

# Take Five

October 2009

## **PINPOINT: What and Where?**



**R**esponse to last month's photo contest was so positive that we decided to run it again this month. To enter, send us an email by Nov.20 with the name of this building, the city in which it is located, and the name of the sculpture upon which the design was based. The winner (drawn from all correct entries) will win a \$100 gift certificate to the restaurant of his or her choice. Congratulations to last month's winner, Ashley Syer, an associate with Taylor Veinotte Sullivan. Like many readers, she correctly identified the building as The Flatiron in New York.

## **Inside this Issue:**

This month we have summarized what we consider to be the five most interesting cases from the BCCA in September.

Cases are from the following areas of law: taxation of fees (p. 6), practice on foreclosure (p.7), reapportionment in family law (p.8), real property- developers' obligations (p.9), and defamation (p.10)

## **Get 6 CPD Credits:**

On pages 2-5, we have included information on the research course we are offering next month, including the full agenda.

**EARLY BIRD  
REGISTRATION  
ENDS TOMORROW,  
THURSDAY, OCT.22.**



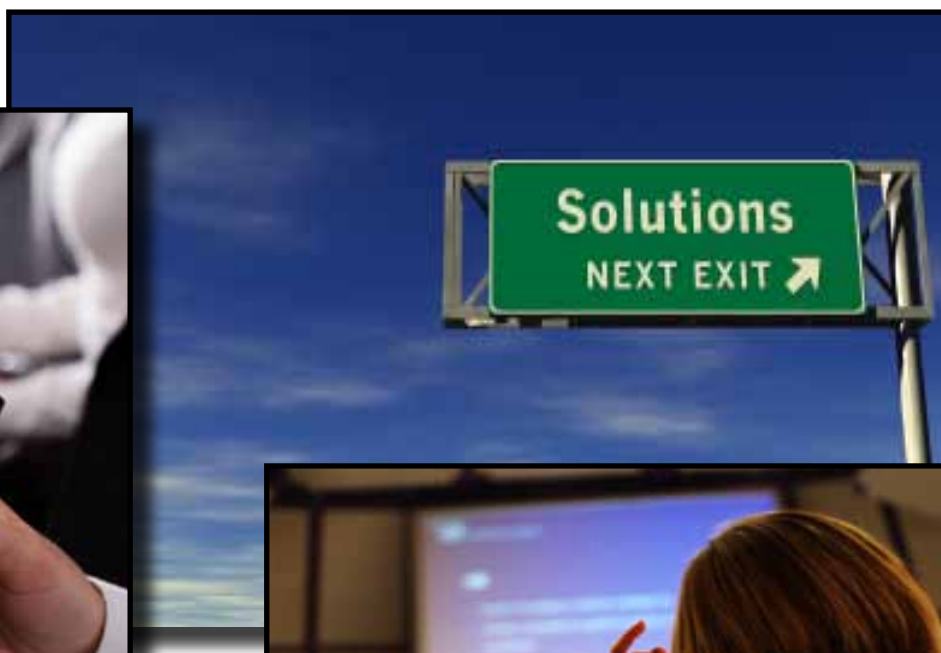
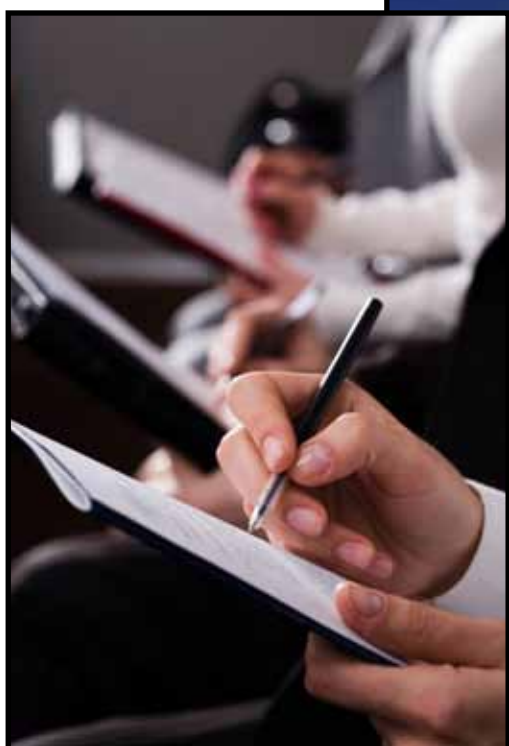
OnPoint Legal Research  
t. 604-879-4280  
www.onpointlaw.com

# ONPOINT FEATURE COURSE

## Legal Research:

*From Problems to Solutions 2009*

*Earn six CPD Credits while learning the latest research techniques from research specialists.*



Thursday, November 19, 2009

Sutton Place Hotel, Vancouver

9:00 am - 4:30 pm

 ONPOINT  
LAW CORPORATION

# Legal Research: From Problems to Solutions 2009

OnPoint has been researching for other lawyers for over 10 years. Drawing from our experience, we will demonstrate how to map out research strategies, examine which resources to use to tackle various problems, and navigate through electronic sources. We will provide countless “insider” tips, discuss legislative research techniques under the guidance of a law librarian from the BC Courthouse Library, and walk through a sample issue, from start to finish.



## *Who should attend?*

We have created this course for all levels. It is appropriate for senior lawyers wanting a refresher course or needing to be updated on the latest techniques, junior lawyers wishing to become better researchers, and students wanting to start off their careers with valuable tips from research specialists. Paralegals will also find this course invaluable.

## Our Panel Knows Research

**Chair:** Sarah Picciotto, Founder of OnPoint Legal Research



***Ellen Vandergrift, OnPoint Law***- Ellen has a winning combination of a keen analytical mind, a clerkship with the Alberta C.A., a stint at Fraser Milner, and a drive to keep digging until she finds the right answer. If it's out there, Ellen will find it! You will learn from her years of experience when to use what resource and how best to use it.



***Doug Morrison, OnPoint Law***- With over 30 years of experience as a litigator, the majority with Bull Housser & Tupper, Doug brings to the table an extraordinary ability to see the big picture and chart out a research course to get the end results he wants. He will show you how to strategically map out a research plan and effectively present results to clients, other lawyers and the court.



***Susan Caird, Librarian and Manager of Reference Services, Courthouse Libraries BC***- Susan has 9 years of experience at the courthouse library and has tackled her share of tricky legislative questions over the years. In addition to working on the two legislative publications that the courthouse library publishes, she has recently co-taught legal research to library students at UBC.

# Agenda

8:30- 9:00- **Registration and Continental Breakfast**

9:00- 9:10- **Welcome from Sarah Picciotto, Founder of OnPoint Law Corporation**

9:10-10:00- **Doug Morrison- “Preparing for the Trek”**

- Determining the end goal to ensure you head down the right path
- Considering your audience in constructing the journey
- The importance of getting the proper facts, instructions, and scope of the research

10:00-10:45- **Ellen Vandergrift- “Starting Out on the Expedition and Staying on the Right Course”**

- The importance of paper and online secondary materials in legal research (texts, digests, encyclopedias and course materials)
- Tips on the best secondary sources to use and how to make the most of them
- Making good research choices- when to stop, when to take a different path, when to check back with the client or supervising lawyer

10:45- 11:00- **Coffee break (with pastries)**

11:00- 12:00- **Ellen Vandergrift- “Navigating the Electronic Terrain”**

- Insider tips from a research lawyer who performs computer research every day
- Cost-efficient uses of electronic resources
- Pointers on when to use which resource for what task
- Tips on how to construct effective searches and manage search results
- Noting up as an essential research tool
- Important resources for keeping current

12:00- 1:30- **Lunch (on own)**

1:30- 2:30- **Susan Caird- “The Legislative Research Journey Made Painless”**

- Tracing legislation back to original provisions
- Locating judicial consideration of legislation using different methods and sources
- Ensuring legislation is current and in force
- Using free and for-fee electronic sources and useful print materials
- Pitfalls of legislative research and how to avoid them

2:30- 3:30- **Ellen and Doug- “Showing Someone Else the Way”**

- Keeping notes for future research or to defend research choices
- A review of our Research Checklist
- How to best create the product for another lawyer, a client, or the court
- Doug will take participants through the process of developing submissions to court using an Outline filed in the BCSC as a model

3:30- 3:45- **Coffee break (with goodies)**

3:45- 4:30- **Ellen Vandergrift- “Time to Take the Plunge: A Sample Research Issue, Step By Step”**

# Course Registration Form



**Program Name:** *Legal Research: From Problems to Solutions 2009*

**Date:** November 19, 2009- 9:00 to 4:30 (continental breakfast starts at 8:30)

**Format:** Live Program with Materials

**Location:** Sutton Place Hotel, 845 Burrard St., Vancouver

**Early Bird (paid before Oct.22):** Regular: \$425; Student: \$250

**After Oct.22:** Regular: \$495; Students: \$295

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SURNAME	GIVEN NAME	INITIAL
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FIRM NAME	ADDRESS	POSTAL CODE
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PHONE	FAX	EMAIL
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Position:    SOLE PRACTITIONER    PARTNER    ASSOCIATE    STUDENT

OTHER \_\_\_\_\_

Year of Call: \_\_\_\_\_

Early Bird Student----- \$250 + \$12.50 GST = \$262.50

Student ----- \$295 + \$14.75 GST = \$309.75

Early Bird Regular ----- \$425 + \$21.25 GST = \$446.25

Regular ----- \$495 + \$24.75 GST = \$519.75

I'm paying by:    Cheque    Money Order    Credit Card

Card Type:    Visa    MasterCard

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CARDHOLDER NAME	CARD NUMBER	EXPIRY
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SIGNATURE

By Fax

By Mail

604.648.8930

OnPoint Law Corporation, 178-2498 W.41<sup>st</sup> Ave, Vancouver, BC V6M2A7

The appellant law firm appealed a taxation decision for legal fees totalling \$10 million. The appellant had achieved very successful results for its client, the respondent mining company, in a complex and difficult action for breach of contract. The respondent was awarded damages of \$88.2 million and prejudgment interest in the amount of \$16 million. Fees had not been discussed with the respondent and the appellant issued monthly "interim" accounts that made no mention of its hourly rates. In light of the successful outcome obtained for the respondent, the appellant sought an additional "fair fee" of \$5 million on a quantum meruit basis. The respondent agreed to pay a further \$1 million bonus and the appellant sought to have its account taxed. At the taxation hearing, the registrar found that the monthly accounts had been "rounded up". The aggregate amount of this "premium" totalled approximately \$1 million. While the registrar was complimentary of the appellant's work, he concluded that the "premium" and "bonus" over and above payment of the interim accounts were sufficient and fair reward. The assessment was upheld by the Supreme Court and the appellant firm appealed.

*Nathanson, Schachter & Thompson v. Inmet Mining Corporation*, 2009 BCCA 385

Area of Law: Compensation- Taxation of Account  
Under Appeal: Mr. Justice Burnyeat



Held: Appeal dismissed.

[CLICK HERE TO ACCESS THE ENTIRE JUDGMENT](#)

The Court, in stressing the importance of candour and transparency throughout the retainer, and the overlay of fiduciary obligations flowing from solicitor to client, found that the appellant failed to discharge its duty to fully and fairly advise the respondent of the terms of the retainer. The appellant had a fiduciary obligation to explain to the respondent the "interim" accounts it was rendering, the "fair fee" concept and its intention to invoke that concept in submitting a final account. The appellant's failure in this regard deprived the respondent of the opportunity to negotiate other terms of payment and accordingly, the Court held that the appellant should be estopped from claiming the "fair fee". Although the appellant was found to be in breach of its fiduciary obligations to the respondent, the Court concluded the breach was a result of an inadvertent omission on the part of the appellant that would not give rise to an implication of dishonesty or deceit.



## *Hill v. Camfield*, 2009 BCCA 398

Areas of Law: Family; Reapportionment of Assets  
Under Appeal: Mr. Justice Hinkson

The parties were married for approximately nine years. The appellant was 68 years old and the respondent was 51 years old. The appellant owned the matrimonial home prior to the marriage, and the respondent owned a condominium which she rented out for most of the time during their marriage. The parties each held their own RRSPs and pension plans, and shared the family expenses. The respondent worked full-time prior to the birth of their child, aged 13 at the date of the trial, and returned to full-time work once he was in school.

Following separation, the appellant remained in the family home and although he did not pay rent to the respondent, he continued to make all mortgage payments. At trial, the respondent argued for an application of the ordinary 50-50 division while the appellant sought a 90 percent share in the

equity in the home. The trial judge reapportioned the matrimonial home 70 percent to the appellant and 30 percent to the respondent. The appellant appealed and sought an order for 85 percent reapportionment in his favour.



Held: Appeal dismissed.

[CLICK HERE TO ACCESS THE ENTIRE JUDGMENT.](#)

The Court concluded that the trial judge properly considered the various factors set out in s. 65 of the Family Relations Act and that his ruling was in many ways a favourable one for the appellant. The trial judge recognized that the disparity in the parties' assets made equal division of the matrimonial home unfair. The Court did not accept the appellant's argument that the trial judge misapprehended certain evidence and held that the 70-30 apportionment was consistent with the established authorities and did not fall outside the appropriate range. The Court found that the trial judge did not err in considering the whole of the parties' financial picture when assessing their respective contributions, and dismissed the appeal.

## *Strata Plan LMS 3851 v. Homer Street Development*, 2009 BCCA 395

Area of Law: Real Property; Developers' Obligations  
Under Appeal: Mr. Justice Truscott

Investors in a hotel brought an action against the developers and the other defendants for alleged misrepresentations made in the developers' disclosure statement with reference to the hotel's financial projections. At issue in the trial was whether the alleged misrepresentations were breaches of any duties of care owed to the investors by any of the respondents. The trial judge found that the projected hotel occupancy rates were unreasonable and negligent. The developers had negligently misrepresented to the investors that the financial projections, which were based largely on the occupancy rates, were reasonable. The trial judge further held that the developers had made a "material false statement" with respect to a statement concerning the calculation of the occupancy rates. The parties appealed and cross-appealed.

Held: Appeal allowed in part  
Cross-appeal allowed in part

[CLICK HERE TO ACCESS  
ENTIRE JUDGMENT](#)

The Court held that the trial judge erred in failing to apply the test of a "range of reasonableness" when he concluded that the projected hotel occupancy rates were not reasonable. The trial judge incorrectly focused on the implied representation of reasonable care and skill rather than on the express representation of reasonableness. While the Court upheld the trial judge's finding that the developers' statement concerning the calculation of occupancy rates was a "material false statement" as defined in the *Real Estate Act*, it found that the judge erred in concluding that it was not a negligent misrepresentation because it was a statement of fact rather than an assumption. Rather, the Court concluded that the developers had breached their express statutory requirement to disclose all material facts.





## *Crookes v. Newton, 2009 BCCA 392*

Area of Law: Defamation

Under Appeal: Mr. Justice Kelleher

The appellant alleged that he had been defamed in a number of articles found on the Internet since 2005. The respondent owned and operated a website from which he distributed an article he had authored that hyperlinked to other articles that allegedly

contained defamatory material. The appellant commenced an action against the respondent for damages for defamation, arguing that the respondent was a publisher of the articles, either by creating the hyperlinks to them or by refusing to remove the hyperlinks on

the basis that they contained content defamatory of the appellant. At trial, the judge dismissed the action on the ground that the appellant had failed to prove publication of the allegedly defamatory articles, which was an essential element in the tort of defamation.

Held: Appeal allowed and remitted back to trial

[CLICK HERE TO ACCESS THE ENTIRE JUDGMENT.](#)

The Court noted that this was the first appellate case in Canada addressing the issue of whether an author is liable for defamation when his work provides a hyperlink to other websites containing defamatory material. The Court adopted the trial judge's assumption that the impugned articles were defamatory. The Court agreed with the trial judge that there was no presumption of publication of hyperlinked articles as there is no presumption that someone who accesses an internet source also accesses the hyperlinked articles. The Court also held that the mere fact that the appellant hyperlinked to the alleged defamatory articles did not constitute publishing. The Court also found, however, that the trial judge failed to properly consider all of the appellant's evidence in determining whether an inference of publication could be drawn in the circumstances of the case.



Sarah Picciotto



Ellen Vandergrift



Doug Morrison

## Who is OnPoint?

OnPoint is not a “temp” agency. We are a law firm of on-call lawyers actively involved in our clients’ files, albeit on a fractional basis. We have two divisions: legal research and on-call associates.

**Legal Research Division:** For over 10 years, our research division has completed research and writing projects for lawyers in the private and public sectors, from case summaries to complex memoranda and facta. Many of our clients consider using our services as equivalent to relying upon work completed by in-house associates, and add a measure of profit accordingly when billing their own clients.

*“OnPoint has always performed in a timely, effective and professional manner and has done excellent work at a reasonable price. We do not hesitate to use their services.”*

**Larry Kahn, QC and Marvin Lithwick, Kahn Zack Ehrlich Lithwick**

**On-Call Associates Division:** Our on-call associates division responds to the need to control costs while effectively managing workload variances. Our litigators are available for a range of services, from background assistance and file management to court appearances and locums. Whether we are engaged for a set period of time, a particular file or a specific project, our clients benefit from having access to temporary assistance from outstanding lawyers without the overhead associated with employing full-time associates.

*“The lawyers at OnPoint are of such high quality that I can give them important portions of my files and be assured that they will be handled with skill and proficiency.”*

**Rose Keith, Rose Keith Law Corporation**

*“OnPoint is a great resource for my practice.”*

**Karen Nordlinger, QC, Karen Nordlinger & Associates**