

*"Excellent program! Great pace,  
great speakers, great content"*

Martine Ordon  
Aylesworth LLP (2009)

## Seventh Annual Conference Evidence Law for the Civil Litigator

Top practitioners and judges will give you practical advice that could make all the difference in your next case. Topics include:

- Effectively using or countering documentary evidence
- How to use discovery transcripts in differing scenarios
- Is it or isn't it hearsay? (and does "traditional" hearsay even exist anymore?)
- Identifying all relevant evidentiary sources – from individuals and institutions other than the parties, from other proceedings, and from out-of-court examinations
- The most effective arguments for limiting the obligation to preserve electronic evidence
- Current best approaches to opinion and expert evidence, in light of recent law
- How to deal with unfavourable facts and inconvenient evidence in specific situations

**Plus!** Optional Pre-Conference Workshop – *Fundamentals of Evidence: A Refresher*

Faculty includes:

### Court of Appeal for Ontario

The Hon. Justice Susan E. Lang

The Hon. Justice J. David Watt

### Superior Court of Justice (Ontario)

The Hon. Justice David M. Brown

The Hon. Justice Peter Lauwers

The Hon. Justice Michael Brown

The Hon. Justice Paul M. Perell

The Hon. Justice Maureen D. Forestell

The Hon. Justice Julie A. Thorburn

The Hon. Justice Michelle Fuerst

### Chairs

James C. Morton, Steinberg, Morton, Hope and Israel LLP

Jacqueline L. King, Miller Thomson LLP



### DATES & TIMES

October 7 - 8, 2010

9:00 a.m. - 4:30 p.m. EDT/EST

### OPTIONAL PRE-CONFERENCE WORKSHOP

October 6, 2010

1:00 p.m. - 4:00 p.m.

### LOCATION

Osgoode Professional  
Development Centre  
1 Dundas St. W., 26th Floor  
Toronto, ON

Webcast and Single Day  
Registration Available



# Seventh Annual Conference Evidence Law for the Civil Litigator

## What Past Attendees Said:

*“Very helpful, relevant, interesting, and useful”*

**Maureen Helt**  
Ontario Energy Board (2009)

*“The sessions were all very valuable...[and] I am happy to have such well-prepared material that I can refer to on an as-needed basis – which will be often”*

**Dona Salmon**  
Ministry of Finance/Revenue (2008)

**T**he rules of evidence are constantly evolving. To maintain a winning edge, it's essential to remain current on the latest caselaw and best practices in locating, preserving and presenting evidence. Your next case may involve new or unfamiliar kinds of evidence (including evidence from quickly-developing electronic/online sources), or new rules, common-law principles and practices that represent significant departures from the past. Are you fully prepared?

Building on the success of six previous programs, *Osgoode Professional Development's Evidence Law for the Civil Litigator* has been designed to provide you with a brisk, informative update on the latest developments and most pressing issues in civil evidence. Top practitioners and judges will discuss key issues that you can count on facing in your litigation practice.

**Two judges' panels** will provide you with an opportunity to gain valuable insights from the Bench. See why these panels have developed a reputation for lively, thought-provoking exchanges with a practical focus.

**Plus!** If you're new to civil litigation, or simply want a review of key evidentiary principles and doctrines, you can benefit from the optional half-day Pre-Conference Workshop (*Fundamentals of Evidence: A Refresher*) on October 6 from 1:00-4:00 p.m. This interactive session, led by the program chairs, will identify and explain a broad variety of critical evidentiary points – also enabling you to get the most over the next two days' programming. Spaces in this workshop are expected to go quickly, so reserve your spot now!

**Register now by visiting** [www.osgoodepd.ca](http://www.osgoodepd.ca), **calling** 416.597.9724 **or** 1.888.923.3394, **emailing** [opd-registration@osgoode.yorku.ca](mailto:opd-registration@osgoode.yorku.ca) **or faxing** 416.597.9736.

## Chairs

**James C. Morton**  
Steinberg Morton Hope and Israel LLP

**Jacqueline L. King**  
Miller Thomson LLP

## Faculty

In addition to the judges listed on the front of the brochure

**Robert B. Bell**, Borden Ladner Gervais LLP

**Andrew E. Bernstein**, Torgys LLP

**Duncan C. Boswell**  
Gowling Lafleur Henderson LLP

**John J. Chapman**, Miller Thomson LLP

**J. Thomas Curry**, Lenczner Slaght Royce Smith Griffin LLP

**Vincent M. de Grandpré**, Torgys LLP

**Thomas G. Heintzman, O.C., Q.C.**  
McCarthy Tétrault LLP

**Marie Henein**, Henein and Associates

**Kenneth Jull**, Baker & McKenzie

**Jacqueline L. King**, Miller Thomson LLP

**James R. Lane**, Bersenas Jacobsen Chouest Thomson Blackburn LLP

**Gary H. Luftspring**, Ricketts Harris LLP

**Edmund Huang**, Counsel, Crown Law Office – Civil, Ministry of the Attorney General (Ontario)

**Barbara A. MacFarlane**, Torkin Manes LLP

**James C. Morton**, Steinberg Morton Hope and Israel LLP

**Mary O'Donoghue**, General Counsel and Manager of Legal Services – Information and Privacy Commissioner/Ontario

**David S. Rose**, Neuberger Rose LLP

# Agenda

## Pre-Conference Workshop

### ***Fundamentals of Evidence: A Refresher***

**October 6, 2010: 1:00 p.m. – 4:00 p.m.**

#### ***Workshop Leaders***

**James C. Morton, Steinberg Morton Hope and Israel LLP**

**Jacqueline L. King, Miller Thomson LLP**

This popular annual workshop regularly garners praise from registrants for its brisk, commonsense review of the essentials of civil evidence, and its emphasis on points of particular interest to the workshop registrants, drawn from such areas as:

- Onuses, burdens and presumptions
- The rule in *Browne v. Dunn*
- The best evidence rule: getting to the right source
- Organizing documents for maximum efficiency
- Objections on discovery and their use at trial
- Powerful advocacy on motions and applications
- Requests to Admit, stipulations and admissions in pleadings
- Witness preparation and communicating with the witness during trial
- Drafting effective pleadings on admissibility of evidence
- Use of affidavit evidence as evidence-in-chief
- Use of evidence where the witness is no longer available to testify
- The missing witness: what happens when evidence isn't called?
- Admissibility of expert evidence
- Establishing (or undermining) an expert's credibility
- Admissibility of novel science
- Similar fact evidence – tips on how and when to use it
- Presentation of illustrative evidence

***“An excellent crash course in evidence law. The refresher served as a useful reminder of the application of principles and rules that are integral to being a successful advocate.”***

## Day One: Thursday, October 7, 2010

**8:15 Registration and Continental Breakfast**

**9:00 Welcome and Introduction**

**James C. Morton, Steinberg Morton Hope and Israel LLP**

**Jacqueline L. King, Miller Thomson LLP**

**9:05 The Year in Review: The Most Important Evidence Cases of the Past Twelve Months**

**John J. Chapman, Miller Thomson LLP**

One of the most eagerly anticipated features of this annual program, and a concise way to keep on top of the cases and their practical implications. The session will include a full opportunity for questions and discussion.

**10:15 Refreshment Break**

**10:30 The Impact of Privacy Interests on the Admissibility of Evidence: Where We Are, Where We're Headed**

**Vincent M. de Grandpré, Torys LLP**

**Mary O'Donoghue, General Counsel and Manager of Legal Services – Information and Privacy Commissioner/Ontario**

- The impact of *PIPEDA* on the use and disclosure of personal information
- Limits on evidence culled from online sources
- Protecting trade secrets and other confidential information
- Limitations on disclosure of Crown briefs and disciplinary records
- Protecting confidential corporate information within the court process

#### **Solicitor-Client and Litigation Privilege Update**

- Litigation privilege: its persistence after litigation ends
- Scope of the privilege
- Limitations on the privilege
- Waiver of the privilege
- Practical advice on how to challenge a claim of privilege

**12:15 Luncheon**

**1:15 Mastering Documentary Evidence**

**Robert B. Bell, Borden Ladner Gervais LLP**

**Gary H. Luftspring, Ricketts Harris LLP**

- Effectively using or countering documentary evidence

# Agenda

- Approaches to using affidavit evidence as evidence-in-chief
- Adducing evidence where the witness is no longer able to testify
- Tactics for introducing business records at trial
- The latest on third-party communications
- Potential difficulties in proving documents at trial
- Altered document drafts vs. final versions and distinguishing between earlier and later annotations
- Statutory notice periods
- Effective use of the Request to Admit
- Current state of the parol evidence rule

## How To Make the Most Effective Use of Discovery Transcripts

The speakers will go beyond generalizations and principles to examine best approaches to a number of specific, challenging situations of the kinds that you have encountered or will encounter in your practice.

### 3:00 The Judges Speak! Part I – What’s Admissible, When?

**The Hon. Justice J. David Watt**  
Court of Appeal for Ontario

**The Hon. Justice David M. Brown**  
Superior Court of Justice (Ontario)

**The Hon. Justice Paul M. Perell**  
Superior Court of Justice (Ontario)

**The Hon. Justice Julie A. Thorburn**  
Superior Court of Justice (Ontario)

#### *Moderator*

**James C. Morton, Steinberg Morton**  
Hope and Israel LLP

A retooled version of the panel that is a perennial favourite of program attendees, focused this time on specific problems of admissibility and their solution, in the areas of:

- Electronic evidence
- Discovery evidence
- Evidence from sources outside your proceeding (from prior proceedings, non-parties, etc.)
- Expert and opinion evidence along with the impact of privilege on admissibility

The session will provide opportunity for questions, answers and discussion.

### 4:15 Day One Adjourns

## Day Two: Friday, October 8, 2010

### 8:30 Continental Breakfast

### 9:00 Is It or Isn't It Hearsay? Getting Down to Cases

**J. Thomas Curry, Lenczner Slaght Royce Smith Griffin LLP**

**Kenneth Jull, Baker & McKenzie**

- Recent law on hearsay
- “Traditional” hearsay – does it still exist?
- Hearsay in written evidence: ruses and remedies
- Hearsay in oral evidence: if, when and how to object
- Statutorily permissible and strategic uses of hearsay
- Admissibility and weight: how to persuade the Court

### 10:00 Refreshment Break

### 10:10 Evidence from Diverse Sources: Have You Gone Everywhere You Need to Go? (And How to Handle What You Find)

**Thomas G. Heintzman, O.C., Q.C.**  
McCarthy Tétrault LLP

**Marie Henein, Henein and Associates**

Are you confident that you have explored all the most useful and relevant sources of evidence to bolster your case? This panel will provide authoritative practitioner perspectives on gathering and adducing evidence.

- From individuals and institutions other than the parties?
- From other proceedings
- From out-of-court examinations

### 11:15 Electronic Evidence and SOAPS (Sources, Organization, Admissibility, Preservation, Spoliation)

**Andrew E. Bernstein, Torys LLP**

**Duncan C. Boswell, Gowling Lafleur Henderson LLP**

**Edmund Huang, Counsel, Crown Law Office—Civil Ministry of the Attorney General (Ontario)**

- Preserving the evidence – and what it means to your case if you don't
- Communicating with clients re: their obligation to preserve evidence
- Proportionality: best arguments for limiting the obligation
- The most relevant recent caselaw identified and surveyed
- Online/social networking evidence, evidence from Internet providers, etc.

# Agenda

- It came from the office photocopier
- Is it authentic? Prove it!
- Current thinking re: the Sedona Canada E-Discovery Guidelines
- Understanding the scope of production obligations
- Consequences of destroying electronic records

## 12:30 Luncheon

### 1:30 Best Approaches to Opinion and Expert Evidence

**James R. Lane, Bersenas Jacobsen Chouest**  
Thomson Blackburn LLP

**Barbara A. MacFarlane, Torkin Manes LLP**

**David S. Rose, Neuberger Rose LLP**

A panel of experienced counsel takes you through vexing problems of admitting and dealing with opinion and expert evidence in light of the most recent law. Includes:

- How to determine the reliability of expert evidence
- Lawyers' difficulties in challenging experts
- Techniques for handling experts on the stand
- What constitutes acceptable opinion evidence?
- Tips on qualifying opinion evidence
- Techniques for qualifying expert reports
- Delivery requirements for opinion evidence
- The ultimate issue
- Experts
  - admissibility, qualifications
  - experts foundation, sources, completeness and trial
- Picking the right expert
- Rule 53.03 and "the substance of his/her proposed testimony"; how much "substance" do you need to provide?
  - weight to be placed on facts not proved in evidence
  - limitations to the rule
  - which sources, other than parties, may be "inherently suspect"?
  - kinds of sources – which are best and weightiest?
- Litigation privilege and experts
- Independence of experts

### 3:00 The Judges Speak! Part II – Turning Evidentiary Sow's Ears Into Silk Purses

**The Hon. Justice Susan E. Lang**  
Court of Appeal for Ontario

**The Hon. Justice Michael Brown**  
Regional Senior Justice (Central East Region)  
Superior Court of Justice (Ontario)

**The Hon. Justice Maureen D. Forestell**  
Superior Court of Justice (Ontario)

**The Hon. Justice Michelle Fuerst**  
Superior Court of Justice (Ontario)

**The Hon. Justice Peter Lauwers**  
Superior Court of Justice (Ontario)

**Moderator**

**Jacqueline L. King, Miller Thomson LLP**

**Once in a while the facts all line up for you to generate the proverbial "slam dunk". Then you wake up.**

How do some counsel manage to deal with unpromising or inconvenient evidence in a way that turns ambiguous cases (and even outright long-shots) into examples of outstanding advocacy? Our judges' panel provides detailed commentary on the specifics of how to best assist the Court and your clients' interests in these situations.

### 4:30 Program Ends

#### Who Should Attend

- **Civil litigators – plaintiffs' and defence**
- **In-house counsel**
- **Government counsel**

***"I appreciated the high quality, current material presented with common sense and clarity."***

**Heather Main, Mollison, McCormick (2008)**

***"It is inspiring to learn from litigators who are recognized as being at the top of their field."***

**Lynn Marchildon, Senior Counsel, Dept. of Justice, Civil Litigation Section (2008)**

## Registration

Please complete all registrant information.

Register me for: *Evidence Law for the Civil Litigator*

Day One  Day Two  Workshop

I will attend:  On site  Via webcast (single viewer)

(Note: Workshop not available via webcast)

I am unable to attend. Please send me information about ordering program materials.

### Fee Per Delegate

Two days plus optional workshop: \$1295 plus 13% HST for a total of \$1463.35; Two days (no workshop): \$1095 plus 13% HST for a total of \$1237.35; Workshop only: \$325 plus 13% HST for a total of \$367.25.

Fees include attendance, program materials, continental breakfast, lunch (conference only) and break refreshments. Group discounts are available for both on site and webcast participants. Visit [www.osgoodepd.ca](http://www.osgoodepd.ca) for details. Please inquire about financial assistance and CLE credits.

### CLE Credits

Approved in accordance with the requirements of the **LSUC Certified Specialist** program, **Barreau du Québec, BC CPD** and **NY CLE Board** (for transitional and non-transitional lawyers). **Note:** NY CLE Credits are not available for webcast participants. BC CPD webcast participants must contact us for further information.



### Interested in Custom and In-house Programs?

Osgoode Professional Development also offers many of its programs in-house and can customize some programs to your specific needs. If you would like further information, please contact Heather Gore, Program & Business Development Lawyer, at 416.597.8847 or [custom@osgoode.yorku.ca](mailto:custom@osgoode.yorku.ca) or visit [www.osgoodepd.ca](http://www.osgoodepd.ca).

### Program Changes

We will make every effort to present the program as advertised, but it may be necessary to change the date, location, speakers or content with little or no notice. In the event of program cancellation, York University's and Osgoode Hall Law School's liability is limited to reimbursement of paid fees.

### Cancellations and Substitutions

Substitution of registrants is permitted at any time. If you are unable to find a substitute, a full refund (less \$50 administration fee) is available if a cancellation request is received in writing 14 days prior to the program date. No other refund is available.

## Registrant Information

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Firm/Company: \_\_\_\_\_

Practice Area: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ Prov: \_\_\_\_\_ Postal Code: \_\_\_\_\_

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### Location

**Osgoode Professional Development  
Downtown Toronto Conference Centre**  
1 Dundas St. W., 26th Floor  
Toronto, ON M5G 1Z3

### Dates & Times

**October 7 - 8, 2010**  
**9:00 a.m. - 4:30 p.m. EDT/EST**  
Optional Pre-Conference Workshop  
**October 6, 2010**  
**1:00 p.m. - 4:00 p.m.**  
Please arrive a half hour early for sign-in and material pick-up.  
Dress is business casual.

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## 4 Convenient Ways to Register

- MAIL** your registration form to:  
Osgoode Professional Development  
Downtown Toronto Conference Centre  
1 Dundas St. W., 26th Floor  
Toronto, ON M5G 1Z3
- ONLINE** at  
[www.osgoodepd.ca](http://www.osgoodepd.ca)
- FAX** your registration to  
416.597.9736
- CALL US** at 416.597.9724  
or 1.888.923.3394