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DSF Devry Smith Frank *LLP*
Lawyers & Mediators

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IN THIS ISSUE:

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THE IMPORTANCE OF HAVING LEGAL COUNSEL FOR YOUR AGGREGATE EXTRACTION LICENCE

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Aggregate (sand, gravel, stone) extraction is one of the most controversial and heavily regulated industries in Ontario. Necessary to build infrastructure in the province, it is often misunderstood and underappreciated.

The industry is governed by complicated web of legislation and policies: the Aggregate Resources Act (the "ARA"), the *Ontario Water Resources Act*, the *Environmental Protection Act*, the *Endangered Species Act*, the *Federal Fisheries Act, the Planning Act,* the Provincial Policy Statement and, in some cases, the Growth Plan. It is further subject to a complex set of rules and procedures.

Licencing Approvals Process

An operator cannot operate a pit or quarry without first securing a licence from the Minister of Natural Resources and Forestry (the "Ministry"). The terms and conditions of the licence will depend on a number of factors, including whether the extraction is above or below the water table, whether the extraction is on private or public land and how much aggregate is proposed to be extracted. There are 15 categories of licences.

The process of obtaining a licence can take years and involves a process of comprehensive consultation with the local community and, where applicable, First Nations. It generally requires the production, and peer review, of environmental, noise, traffic, dust and water reports. Applications for local planning permissions (official plan and zoning by-law amendments) are often required. It engages a number of agencies, including municipalities, the Ministry and Conservation Authorities.

A crucial part of the process is the negotiation of the terms of the site plan which sets out the requirements under which the pit or quarry will operate, outline what must be done to mitigate potential adverse impacts and what must be done to rehabilitate the site once the extraction process has finished. It may also be necessary to enter into agreements with the local municipality are often required as a condition of achieving a licence or a planning permission.

Often an application will need to be considered by the Local Planning Appeal Tribunal, a court-like body which will hear evidence, consider objections to a licence and decide whether it should be issued.

Factors which determine whether a licence will be issued

The general factors to be considered in issuing a licence are listed under s. 12 of the ARA . These factors, designed to protect the public interest, are broad and subject to considerable interpretation. As a result, it is important to engage a lawyer early on to help guide the application successfully through the process. As an

example of a successful intervention, DSF lawyers were at the forefront of seeking amendments to the ARA to prohibit municipalities from demanding fees from aggregate operators to pay for road maintenance and repairs. This has resulted in significant cost savings for existing and future clients.

The Importance of Experience DSF Lawyers in Aggregate Approvals

A successful licence application, requires a keen understanding of the applicable law, sound planning and solid execution. Our experienced lawyers at DSF are ready to help you. David White and Marc Kemerer are leading lawyers in the area, having had notable success in securing licences and planning approvals for a wide variety of extraction proposals, including those which faced strong municipal and local opposition.

EVENT & SPONSORSHIP

Earlier this year a team from Devry Smith Frank *LLP* participated in Wheels for Wellness, hosted by the Rotary Club of Barrie. Our team members took turns spinning for charity over the course of the 5 hour event, which raised over $16,000 for local charities.

Devry Smith Frank *LLP* is a proud sponsor of the Barrie Film Festival, which ran from October 1-4. The event looked a little different this year, taking place at the Sunset Drive-in. https://barriefilmfestival.ca/

NEWS AND UPDATES

MOST RECENT SEMINARS

Employment lawyer Marty Rabinovitch hosted an informative online webinar on COVID-19 and how it's affecting Human Resources and Employment Law.

Note: We are in the process of organizing another HR/Employment webinar in November. Please visit our website for future updates.

Marty Rabinovitch
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RECENT NEWS AND EVENTS

DSF's immigration lawyer, Asher Frankel, was featured in Geneva Group International's newsletter. Asher serves as the current regional chairperson for North America. In the newsletter, he discussed the Canadian immigration approach to Covid-19 containment.

Asher Frankel
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DSF's education lawyer, Katelyn Bell, successfully defended the parents of a three-year-old student against a claim for unpaid tuition. The pupil's parents were instead awarded $2,000 in damages against the school.

Katelyn Bell
416-446-5837 | katelyn.bell@devrylaw.ca

DSF's education lawyer, John Schuman, was mentioned in CTV News and Kitchener Today discussing why COVID19 waivers might not shield private schools from legal action.

John P. Schuman
416-446-5080 | john.schuman@devrylaw.ca

DSF's personal injury lawyer, Marc Spivak, sent an open email to the Honorable Doug Downey, Attorney General of Ontario, regarding suspending juries in civil law cases, explaining why it could be efficient in helping civil trials move faster.

Marc Spivak
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BLOGS

3 IMPORTANT THINGS TO KEEP IN MIND WHEN THE CHILDREN'S AID SOCIETY COMES KNOCKING

Kenna Bromley
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The Children's Aid Society is knocking at your door. Now. You might have been warned of their visit, but they do not need to give you notice. The visit could be the result of someone giving Children's Aid information about your parenting which raises concerns about the safety or well-being of your children. You may never know what made them come knocking.

You must answer the door. You must let them in. This intrusion can be alarming and upsetting. But what do you do next? How can you act to best keep your family together?

Contact a family lawyer or a child protection lawyer

The stakes are high. Children's Aid could take your children away as a result of this visit.
If you have been given advance notice, contact a family lawyer or a child protection lawyer as early as possible. If you did not receive notice, contact a family lawyer or a child protection lawyer as soon as practicable. The circumstances of each situation are unique; tailored advice to your situation may be critical in preventing the seizure of your children, or in expediting their return if they are removed.

Speak to a lawyer before signing any kind of "agreement" with Children's Aid. It is possible that the Society may request "authorizations" from you to speak with other people as part of their investigation—e.g. teachers, doctors, et cetera—and your consent will simply speed up this process (they will be able eventually to speak with them regardless of whether you consent or not). Generally speaking, if you are uncertain what you are being asked to sign, speak with a family lawyer or a child protection lawyer first.

If any criminal charges, such as assault or sexual assault are alleged, do not discuss these matters with Children's Aid until you have spoken with a lawyer. Children's Aid works with the police and will report everything you say to them and that information may be used against you. That being said…

Be welcoming, friendly and co-operative

Children's Aid is not the police. Work together with them and show that you share their concern for the safety and well-being of your children. Be a "team player," knowledgeable that the goal is to ensure that all that happens is in the best interest of the children. Do not refuse to meet with Children's Aid or otherwise behave in a manner that raises their suspicion that you have something to hide.

If you had time to prepare for the visit, ensure your home makes a good first impression. This means ensuring the home covers the basics: safe for children with enough food but also demonstrates that this is a happy and loving home. Children's Aid will want to inspect everywhere—e.g. see the children's rooms—so be welcoming and offer them a complete tour.

During the COVID-19 pandemic, there may be a heightened emphasis on health and safety. Show Children's Aid that you and your family are taking appropriate measures to prevent the spread of the virus. Do the children know to wash their hands before eating? Do they practice social distancing from their friends or wear appropriate face coverings when in public places?

Allow Children's Aid to speak with your child alone

Children's Aid has the right to interview your children without your consent. Facilitate this and make it easy for them. As a parent, do not create the impression that you are attempting to interfere or hide something.

While children have the right to have a lawyer present while speaking with Children's Aid, this is the right of the

child—not the parent. It must be the child who arranges to have a lawyer present if this is their desire.

Do not assume that Children's Aid has completed its investigation until you are notified that the file is closed. Ask for disclosure if the investigation is ongoing.

After the home visit, you may be watched from a distance.

Knowing how to act and respond to an investigation from Children's Aid may improve the chances that your family remains together. If you are uncertain, contact a family lawyer or a child protection lawyer as soon as possible.

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FOUR THINGS YOU NEED TO KNOW ABOUT "TIME IS OF THE ESSENCE " IN THE REAL ESTATE TRANSACTIONS (ESPECIALLY IN A PANDEMIC!)

Laura Rosati
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A contract of sale for a piece of real estate property will almost always provide that time is of the essence. This clause means that you and the other parties in the agreement must be punctual and fulfill obligations promptly. Should you fail to perform in a timely fashion, the contract may end and you may be liable for damages.

For example, if you change your mind about purchasing the property or cannot attain suitable funding in time for the closing date, you may be in breach and liable to the other parties. In other words, the deadlines are very important; missing them could cost you. You may need to pay for the other parties' damages.

Here are four things you need to know:

Proceed diligently and in good faith
Stay true to your word, secure funding, fulfil your obligations with diligence. Complete your obligations faithfully and do not interfere with the other party's ability to fulfil their responsibilities. If you are uncertain about your obligations, obtain legal advice.

How to rely on the clause
If you want to rely on the clause to accuse another party of failing to live up to their obligations, you must demonstrate that you are ready, willing, and able to complete the agreement. In other words, if both parties are not ready to close on a real estate transaction, neither party can rely on the clause to bring an action for specific performance, damages, or termination of the contract.

When the clause is negated
One way to negate the clause is by waiver. For example, if both parties agree to extend the closing date by two days, then there is a waiver. In general, if one party in a contract takes action(s) to make it clear that the strict contractual provisions will not be enforced, the clause is waived in that instance.

Another way to negate the clause is by-election: For example, if the buyer does not have the requisite financing completed on the closing date, the seller could agree to extend the closing date. In general, when one party breaches the contract and the other parties consent, the clause is negated by election.

How the clause is impacted by the Coronavirus pandemic (COVID-19)
COVID-19 has disrupted the economy and caused some institutions which facilitate real estate transactions to have scaled back temporarily or suspended their operations. Further, COVID-19 has caused financial hardships which also have the potential to delay real estate transactions. Delays may cause deadlines to be missed, and you do not want to be on the hook due to a delay caused by COVID-19.

To ensure that your real estate deal is not held up by the pandemic, obtain legal advice to ensure you either:

1. enter into agreements properly drafted with COVID-19 in mind, or
2. that your existing agreement completes without delays caused by COVID-19.

For more information or any other questions regarding real estate transactions, please contact our real estate lawyers today. Don't delay, time is of the essence.

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HOW A MEDIATOR CAN GET YOU OUT OF AN IMPASSE

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Mediators have to be adept in soft skills to identify and break down the causes of an impasse between opposing sides. DSF lawyer and mediator Eric Gossin shares his wisdom and experience on the tricky task of bridging often seemingly insurmountable differences.

Grasping underlying issues
Disputes are often multilayered and it takes a skilled mediator to peel them back and understand what's at the core. A superior mediator has the skill to read between the lines and intuitively understand what the issues are that are not spoken about. For example, in an estate matter between siblings, the background of their relationship needs to be taken into consideration. At times it may be necessary to address the personal issue that the father has always favoured one sibling over the other and the hurt feelings this caused in order to be able to get to a compromise regarding the legal issue.

The mediator moves away from the money and property issues in an attempt to get one party to understand what is bothering the other side. The goal is to get the parties to acknowledge the other side's real interests.

Getting parties to talk
In order to reveal underlying issues, the mediator needs to get the parties to talk, which is not always an easy endeavour. One strategy is to focus on things the parties have in common. Another is to convey to them that the other side is giving conciliatory signals. Such commonalities and signals are usually overlooked by parties who are in rigorous dispute. In order to make them see these signals and common interests, it takes much restating and reframing of positions by the mediator.

Another strategy is directing the parties to areas where something positive can be accomplished, even if it is small at first. Small victories will help them move to a position that can break the impasse on a larger matter.

If parties are immovable and none of the above bears fruit, it is a good idea to carefully point out respective weaknesses in the parties' cases. This will showcase that litigation, the alternative to mediation, and the route that the case will often take if mediation fails comes with risks. A judge's decision may well be one where neither side is getting what it wants. It is in only in rare cases that one party gets all they want. Compromises are the rule. Realizing this will often keep the parties at the table and make them more flexible so that a stalemate position is avoided, which is the first step to a settlement.

Sometimes a mediator will invite third parties into the mediation, such as a shareholder, a spouse, or business partner, if he thinks that will help move the matter forward.

The relation between mediators and lawyers
In my observation, it is common for lawyers to take the position that they have made their final and best offer, or to pronounce a stalemate. A mediator then has to walk a fine line, careful not to undermine the legal advice of the parties' lawyers.

Each lawyer has the obligation to put forth and defend their client's case, but sometimes seeing what is in the client's best interests is not always cut and dried. Lawyers may not always dig deep enough to reveal the underlying issues that stand in the way of a settlement.

The situation can become difficult for a mediator when he or she realizes the impasse is due to counsel. Sometimes a mediator can sense that if it wasn't for counsel, the client would be prepared to move. Sometimes the reverse happens where the clients are stuck, and the lawyers are encouraging them to settlement.

That dynamic is a great challenge in mediation, and one of the things that separates the average mediator from a better one is their ability to recognize that tension between the lawyer's legal position and the client's — and whether one or the other is more enthusiastic in settling.

Admittedly, sometimes people just want to fight. Mediation cannot solve every case. However, in most cases, it is successful.

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WHAT ARE THE CONSEQUENCES OF FILING A FALSE POLICE REPORT IN CANADA?

David Schell
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By now we have all been subjected to the tragic details of television star Jussie Smollett's alleged attack in Chicago earlier this year. When the news broke initially, it seemed as though Smollett was a survivor of what appeared to be a hate crime and his colleagues within the entertainment business did not hesitate to express their support and vocalise the need for change. It was and still is a media frenzy.

However, as the evidence unfolded, it quickly became apparent that the crime itself could have been fabricated and orchestrated by Smollett himself. Subsequently, the actor now faces charges for filing a false police report and the story has raised an all important question about the repercussions for such actions.

What are the offences someone can be charged with under the *Criminal Code of Canada* for filing a false police report or lying to the police?

The offence under the *Criminal Code* which would be most applicable is committing public mischief under section 140. That section states:

140 (1) Every one commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by

(a) making a false statement that accuses some other person of having committed an offence;

(b) doing anything intended to cause some other person to be suspected of having committed an offence that the other person has not committed, or to divert suspicion from himself;

(c) reporting that an offence has been committed when it has not been committed; or

(d) reporting or in any other way making it known or causing it to be made known that he or some other person has died when he or that other person has not died.

The purpose of the law is to discourage and punish false reporting and of course to prohibit people from falsely accusing others. Making a false statement transpires when the person makes the statement with the intention of misleading justice. One cannot be convicted if it is determined that they genuinely believed the statement to be true at the time it was made.

The penalties for committing public mischief are outlined at section 140(2) of the Criminal Code. If the Crown Attorney perceives the case as serious and elects to proceed by indictment, then an accused who is found guilty is potentially liable to imprisonment for a term not exceeding five years. If the Crown decides to proceed summarily (less serious case) and an accused is found guilty then they are liable to a fine of not more than five thousand dollars or to a term of imprisonment not exceeding six months or to both. The actual punishment imposed for those convicted will vary according to the facts of each case and the circumstances of each offender.

In addition to public mischief, there are several other offences under the Criminal Code that a person could find themselves charged with if they file a false police report or lie to the police. These include the following:

Perjury under section 131 of the Code if the person, with intent to mislead, knowingly gives a false statement under oath, affirmation, by affidavit, solemn declaration or deposition;
Fabricating Evidence under section 137 of the Code if the person, with intent to mislead, fabricates anything (such as a police report) with the intent that it shall be used as evidence in a judicial proceeding; and
Obstructing Justice under section 139 (2) of the Code if the person willfully attempts to obstruct, pervert or defeat the course of justice.

These offences involving the misleading of justice and which include lying to the authorities are taken very seriously. This is clear when looking at the potential and maximum penalties under the Code. Perjury and fabricating evidence are indictable offences with potential prison terms of up to 14 years, while obstruct justice under 139 (2) of the Criminal Code is an indictable offence with a maximum sentence of imprisonment for 10 years.

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DETERMINING THE CHILD SUPPORT OBLIGATIONS OF A STEP-PARENT

Amy E. Jephson
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A spouse who stands in the place of a parent to a child can be obligated to pay child support, according to s. 5 of the Ontario Child Support Guidelines ("Guidelines"). The amount a step-parent will be ordered to pay is at the discretion of courts. When exercising this discretion, the court will look to the other provisions of the Guidelines, and to any other parent's obligation to support the child (including biological parents). The approach courts take to calculate the amount of child support owing by a step-parent can vary ranging from apportionment to percentages and top-ups. However, the case law has carved out several principles that courts generally follow in determining a step-parents' child support obligations. These principles are described below.

Primary Child Support Obligation of the Biological Parent

The Ontario Court of Appeal in Wright v. Zaver, 59 OR (3d) 26 [2002] interpreted s. 3 of the Guidelines as placing a primary obligation on the biological parent to pay child support in the amount that is determined by the Guidelines (sometimes referred to as the table amount). The Guidelines determine the quantum of child support based on the income of the payor parent and the number of children to whom support is owed. For the biological parent, this amount is automatically calculated, and cannot ordinarily be negotiated lower due to the presence of a step-parent.

On the other hand, the step-parent can argue for a reduction in the quantum of child support payable if a court finds that it is appropriate to do so. The full Guideline amount may be the starting point for the court's determination, but the step-parent can rebut the supposition that they owe the full table Guideline amount with compelling evidence that the Guideline amount would be inappropriate (Kobe v Kobe, [2002] OTC 186 [ONSC]). Regardless of the approach taken, the Guideline table amount will likely still serve as an upper limit for the step-parent's support obligation.

Step-parent's Child Support Obligation is in Addition to Biological Parent's Obligation

If a court orders a step-parent to pay child support in accordance with the Guidelines, the biological parent's support obligations are still not displaced. It is at the discretion of the court to determine what additional amount would be appropriate for the step-parent to pay. In most cases, it is unlikely that courts will find it appropriate to award a "windfall" to the support recipient resulting from collecting the full amount of child support twice - from the biological parent and from the step-parent. It is also unlikely that the court will grant this accumulated child support obligation from all parents when this would lead to a standard of living beyond one the child has previously enjoyed. However, if the child support payable by the biological parent is not enough to provide the child with the standard of living enjoyed previous to their parent's separation, the step-parent may be obliged to top up the amount paid by the biological parent or pay the full Guideline amount, where the biological parent is unable to pay at all, or cannot be located.

Children First Objective

It is important to keep the objectives found at section 1 of the Guidelines in mind. These include that a "fair standard of support" and "reduction of conflict between parents" are relevant to the determination of appropriate support by a step-parent. The legislation and courts set out to provide a degree of certainty for parents sorting out their affairs after a separation. However, primacy is given to the standard of living the child enjoyed when the parents were still living together, and to the best interests of the child, in accordance with the "children first" perspective of the Guidelines.

ONTARIO STONE, SAND & GRAVEL ASSOCIATION EXPRESSES SUPPORT FOR AGGREGATE APPROVAL PROCESS

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The Ontario Stone, Sand & Gravel Association ("OSSGA") has recently written to the Honourable Doug Ford, Premier of Ontario, to state that the Premier should not interfere in the licensing and approval process for pits and quarries in the Province [1]. OSSGA did so in response to alarming comments made by the Premier about preventing, at any cost, the licensing of a quarry in the Milton area.

The aggregate industry is vital to Ontario. The stone, sand and gravel which it supplies are used to build homes, schools, libraries, colleges, universities, hospitals, fire and police stations, as well as to construct roads, highways, water and sewer infrastructure, public transportation systems, workplaces, recreational and social centres, arenas and stadiums. We all contribute to the need for aggregates and we all benefit from the activities of the industry which extracts them.

Aggregates are to be extracted as close to market as possible to ensure an economical supply of material with shorter truck trips. This also significantly lowers overall emissions. The industry creates jobs, generates vital revenue for local governments and operates under strict regulations.

To balance the interests of all stakeholders and to protect the public, the licensing and operation of pits and quarries are subject to the requirements of the Aggregate Resources Act, the Planning Act and 23 other pieces of legislation and hundreds of regulations. The process also involves consultation with First Nations, the scrutiny of provincial government ministries, the review of local planning authorities and governments, the examination of the community, and, often, a hearing in front of the Local Planning Appeal Tribunal.

The process is a careful, deliberative, and rigorous one. It takes years and a wide array of technical and expert reports, including environmental studies, to complete. At the end of the life of a pit or quarry, the land must be rehabilitated, which adds green space to the Province.

The aggregate licensing system in Ontario represents a solid, safe and sustainable approach to bringing vital material to the market. It should not be undermined by political considerations.

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DSF IS GROWING

Kenna Bromley *B.A., J.D.*

Kenna Bromley joined DSF in 2020 as an associate in our Barrie Family Law group. She has appeared at all levels of court in Ontario; although her practice often takes her to the courtroom for conferences, summaries, motions and trials, she also uses collaborative and alternative processes to reach agreements that are mutually beneficial for all parties involved.

Cindy Leung *B.SC., J.D.*

Cindy Leung joined DSF in August 2020 as an associate lawyer in our litigation, personal injury and insurance groups. She has extensive experience acting on numerous complex matters including motor vehicle accidents, slip and falls, medical malpractice, (sexual) assaults, product liability, burn injuries, dog injuries, wrongful dismissals, disability benefits, and home insurance claims.

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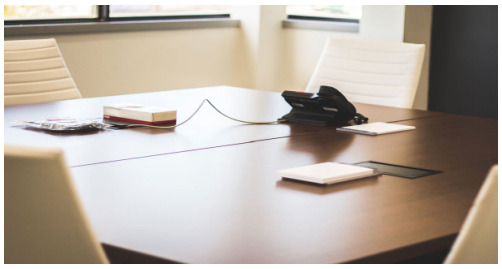

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FAQ - CIVIL LITIGATION

What is civil litigation?
In Ontario, the Limitations Act 2002 imposes a general two-year limitation period from the "discovery" of a claim, after which no litigation may be started. Filing a claim after this two-year period may prevent you from taking legal action and receiving compensation.

Why file your claim asap?
This is because, in Ontario, the Limitations Act 2002 imposes a general two-year limitation period from the "discovery" of a claim, after which no litigation may be started. Filing a claim after this two-year period may prevent you from taking legal action and receiving compensation,

Out-of-court settlement?
This type of settlement simply means that both parties have come to an agreement to resolve the dispute outside the courtroom. As a result, a compensation that mutually benefits both sides is achieved.

What papers are required to file a lawsuit?
In order for a legal proceeding to commence, a plaintiff must file a pleading known as a 'Statement of Claim' and the defendant will need to file their own pleading, namely, a 'Statement of defence'.

Stages of a civil litigation?
- The investigation
- The pleadings
- Discovery
- Pre-trial
- Trial
- Appeal

LETTER FROM OUR MANAGING PARTNER

This has certainly been a challenging year for all of us. As the province reopens, Devry Smith Frank *LLP* ("DSF") continues to provide its clients with focused and excellent service both on-site and through virtual platforms. DSF is committed to rise to the challenge and continue to meet the needs of our clients and address their legal challenges.

As we recognize the demand for excellent service, DSF continues to grow. We are pleased to welcome Kenna Bromley to our family law practice in our Barrie office. Kenna's extensive litigation experience in all areas of family law has set her apart in her practice. We have also added depth in our Toronto office's personal injury and litigation groups by hiring Cindy Leung, who brings with her years of experience in personal injury matters.

We are also pleased to announce the merging of Woitzik Polsinelli ("WP") with DSF operating under a new title, 'Woitzik Polsinelli Lawyers and Mediators'. WP has a reputation as one of the pre-eminent real estate firms in the Durham region. We have combined our respective skills and reputations to become the pre-eminent full-service law firm in Durham

Our vision of service has encouraged us to continue to grow our practice which services the aggregates industry, one of the most important segments of the Ontario economy. Our legal team in the 'Aggregate resource extraction' group lead by David White, Marc Kemerer and Lawrence Hansen have spent years working with leading planning, environmental, and engineering consultants to address a large variety of issues, ranging from land-use planning, consultation with First Nations and local resident concerns.

These additions advance our goal of bolstering our collective talent and experience levels to better serve our clients and further our commitment to provide top expertise in many legal fields.

We are grateful to all of our clients, with whom we have worked closely over the years and with whom we have built long-standing relationships. We look forward to continuing to foster, grow and strengthen these relationships. We also look forward to meeting and building relationships with new clients, as our practice areas expand. Stay safe and stay healthy.

Larry Keown
Managing Partner
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Devry Smith Frank *LLP*
Lawyers & Mediators