monthly since September and has disseminated information to the family bar by a Newsletter. If you would like to be included on the email distribution list, please contact Jennifer Suzor at [jsuzor@familylawspecialist.ca](mailto:jsuzor@familylawspecialist.ca).

## Supreme Court

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search and seizure. This purpose is not engaged in the case of property which the accused has discarded" (para. 223). (To the same effect see *Cory J.* for the majority at para. 62, and *Major J.*, concurring in part, at para. 274.)

[24] This may be contrasted with the situation in *R. v. Law*, [2002] 1 S.C.R. 227, 2002 SCC 10 (CanLII), where a locked safe containing confidential documents had been stolen (not discarded) and the accused had never acted in a manner inconsistent with the continued assertion of a privacy interest in the information contained therein. When the police, after recovering the stolen safe, decided to scrutinize the documents inside (and the accused subsequently was charged with tax offences), they infringed the s. 8 reasonableness line.

An analogy may be made in circumstances other than trash. As individuals, we may release information that we know or should know is accessible to the world at large. For instance, in *R. v. Kang-Brown*, 2008 SCC 18 (CanLII), the court, in a complex set of decisions, ruled that the use of sniffer dogs at a bus terminal was a violation of s. 8 of the Charter. We know too that cell phone transmissions and many internet communications may be open for public scrutiny. However, all these human emanations would be protected by s. 8, yet they are not fundamentally different from leaving garbage out, except in one respect, that is, that they may require advanced technology to access the information that individuals discard. This would be subject to the holding in *R. v. Tessling*, 2004 SCC 67 (CanLII) where, also in an opinion authored by Binnie J., the court ruled that the use of a Forward Looking Infra-

Red ("FLIR") camera from a police airplane was not a violation of s. 8. This was because the technology is not currently capable of providing specific enough information:

[29] In my view, with respect, the reasonableness line has to be determined by looking at the information generated by existing FLIR technology, and then evaluating its impact on a reasonable privacy interest. If, as expected, the capability of FLIR and other technologies will improve and the nature and quality of the information hereafter changes, it will be a different case, and the courts will have to deal with its privacy implications at that time in light of the facts as they then exist.

It is from this that one possible bright line rule emerges from the majority decision, namely that police are not constrained from gathering information that is readily accessible to the public in general.