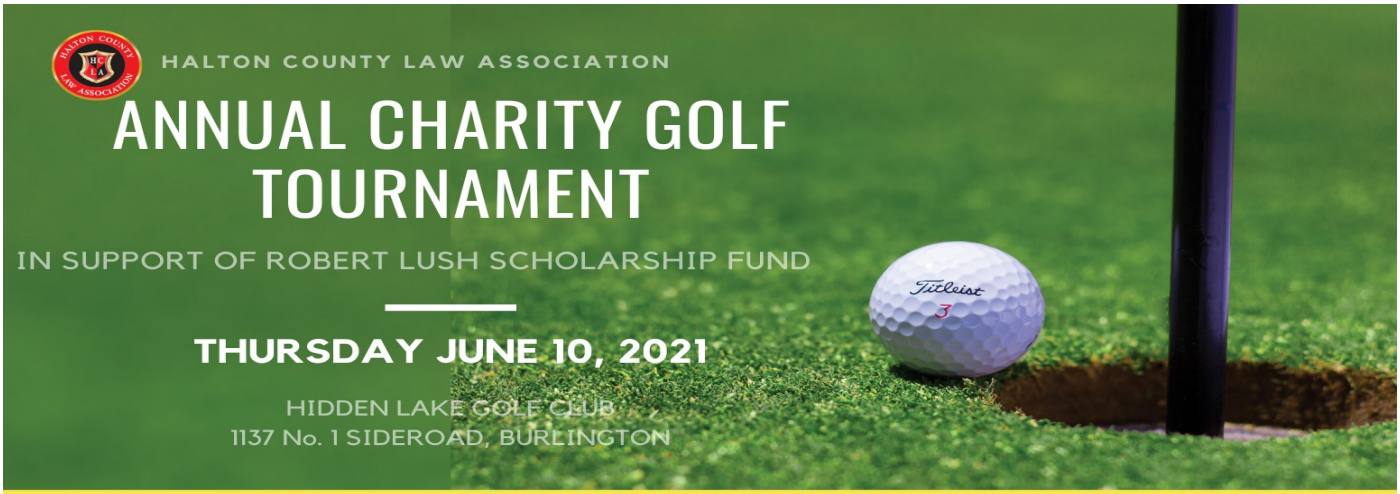
HCLA NEWS

Newsletter of the Halton County Law Association

Volume 12 Issue 2 Spring 2021



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EARLY BIRD: REGISTER BY MAY 10

$150.00	MEMBERS
$175.00	NON-MEMBERS

REGISTRATION AFTER MAY 10

$175.00	MEMBERS
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- COVID-19 protocols and social distancing - enjoy a safe round!!
- Staggered tee times will be assigned beginning at 11:00 am
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PRESIDENT'S REPORT

by Melissa Fedsin

It is a privilege to write this welcome message and first report as I begin my term as President of the Halton County Law Association.

At this point, calling the past year 'challenging' (as we have heard so many times) would be a vast understatement. was elected to the role of Vice-President a little over two years ago, never could I have imagined that this was the future we had in store - but here we are.

As a community and nation, the past year has been marked by untold loss, anxiety, disappointment and despair. People are navigating challenges unique to their circumstances, including isolation and mental health concerns, financial distress, challenges of eldercare and perils of remote learning with children, and everything in between. The small parts of our daily routines we once took for granted we now long for and our patience seems tested daily.

As counsel, we have faced the unprecedented action of the suspension of court operations, the complete alteration of the way that we practice and the newfound responsibility of advocating for our clients in a legal world we have never encountered before.

While still processing the shock of the pandemic, the Halton bar faced further disappointment with the announcement of the cancellation of the Halton Region Consolidated Courthouse: a project that our Association and many other devoted supporters had tenaciously advocated for. Like a cruel joke, the announcement of the cancellation came the very same spring that we had anticipated to finally see ground broken on the construction.

To add further insult to injury, mold was once again discovered in the existing Milton courthouse in the fall. As a result, we were advised that the Milton courthouse will be closed for remediation for an extended period, during which time all Ministry staff and stakeholders will be required to vacate.

By way of recent update, we can now confirm that during the closure, court operations will be relocated to the Burlington Convention Centre and adjoining property, the Courtyard by Marriott Hotel, as temporary work sites.

We can further advise that we have received confirmation that the Association has secured a space within the Courtyard by Marriott Hotel to serve as a temporary location for the Halton County law library and to serve the needs of our members as necessary. Our temporary location will be equipped with a photocopier, computer stations and a limited selection of physical library resources.

The Ministry has also confirmed that the temporary work location of Small Claims, Finance and Enforcement services will be the Burlington Courthouse.

We are advised that the effective date for these changes will be May 31st, 2021. The Association will continue to remain in communications with court staff and the Ministry and update our membership as more information becomes available.

If there is a silver lining to the pandemic, it is that it has launched our justice system into 21st century technology, a change that was indeed long overdue.

Many of us are now accustomed to the new norms of e-filings and Zoom appearances. While the transition was rocky, I am encouraged by the ongoing resilience and adaptability demonstrated by fellow members of our bar in their navigation of these ongoing changes, in their support of one another and in their continued service to their clients despite what seems to be an

endlessly shifting and often unclear landscape of the practice of law.

With the general social and professional transition to virtual connection, the Association has also transitioned our continuing professional development programs to a virtual model for at least the time being, making our programs more accessible and more affordable to members.

That said, the future of physical structures that will serve as the central hub and underlying supports of the justice system in Halton remain uncertain at this point in time.

In their March 11, 2021 media release, *Plans to Accelerate Access to the Justice System*, the Ministry spoke of their objective of a 'courthouse of the future.' The Association has already written to the Attorney General to express our concern that despite their assurances of an update in fall 2020 about how they would address the significant needs of the justice system in Halton, we have yet to receive any notice or consultation in that regard and their recent media release noticeably does not provide any realistic or practical discussion about how their promises of investment in technology can be applied to our mold-infested, crumbling building. A link to our letter to the Attorney General dated March 24, 2021 can be found here.

As the pandemic continues to persist and as most of you will be aware, we were just faced with yet another suspension of the regular operations of the court, again highlighting the limitations of our existing justice structures in meeting the demands of the future.

Despite the admittedly significant setbacks of the past year, the Association remains committed to ongoing advocacy to reconsider the decision to cancel the Halton Region Consolidated Courthouse and to champion the Halton Region as the priority recipient of any promised investment in the justice system in Ontario.

That said, hope in the future does not seem misplaced. Mass vaccination and herd immunity finally appear to be on the horizon. And while the ability of our professionals to pivot in these uncertain times has been reassuring, the past year has also offered many stark awakenings and lessons learned. We now have the opportunity to learn from past mistakes and complacency and to take on the future with a new-found confidence and toolkit. I am a firm believer in that what we overcome, only makes us stronger and more resilient.

As we continue to persevere, I encourage you all to make the best of what we can and to cherish the gifts of life. An intimate group of us were able to enjoy an amusing evening of virtual paint instruction in March and be gently reminded of the importance of continuing to make time for each other and ourselves, despite that chaos that may seem to ensue.

We continue to hope to have the ability to plan some other social gatherings, ideally outdoors if possible, but if not, by way of Zoom as we began to do last year, to ensure that our members are able to connect to those once familiar faces and provide the opportunity for some much needed networking and collegiality.

Our Association will continue to offer support for our members as we navigate these times. We have continued to utilize our website as a key tool to provide updates and information to our membership, particularly with respect to the ongoing COVID-19 pandemic. I would encourage you all to check in with the website regularly.

If anyone has any questions, concerns, or ideas about how the Association can better serve its membership, please do not hesitate to contact me directly. I otherwise hope that everyone is keeping safe and healthy and wish you all a wonderful - and long-awaited - summer. I am looking forward to seeing you again soon and - in the words of my four-year-old - "having a big party when the germs go away."

Meet the Halton County Law Association Board of Directors 2021-2023

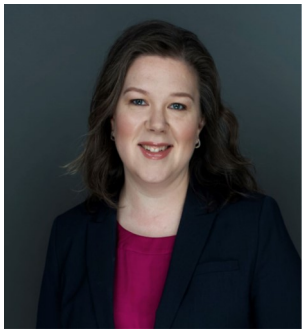
Melissa Fedsin, President

Kathy Batycky, Vice-President

Fay Hassaan, Treasurer

Jill Edwards,
Secretary and Library Chair

Ken Kelertas, Past President



Melissa Babel

Evan Chang

Kaleigh Dryla

Jaspal Gill

Michael Kril-Mascarin

James Page

Meghan Walker

Amit Ummat

HALTON COUNTY
LAW ASSOCIATION

MENTORSHIP PROGRAM

COMING SOON

- BUILD RELATIONSHIPS WITH OTHER HCLA MEMBERS
- HELP TO BUILD A SKILLED AND DIVERSE LEGAL COMMUNITY
- PROVIDE GUIDANCE TO NEWER LAWYERS WITHIN YOUR PRACTICE AREA(S)
- EARN CPD CREDITS

BENCHER REPORT

by M. Claire Wilkinson

Highlights from April 22, 2021 Convocation:
LL.D conferred to Barbara McIsaac:

Convocation commenced with conferring a LL.D. on Barbara McIsaac, who entered the legal profession in 1975, at a time when few women were brave enough to do so. In fact, she noted that only 16 out of 112 students from her graduating class were women. She also acknowledged the lack of racial diversity in her graduating class from law school. She rightly pointed out that the bar needs to reflect the diversity of the community that we serve. She spoke about the challenges women faced back then in obtaining articling positions. For the women who did obtain jobs, there was a reluctance to steer them into certain areas of law, such as litigation, and many women faced sexual harassment. She spoke about the first time that she appeared at the Supreme Court of Canada, and how, being a woman, there was no change room for her. Fortunately, that situation has now been rectified! Ms. McIsaac is a leader in administrative and public law, but continues to recognize the ongoing challenges facing women, such as unequal compensation between men and women in the legal sector.

Treasurer's Report – Teresa Donnelly:

Treasurer Donnelly announced the recipients of the 2021 LSO awards. She also announced that Faculty of Law at Ryerson University is being renamed the "Lincoln Alexander School of Law at Ryerson University". The re-naming ceremony will take place on May 16, 2021. The Treasurer also reminded Convocation that the pandemic has put a strain on the mental health of many of us, and she encouraged licensees to make use of the free and confidential Member Assistance Program, that provides counselling services and other services to articling students, lawyers, and paralegals, and their families. The Treasurer also noted that the Law Society is presenting a two day mental health summit on May 19-20, 2021, which will include presentations from practitioners who have dealt with mental health issues, and who can provide advice about reducing the stigma associated with mental health. This program is FREE and it can also qualify for up to 8 hours of EDI and professional credits. You can sign up for the program on the LSO website in the CPD store. The AGM for the LSO will be May 12, 2021 at 5:15 pm. She also noted that changes to contingency fee agreements will come into force on July 1/21, which primarily involves repealing the prohibition against including costs in contingency fee agreements, and the requirement that licensees use a standardized contingency fee agreement. The LSO will be hosting a program to deal with the contingency fee changes on May 14, 2021 from 9 -10:30 am. You can register for this program in the CPD store on the LSO website.

Regulatory Sandbox for Innovative Technological Legal Services approved:

Artificial intelligence has already evolved to the point where some websites and apps are offering legal services that are not presently being regulated by the Law Society. Although some of these services can augment the services being provided by lawyers and paralegals, it is also recognized that some of the services directly compete with the services provided by lawyers and paralegals. Research reveals that 80% of legal needs remain unmet by legal professionals, but there are certainly areas of legal service where there is no access to justice problem, such as in servicing clients who hire legal representation by way of contingency fees. Still, non lawyer owned legal services are coming whether lawyers and paralegals like it or not, so it is a matter of good governance for the LSO to explore if it can regulate these services in a manner which protects the public. An advisory board will be established to consider each application, and consumer demographics and performance outcomes will be reported by the service provider to the

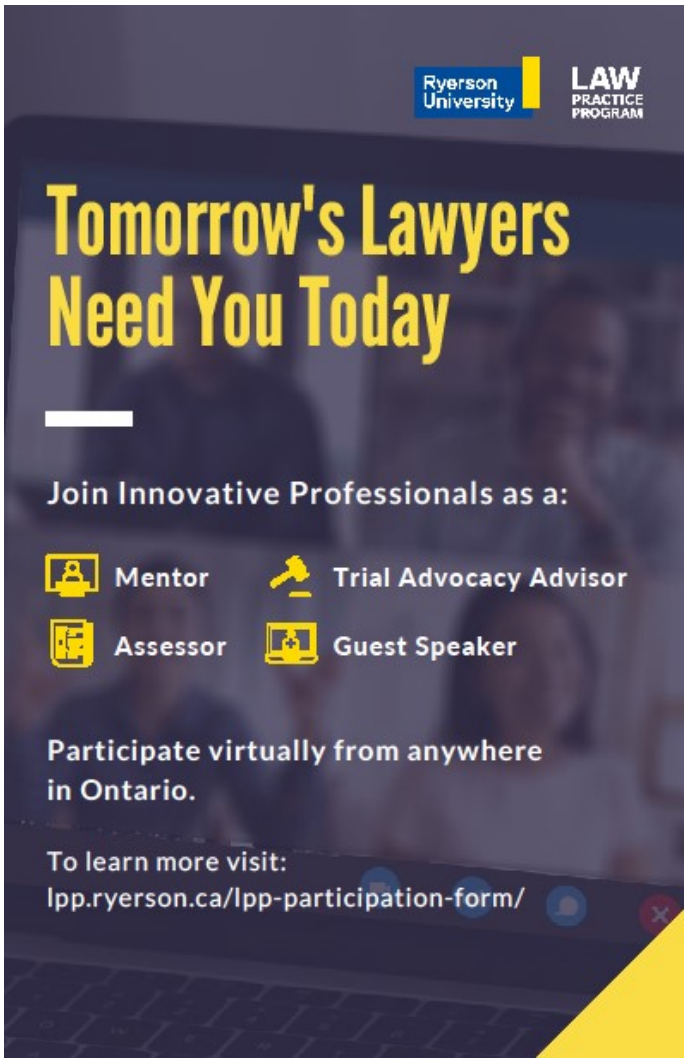
LSO. LSO staff will then analyze the data, and report to Convocation a minumus of once per year. There will also be a Roundtable established to obtain input from the professions from representative organizations, that will meet with the Chair of the Advisory Council and the LSO Sandbox manager. The Sandbox manager will also provide quarterly written reports. There was a significant amount of debate regarding this issue, but ultimately, Convocation voted in favour of the LSO setting up a Regulatory sandbox to determine if innovative technological legal services can be regulated to ensure the public is protected. Participants will be required to meet LSO criteria, and will also be required to be insured. The LSO intends to be transparent with the operation of the Sandbox, and decisions on applications will be publicly available. Similarly, Sandbox participation that has been revoked will also be publicized. The project is a pilot project that will run for 5 years.

Audit and Finance Committee Report

At the beginning of the pandemic in 2020, steps were taken to respond to licensee concerns, including an expansion of free CPD material on the LSO website, and delay of suspensions to practice for those who were late paying fees or filing reports for 2020. The LSO has also offered a one year fee deferral program, that was utilized by 660 lawyers and 445 paralegals, with a corresponding loss to the LSO this year of $1.5 million in licensee fees. In addition, CPD revenues were reduced by $2.5 million, and these reductions in CPD revenue continue into 2021. On the position side, moving to virtual platforms and other expense savings including laying off a number of LSO staff, have resulted in the LSO being under budget by $16 million. The LSO is, however, bracing itself for an increase in claims to the Compensation Fund, which has been the pattern historically seen after a time of crisis.

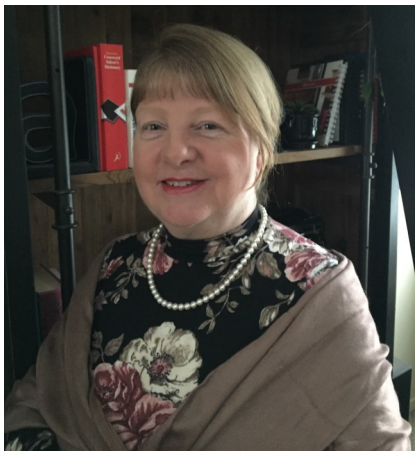
Lawpro also presented its 2020 report. New claims were reduced by 11% by the end of the year, which may be a function of slower economic activity and the courts not being open. It was reported that claims were starting to pick up in 2021. Many of the claims involve limitation period issues, and confusion around the previous suspension of limitation periods announced during the pandemic.

The report concluded that the LSO has weathered the pandemic storm in a solid financial position, and is well equipped to continue with its mandate of regulating the legal profession and protecting the public.



LIBRARY NEWS

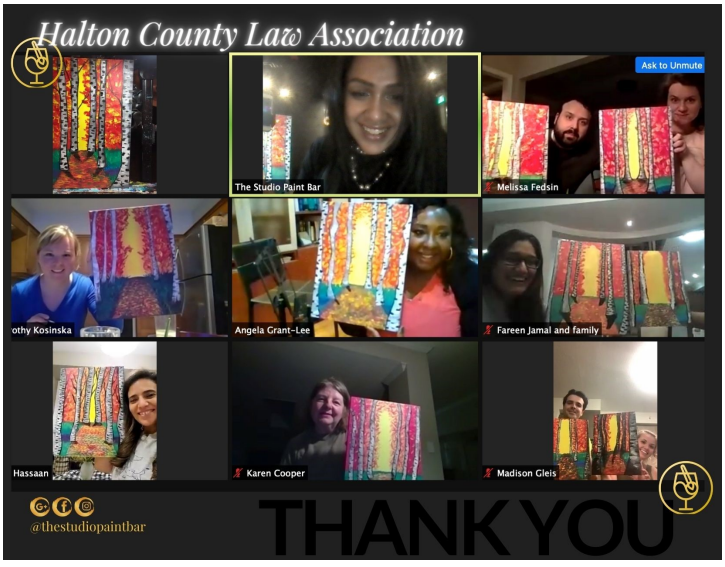
by Karen Cooper



Well spring has sprung and that always means a very busy time at the HCLA!! A warm welcome to the members of our newly-appointed Board of Directors, who are eagerly diving into new initiatives, such as an HCLA mentorship program and they have begun planning a wide array of CPD programs that are sure to pique your interest and fulfill your Law Society Annual CPD requirement.

Virtual Paint Night

Thanks to all who participated in the HCLA Virtual Paint Night which was held on March 25th! It was certainly lots of fun and was a great success. Please feel free to share any other ideas you may have for possible virtual social events!!



HCLA Virtual Paint Night

QL Demonstration—May 12th

I hope you have been able to take advantage of the free Quicklaw service that has been offered during the pandemic. I am pleased to announce that Gordon Brough from LexisNexis has kindly agreed to provide a one hour *FREE* Lexis Advance Quicklaw Training session on Wednesday, May 12 at 12:30 pm. There are spaces still available and you can register by clicking here. This is a great way to brush up on your research skills and take advantage of the one free professional CPD hour!

CALL Conference

May is a time when law librarians very much look forward to the Annual Conference of the Canadian Association of Law Libraries. It is a wonderful learning opportunity to develop new skills, network with colleagues and learn about innovative products and solutions. The annual conference is set around its 5 key themes: Data & Legal Information, Service & Technology, Social Justice, History Meets Innovation and Resilience & Reinvention. This year's conference is themed Legal Information Outside the Box and will be held virtually from May 26 to June 4.

Sessions will include:

- *Keeping Abreast of Canadian Legislative Changes*
- *Building Accessible Legal Resources to Innovate Legal Services: Lessons Learned from CanLII*
- *Directed Research Collective—Law in a Post-Pandemic World*

Stay well and keep on smiling … via Zoom:)

CIVIL LITIGATION NEWS

by James Page

THE STATE OF JURY TRIALS IN MILTON!

Motions to strike jury notices are being heard throughout the province because of this horrible, unpredictable pandemic. Plaintiffs' lawyers are bringing the motions to better ensure that trials are being heard in a timely fashion. Defence lawyers are resisting these motions to maintain their important, substantive right to a jury.

Some motions have been successfully brought and some have been successfully defended. The outcome very much depends on the factual circumstances of the case and what is happening in the local jurisdiction. It also seems to depend on what we are learning from our government officials, which seems to change weekly, and the infection rates, which also changes frequently.

The Court of Appeal in *Louis v. Poitras* has provided guidance to our Superior Courts about how to balance competing interests when considering these motions and what principles should be applied. The overarching test is for the court to make a decision that is in the best interests of the parties.

What is clear is that significant discretion is being given to motions Judges. Our Court of Appeal has strongly encouraged Judges to make inquiries of local court staff and the Regional Senior Justice about when jury trials can be heard versus non-jury trials. Further, it has been made clear that there is a crisis in our civil justice system and delay alone may in and of itself be enough to compel a non-jury trial.

There have been three recent decisions in Milton by Justices Fitzpatrick, Doi and Trimble. Each Judge has taken a different approach that is highly dependent on the facts. What makes Milton somewhat unique is that our courthouse will be closed at least until September for remediation work. Further, we do not yet have an official pronouncement from our government about our temporary replacement facility. We don't know exactly how many courtrooms we will have, which ones will be available for civil trials and what will be in place to protect the health of jurors.

In *S.M v. Longo*, the plaintiff commenced an action in 2012 alleging sexual touch and psychological

abuse which stemmed from the 1980s. A trial was set for March 2021. The plaintiff moved to strike the jury notice so the trial could proceed. Justice Fitzpatrick found that at the time, the numbers were trending downwards, people should be vaccinated by September 2021 and facilities in Milton should be available by October 2021. His Honour found that it was in the best interests of the parties to maintain the jury notice and adjourn the trial to October 2021. The order was without prejudice the plaintiff moving again to strike the jury notice if the jury trial could not proceed in October.

It's my reading of the case that the dated nature of the allegations (from the 1980s) played a significant role in Justice Fitzpatrick's decision to adjourn the trial for six months. Six months in that context was not viewed as unreasonable. There was also no prejudice to the plaintiff beyond the delay in and of itself, which I think was important to His Honour's analysis. But that is just my interpretation.

In *Sauve v. Steele*, the matter was scheduled for trial in March 2021 concerning a 2014 car accident. The plaintiff brought a motion to strike the jury notice. Justice Doi found that the matter could not proceed as a jury trial in March but it could likely proceed as a non-jury trial. His Honour found that there was no certainty that the pandemic will allow for a jury trial in the Fall of 2021. Therefore, the jury notice was struck.

Most recently, *Roszczka v. Tiwari*, 2021 ONSC 2372 concerned an action that is set for trial in October 2021 in Kitchener (though it is a Milton action). The motion was brought in March as a result of a timetable set by the presiding Case Management Judge. The action involved a car accident from 2013. While the trial was set for October 2021, central south had not yet given permission for the trial to proceed in Kitchener. Justice Trimble maintained the jury notice but under the following conditions:

- The action will proceed as a jury trial if jury trials can be accommodated in October 2021.
- If the action cannot proceed as a jury trial in October 2021 but can proceed as a non-jury trial, the jury notice will automatically be struck.
- If the action cannot proceed as a jury or non-jury trial in October 2021, then the trial will be rescheduled by the Case Management Judge.
- If the action cannot proceed as a jury trial at the rescheduled date, the jury notice will automatically be struck so the trial can be heard.

It seems that that three potential approaches in Mil-

ton are as follows:

1. Permit a short adjournment of the trial to maintain the jury notice, without prejudice to the plaintiff's right to move again to strike the jury if the trial does not proceed as rescheduled.

2. Strike the jury notice if the action can proceed as scheduled as a non-jury trial but not as a jury trial.

3. For trials that are at least a few months away from when the motion is heard, maintain the jury notice. However, the notice will automatically be struck if a jury trial cannot proceed as scheduled but a non-jury trial can be accommodated.

This is a very interesting and fast developing area of the law. Civil litigation lawyers, keep your eye peeled for future decisions.

ESTATES NEWS

by Suzana Popovic-Montag and Nick Esterbauer

Moore v Sweet and Life Insurance: Implications for Family Dispute Resolution Professionals

Introduction

For many Canadians, whether the purpose is to fund payment of anticipated estate liabilities, to assist in the financial support of one's dependants, to honour support payment obligations, to equalize the distribution of an estate amongst multiple children, or to provide a direct benefit to one or more designated beneficiaries, life insurance policies represent an important component of an estate plan. If the beneficiary designation of a policy cannot be honoured following the insured's death, this may result in the complete frustration of his or her testamentary wishes and prevent the estate plan from being implemented in the manner that was intended. In some circumstances, if the proceeds of a life insurance policy cannot be paid out to the intended beneficiaries, estate assets that beneficiaries intended to retain *in specie*, such as cherished family heirlooms or multigenerational real property, may need to be sold to fund payment of estate liabilities and one's survivors may be left in need of financial support in any event.

In a time when many Canadians are facing their mortality and taking the pause from normal life as an opportunity to review and update estate plans, many are turning their minds to life insurance, with applications for new life insurance policies doubling during the pandemic,[1] highlighting the role of insurance in planning for the unexpected during this period of uncertainty.

From time to time, decisions of courts in Ontario and other provinces have impacted how Canadians have been able to use life insurance as part of their plans. For example, the 1985 decision of the Ontario High Court of Justice in *Shannon v Shannon*[2] saw the enforcement of a separation agreement to provide a surviving separated spouse with the proceeds of a life insurance policy to the exclusion of its designated beneficiaries. More recently, the Ontario Court of Appeal[3] considered the issue of support obligations secured in the form of a life insurance policy pursuant to court order in the context of a dependant's support application against the estate and the policy proceeds. This article will focus on the impact that the Supreme Court of Canada's decision in *Moore v Sweet*[4] has had on life insurance planning, including the ability of Canadians to rely upon irrevocable beneficiary designations and the enforceability of agreements regarding insurance proceeds that are inconsistent with such designations. As outlined below, *Moore v Sweet* has clarified the limitations of irrevocable beneficiary designations, providing guidance to estate planners, family lawyers and insurance professionals alike.

The Facts of *Moore v Sweet*

The facts of *Moore v Sweet* were relatively straightforward. The applicant had been married to the deceased and they had separated in late 1999. In 2000, the applicant and the deceased entered into an oral agreement (which finding was never appealed) regarding the insurance policy that had been held on the deceased's life since 1985, valued at $250,000. The applicant had at that time already been designated as the beneficiary of the policy and the premiums had been paid out of the couple's joint bank account leading up to their separation. The applicant and the deceased agreed that, going forward, the applicant would pay all of the premiums for the policy and, in exchange, she would remain its beneficiary.

Shortly after the oral agreement was made, unbeknownst to the applicant, the deceased breached the agreement by naming the respondent, his new common-law spouse, as *irrevocable* beneficiary of the life insurance policy. The applicant complied with her obligations under the agreement and paid all premiums on the life insurance policy until the deceased's death approximately thirteen years later.

Decisions of the Lower Courts

At the time of the deceased's death, his estate was

insolvent and the applicant was, accordingly, unable to pursue a claim in damages for breach of contract. She commenced an application for the opinion, advice and direction of the Court as to her entitlement to the proceeds of the life insurance policy. Justice Wilton-Siegel of the Ontario Superior Court of Justice found that the respondent had been unjustly enriched[5] and imposed a constructive trust benefitting the applicant upon the policy proceeds.

The respondent successfully appealed the finding of unjust enrichment to the Ontario Court of Appeal. While the Court of Appeal found that the applicant had satisfied the first two parts of the test for unjust enrichment, it disagreed with Justice Wilton-Siegel that there had been no juristic reason for the respondent's retention of the proceeds of the policy. The Court considered the irrevocable beneficiary designation in a manner consistent with the requirements of the *Insurance Act*[6] to be a juristic reason (falling under the category of "disposition of law"[7]) that permitted what otherwise would have been considered a remediable unjust enrichment. The applicant's claim for a constructive trust over the policy proceeds on the basis of good conscience was, similarly, dismissed.

Appeal Before the Supreme Court

The applicant subsequently applied for and was granted leave to appeal to the Supreme Court of Canada. She asserted that a beneficiary designation under the *Insurance Act*, whether revocable or irrevocable, could not in all circumstances constitute a juristic reason, and that, even if the test for unjust enrichment could not be satisfied, she was entitled to a constructive trust remedy on the basis of good conscience.

The Supreme Court of Canada released its decision in late 2018 and ruled 7-2 in favour of the applicant. Justice Côté, writing for the Majority, agreed that the test for unjust enrichment is flexible and permits courts to use it in the promotion of justice and fairness where required by good conscience. The Court clarified that the juristic reason permitting an unjust enrichment needs to justify not only the enrichment of one party but also the corresponding deprivation of the other party. While the irrevocable beneficiary designation may have required the payment of the proceeds of the policy to the respondent, it could not be considered as also requiring the applicant's deprivation of the proceeds to which she was entitled under the oral agreement.

The Court found that a designation of an irrevocable beneficiary under the *Insurance Act* precludes claims by creditors of an estate, but it does not state "with irresistible clearness" that it

also precludes a claim in unjust enrichment by a party who has a contractual or equitable interest in the proceeds:

> At issue in this case … is whether a designation made pursuant to ss. 190 (1) and 191(1) of the *Insurance Act* provides any reason in law or justice for [the respondent] to retain the disputed benefit notwithstanding [the applicant]'s prior contractual right to remain named as beneficiary and therefore to receive the policy proceeds. In other words, does the statute preclude recovery for a plaintiff, like [the applicant], who stands deprived of the benefit of the insurance policy in circumstances such as these? In my view, it does not. Nothing in the *Insurance Act* can be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds. As this Court explained in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 (S.C.C.), at p. 90, the "legislature is presumed not to depart from prevailing law 'without expressing its intentions to do so with irresistible clearness'" … for example, the British Columbia Court of Appeal found that the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, provided a "complete set of priority rules" that was "designed to replace convoluted common law, equitable and statutory rules that beset personal property security law with complexity and uncertainty" (paras. 21 and 27, citing *Innovation Credit Union v. Bank of Montreal*, 2010 SCC 47, [2010] 3 S.C.R. 3 (S.C.C.)). In those circumstances, there was no "room for priorities to be determined on the basis of common law or equitable principles" (para. 22). By contrast, while the *Insurance Act* provides the mechanism by which beneficiaries can be designated and therefore become statutorily entitled to receive policy proceeds, no part of the *Insurance Act* operates with the necessary "irresistible clearness" to preclude the existence of contractual or equitable rights in those insurance proceeds once they have been paid to the named beneficiary[8].

The Court did not consider it necessary to address the issue of whether a constructive trust remedy may be available in the absence of a finding of unjust enrichment, as the applicant had satisfied the tripartite analysis. The potential implications of this conclusion are referred to in greater detail below.

While reaching the opposite result, the dissent acknowledged that this was a difficult appeal, in which both parties were innocent and had strong moral claims to the proceeds of the life insurance policy.

This recent Supreme Court decision has provided necessary clarification of the juristic reason component of the test for unjust enrichment. It has also confirmed the circumstances in which a constructive trust remedy is appropriate within the context of unjust enrichment.

Constructive Trust Remedies in Other Contexts

As it made a finding of unjust enrichment, it was not necessary for the Court in *Moore v Sweet* to consider the second issue before it, being whether, in the absence of unjust enrichment, a constructive trust could nevertheless be imposed in the circumstances on the basis of "good conscience". As it was not addressed by the Supreme Court of Canada, the state of the law with respect to the limitations of remedial constructive trusts remains somewhat uncertain.

In 1997, the Supreme Court released its decision in *Soulos v Korkontzilas*[9]. That case considered situations that may give rise to a constructive trust remedy. In referring to the categories in which a constructive trust may be appropriate, which were noted to historically include where it was otherwise required by good conscience, Justice McLachlin, as she then was, stated as follows:

> I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation … Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and

> experience may dictate[10].

Since 1997, *Soulos* and the above excerpt have been interpreted differently by scholars and Courts of Appeal throughout Canada: in some instances, Canadian courts have interpreted *Soulos* as having broadened the law with respect to the applicability of remedial constructive trust, whereas in others, courts have cited *Soulos* as having abolished the good conscience constructive trust and restricting the availability of constructive trust to a very limited set of circumstances[11].

In choosing not to address the issue of the availability of constructive trust remedies outside of the unjust enrichment context, Justice Côté stated as follows:

> This disposition of the appeal renders it unnecessary to determine whether this Court's decision in *Soulos* should be interpreted as precluding the availability of a remedial constructive trust beyond cases involving unjust enrichment or wrongful acts like breach of fiduciary duty. Similarly, the extent to which this Court's decision in *Soulos* may have incorporated the "traditional English institutional trusts" into the remedial constructive trust framework is beyond the scope of this appeal. While recognizing that these remain open questions, I am of the view that they are best left for another day.

It will be interesting to see if and when the Supreme Court ultimately chooses to determine "the open questions" regarding the availability of the remedial constructive trust. Until then, it appears that some debate regarding the circumstances in which it may be imposed will remain. Depending on how the law may develop in the future, it is certainly possible that the proceeds of a life insurance policy will be subject to the imposition of a constructive trust even in the absence of a finding of unjust enrichment or a wrongful act.

Practical Considerations

When assisting clients with estate planning (particularly in the circumstances of a separated or divorced client), or in negotiating separation or divorce terms, it is important to remember that life insurance policies may be subject to claims that result in the imposition of a constructive trust, preventing their proceeds from being paid out to designated beneficiaries.

In *Moore v Sweet*, the Supreme Court of Canada confirmed that the designation of an irrevocable beneficiary in accordance with the provisions of the *Insurance Act* does not preclude the existence of other rights that may take priority over those of an irrevocable beneficiary.

Typically, in family law proceedings, the rights of separated or divorced parties to the proceeds of an insurance policy are clearly set out as terms of a separation agreement and may be subsequently confirmed within a court order that requires one party to maintain a life insurance policy for the benefit of the other party and/or the children of the relationship. For example, in *Dagg v Cameron Estate*[12], a court order confirmed that support obligations were to be satisfied out of life insurance proceeds upon the predeceasing spouse's death and the interest of the surviving spouse was deemed to have been protected (to the extent of the deceased's support obligations) against a claim for dependant's support. However, the presence or absence of a formal written agreement or a court order securing one's interests in a life insurance policy may not necessarily mean that the proceeds are insulated from claims that will take priority over the rights of an irrevocable beneficiary.

The outcome of *Moore v Sweet* confirms that a constructive trust can be imposed with respect to the proceeds of a life insurance policy, regardless of the irrevocable nature of a beneficiary designation, and regardless of whether there is a written agreement clearly setting out the rights of the parties *vis-à-vis* the policy.

Professionals and lawyers assisting clients with marital breakdown and/or life insurance planning should inquire as to the background and purpose of the policy and any related agreements between the client and other individuals (including and beyond what may be contained within a separation agreement), so that they can advise clients in a manner that reflects the most likely disposition of the asset after death. While any claim against the policy may ultimately need to be assessed by the court, it is important to remember that the *Insurance Act* does not preclude rights outside of its provisions unless it is "irresistibly" clear that it was the intention of the legislature to do so.

Questions family law and estate planning professionals may wish to consider asking clients include the following:

I. What was the purpose of the life insurance policy when it was first

obtained? Was this objective subject to an oral or written agreement?

II. Has there been any change in the intended purpose of the life insurance policy? If so, has any pre-existing agreement regarding the policy been formally amended to reflect that intention?
III. Who pays the premiums of the life insurance policy? Is he or she under a legal obligation to do so?
IV. If premiums are paid from a joint account, who contributes toward the account and is it impressed with a resulting trust in favour of only one of the joint account holders?
V. Is the life insurance policy subject to an assignment (either legal or equitable)? Has the contract been assigned as security and, if so, to what extent? Has the insured retained the ability to designate an irrevocable beneficiary of the policy?
VI. Have the proceeds of the life insurance policy been promised to any individual? If so, has any consideration been provided?
VII. Is there any court order referring to the life insurance policy and/or any related obligations?
VIII. Is the beneficiary designation in place for the policy revocable or irrevocable? If revocable, is it understood by the insured and the beneficiary that the insured is at liberty to designate a new beneficiary (either revocable or irrevocable)?
IX. Are the proceeds of the life insurance policy required for the support of one or more dependants who are anticipated to survive the insured?

Addressing these issues as part of separation or divorce negotiations or contemporaneous estate planning discussions may assist in preventing litigation surrounding a life insurance policy and its proceeds after death.

Conclusion

In light of the significant impact that new case law can and does continue to have on the ability of Canadians to freely designate beneficiaries of life insurance policies, it is best for family law professionals, estate planners and others who deal with life insurance to remain apprised of meaningful developments as they occur. Many individuals rely upon life insurance as an integral part of their estate plans and, absent adequate consideration of the claims that may be made against a policy after death, a client's testamentary wishes may not be capable of being fulfilled.

1. Juliette Baxter, "Life insurance costs are on the rise because of COVID-19. Here's how you can still get coverage" *Financial Post* [online], July 10, 2020, available at: <https://bit.ly/3k2PaY4>.

2. 50 OR (2d) 456, 19 ETR 1.

3. *Dagg v Cameron Estate*, 2017 ONCA 366.

4. 2018 SCC 52.

5. The elements of unjust enrichment applied by all levels of court were consistent, being those set out by the Supreme Court of Canada in *Pettkus v Becker*, [1980] 2 SCR 834: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of any juristic reason.

6. RSO 1990, c I.8.

7. This category of juristic reason and others were recognized in *Garland v Consumers' Gas Co.*, [2004] 1 SCR 629, which employed a new analytical framework for the third element of the test for unjust enrichment that courts have subsequently applied.

8. *Supra* note 4 at para 70.

9. [1997] 2 SCR 217 [*Soulos*].

10. *Ibid* at para 43.

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FAMILY LAW NEWS

by Katherine Batycky

Now that March 1, 2021 has come and gone, on top of the ever-continuing pandemic, the family law bar has new provisions in the Divorce Act and the Children's Law Reform Act to follow and new forms to use. Below is a small highlight of some of the main changes to family law.

As I am sure all family law lawyers know, the new Divorce Act and CLRA provisions eliminate the concepts of "custody" and "access" and instead now require parents to discuss parenting time and decision-making responsibility. In addition, the statutes now specify that parties can make a "Parenting Plan" and that when doing so they are to consider "the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained."

Thus, it is important to make reasonable efforts to "ascertain" the views and preferences children.

The statutes also require, to the extent that it is appropriate to do so, to first try to resolve matters through a family dispute resolution process before going to court.

And lawyers now have a specific duty to encourage the client to attempt to resolve the matters through a family dispute resolution process, unless the circumstances of the case are of such a nature that

it would clearly not be appropriate to do so.

The statutes also have a focus on the impact of family violence on a case, with a large list of possible conduct that would be considered aspects of family violence to consider.

This shift to ensure that family violence is considered is important for all cases and will require family law lawyers to ensure they learn how to identify the existence of family violence, and what to do if it exists.

One other shift is the new provisions on “relocation” of a child. There now is a positive duty of a person with parenting time or decision-making responsibility and who wants to relocate, shall give formal notice to any other person with parenting time or decision-making responsibility of the intention to relocate 60 days in advance of the move and if a person objects to the possible move, to notify the other of the objection. The Divorce Act does provide specific forms for the notice whereas the CLRA does not provide an “objection” form.

These changes are but a fraction of the changes that the statutes have created, and it is important that we all learn the detailed changes and how it will impact our practices.

The Halton County Law Association is planning our annual Family Law seminar for June 25th; See below for details and visit the HCLA website to register.

Annual Family Law Seminar
via ZOOM

Friday June 25th, 2021 - 9:00 am - 1:00 pm

Speakers and Topics

The New Divorce Act Amendments and the New Children's Law Reform Act Amendments:
Where are we since March 1, 2021? - **Madam Justice Kendra Coats,** Superior Court of Justice
Family Violence: View from the Bench - **Mr. Justice Marvin Kurz,** Superior Court of Justice
New Duties Under the Amended Legislation - **Madam Justice Victoria Starr,** Ontario Court of Justice
The Child’s Cultural, Linguistic, Religious and Spiritual
Upbringing and Heritage – **Madam Justice Sharon Shore**, Superior Court of Justice
Advanced Spousal Support and Relocation – **Rollie Thompson**, Dalhousie Law School
Family and Domestic Violence – **Kathy Batycky**
Racialization in the Profession– **Charlene Theodore**

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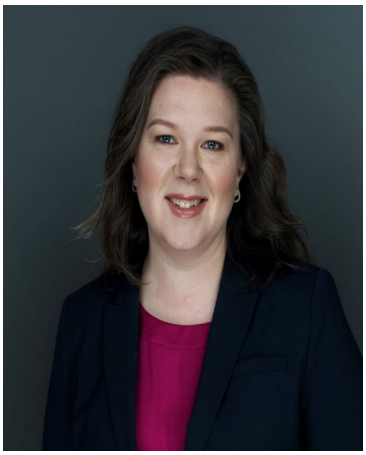
Thank you.

IMMIGRATION LAW NEWS

by Melissa Babel



Canadian and U.S. Immigration Law Updates

Canada Immigration Update:

Travel restrictions and quarantine requirements continue to be the norm for travel to Canada in the first par of 2021. There are several key updates that impact all travelers to Canada and the U.S. as well as applicants for work and study permits; permanent residence and citizenship which are reviewed in more detail below.

Extension of Travel Restrictions: Canada has extended the travel restrictions and Mandatory Isolation Order for all travelers seeking entry into Canada until April 21, 2021, including travelers from the U.S.. **These restrictions may be extended at any time.**

ArriveCan App: is now mandatory for all travelers arriving by air to Canada, including Canadian Permanent Residents and Citizens. If you are flying to Canada, be ready. Download the app before you travel and complete the mandatory travel and contact information, quarantine plan (unless you are exempt) and the COVID-19 symptom self-assessments. Usage of the app is not mandatory for travel by land and sea, but it is strongly encouraged.

Hotel Quarantine for travelers to Canada by Air: As of midnight February 22, 2021, unless exempted, all travelers aged 5 and older to Canada by air are required to reserve a government-authorized hotel for 3 nights, take a COVID-19 molecular test on arrival, stay in the hotel while awaiting results of said test, and pay for the cost of the hotel. Once a negative test result is received, travelers can then proceed to their home or other quarantine site for the remainder of the 14 day period. Travelers to Canada who are exempt from quarantine (those providing essential services, maintaining the flow of essential goods or people, as well as those receiving medical care within 36 hours or entering Canada, or who live in an integrated trans-border community) are also exempt from the hotel quarantine. Other narrow exemptions exist, including for diplomats and for certain 'extraordinary and unforeseen circumstances. **All travelers to Canada, including Canadian citizens and permanent residents, should ensure that they check the most recent travel information before leaving, or returning to Canada.**

Pre-entry COVID-19 Test Requirements at the Land Border: As of midnight February 14, 2021, all travelers aged 5 years of older, regardless of citizenship, must provide proof of a valid COVID-19 molecular test at a land border entry. The test must be taken in the US within 72 hours prior to entry to Canada. There are a few narrow exemptions including for persons who have proof of a previous positive COVID-19 test, those seeking essential medical services in another country, and those performing essential work as determined by the Chief Public Health Officer (this includes persons in trade and transpiration, frequent cross border workers, emergency services, government officials, and others). Other narrow exemptions currently exist for habitual residents of trans-border communities, cross-border students, and a dependent child entering Canada under a custody or access agreement. There is also a 'national interest' exemption and some allowance for 'unforeseen and extraordinary' circumstances.

Hong Kong Work Permit Pathway: On February 4, 2021, the Minister of Immigration announced a new pathway for Hong Kong residents to work and live in Canada. Hong Kong residents who have graduated with a Canadian post-secondary diploma or degree in the last 5 years, or who hold an equivalent foreign credential (of at least 2 years) can now apply for open work permits, which will be

issued for up to three years. This new program will allow highly educated residents of Hong Kong, and their accompanying spouse and dependent children, to acquire critical Canadian work experience, which in turn opens up eligibility for permanent residence under the Canadian Experience Class or other.

Foreign Students - Online Study and eligibility for a Post-Graduate Work Permit: Students can now complete up to 100% of their Canadian education program online from outside Canada while remaining eligible for a Post-Graduate Work Permit. Time spent studying outside Canada between March 2020 up to December 31, 2021 will count towards the eligibility for and length of a future Post-graduate work permit. This allowance has been made in addition to other policies directly aimed at supporting and retaining foreign students in Canada in their pathway to permanent residence.

Work without a work permit for Foreign Medical Students: On March 22, 2021, IRCC announced that certain eligible students in a health field at a school outside of Canada can request authorization to work in Canada without a work permit. Foreign nationals who have not yet completed the Doctor of Medicine (MD) and who are seeking to enter Canada for a short-term medical elective or clinical clerkship at a medical teaching institution in Canada, and who will return to their foreign institution may be eligible. Relevant Programs of study include medicine (including dentistry) occupational and physical therapy, medical technology, nursing and other professions in human health care should be eligible for this program. Medical residents who have finished the MD are not eligible.

Express Entry February Update

On February 13, 2021, IRCC broke with all conventions in the Express Entry processing system and issued **27, 332** invitations to apply to candidates eligible under the Canadian Experience Class. The minimum CRS Points required to recieve an invitation was **75**. This draw is 600% larger than the average draw from the Express Entry pool and an 'historic' draw meant to address the lagging numbers of immigrants approved since the start of the pandemic.

What is not know is how this extremely large draw will impact processing times for pending applications for permanent residence. Additionally. with this 'emptying of the pool' it is unclear what the impact will be on the various Provincial Nominee Programs who also draw skilled candidates from the Express Entry pool. Finally, query when Federal Skilled Workers will next be invited to apply for permanent residence. If this draw is a sign of things to come, applicants for PR who meet the Canadian Experience Class requirements but who were not competitive in the pool may now have a pathway to Permanent Residence not previously available to them.

U.S. Immigration Update

Visa Ban Lifted after March 31, 2021: President Biden has not extended the ban on issuance of certain visas put in place by President Trump which impacted of entry of foreign nationals in H-1B, H-2B, L-1 and certain J-1 statuses (plus their dependents) up until March 31, 2021. This means that U.S. visas can once again be issued to applicants in these categories. Delays in processing should be expected given the sudden change in policy. Canadian citizens were not impacted by the ban because of our visa-exempt status in the US.

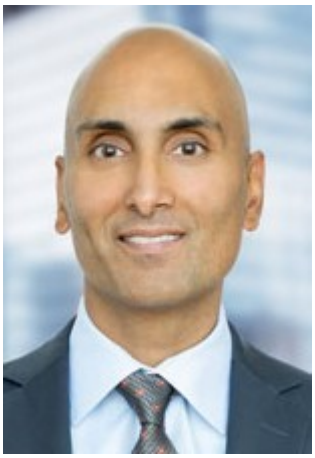
COVID Testing Rules for Air Travelers All air passengers age two and older traveling to the U.S. must be tested for COVID-19 no more than three days before their flight. Travelers must show proof of their negative results before boarding their plan. **This rule includes U.S. citizens and everyone who has already been vaccinated.**

Extension of Travel Restrictions: The U.S. has extended its travel restrictions at its land borders with Canada and Mexico through to April 21, 2021. These restrictions do not apply to air travel. Essential travel is permitted, and includes travel by U.S. citizens, lawful permanent residents and foreign nationals traveling to work in the United States.

Vice President Harris tasked with overseeing influx of migrants at the Mexican Border: On March 25, 2021, President Biden tasked Vice President Kamala Harries with overseeing the administration's efforts to check in the influx of migrants at the U.S./Mexico border.

TAX NEWS

by Amit Ummat



Minister's Refusal to Grant Remission Unreasonable

Mokrycke v. Canada (Attorney General) 2020 FC 1027

Summary

The Applicant applied for a remission order, which was rejected by the Minister of National Revenue ("Minister"). The Applicant sought judicial review of the Minister's refusal. The application for judicial review was allowed.

Background

The Applicant is an architect in Hamilton, Ontario. In 2008, he was audited by the CRA in respect of his 2005 and 2006 taxation years. The CRA concluded that the Applicant was in receipt of unreported income and had many unsubstantiated business expenses. The Applicant was reassessed in 2009 in respect of the alleged unreported income and unsubstantiated expenses.

The Applicant's accountant filed objections on time. Due to personal difficulties, the Applicant's accountant ceased to act for the Applicant. The Applicant retained a second accountant. The second accountant failed to deliver relevant documentation by a deadline imposed by the CRA. The deadline came and went, and a Notice of Confirmation was issued by the Appeals Division. The second accountant did not act in response to the Confirmation.

The Applicant tried to act on his own behalf but was largely unsuccessful and did not appeal to the Tax Court of Canada, the next step in the process. The Applicant eventually retained his first accountant, who eventually filed a tax court appeal along with an application for an extension of time to file said appeal in 2014. That application was dismissed in 2015.

An interest relief application was filed and rejected.

The Applicant eventually hired experienced tax counsel to assist with a second request for interest relief (which was refused) and a remission order. A remission order is an alternative process to obtain relief. Subsection 23(2) of the *Financial Administration Act* gives the federal government the authority to forgive a tax debt of a taxpayer in circumstances where the collection of the tax is unreasonable, unjust or where it would not be in the public interest to do so. CRA has developed internal guidelines that identity the following factors as situations in which tax may be remitted:

- Payment of amounts owing would cause extreme hardship
- Financial setback coupled with extenuating factors
- Amount owing is an unintended result of the legislation
- Amount owing is the result of incorrect action or advice by CRA officials

In rejecting the second request for administrative relief, the CRA suggested a remission order. The remission order was requested in 2017, on the basis that the Applicant relied on tax professionals, and he experienced financial and health difficulties during the relevant time. On May 22, 2019, this request for a remission order was rejected on the basis that none of the criteria above applied to the Applicant's situation.

The remission order request was rejected mainly because the Applicant's allegation that the assessed amounts were incorrect could not be verified during the remission review. In other words, the review committee did not see anything in the submission that suggested the CRA made any error at the audit stage or in reassessing the years at issue. Similarly, the Applicant failed to present evidence substantiating his alleged health difficulties. Last, despite his accountants not

diligently handling matters, the Minister posited it was the Applicant's own responsibility to ensure that his tax obligations were met. Furthermore, it was suggested that the Applicant's dispute with his accountants should be settled between those parties and that allegations of professional negligence would not be considered extenuating circumstances for the purposes of a remission order.

Decision & Analysis

Following a detailed analysis of the CRA's Remission Guide, the Federal Court found that:

1. The Guide did not explicitly address the reasonableness of relying on tax professionals.
2. Factors such as a person's financial or personal situation may warrant consideration for remission.
3. The Guide does not address whether and, if so, when errors or omissions by a tax professional could constitute an extenuating circumstance.
4. The criteria for applying for remission is not an exhaustive list.

A critical issue was whether the CRA advised the Applicant of the guidelines for applying for a remission order when suggesting in its letter that remission be considered. The Applicant indicated he was unaware of the guidelines and that knowledge of the guidelines would have impacted his submission.

The question became, was the decision to refuse remission reasonable? The Court answered in the affirmative. First, the Court found that it was unreasonable to reject the remission request on the basis that that the information examined during the remission review "did not reveal that the CRA made any error at the audit stage or in reassessing the 2005 and 2006 tax years" when this was the very point in issue. In the Court's view, this logical flaw undermined the internal rationality of the decision.

The Court also questioned the Minister's position on the Applicant's reliance on tax professionals who may have failed to adequately discharge their professional responsibilities. Namely, it is the Minister's position that when a Applicant "engages the services of a tax professional who makes an

error or omission, any delays or failures on the part of the representatives are matters to be settled between those parties and are not considered extenuating circumstances for the purpose of remission." The Court found that it was unreasonable to treat this as an absolute rule.

> As the Guide states, to determine whether a taxpayer took reasonable steps to address an alleged error by the CRA, "the person's personal circumstances should be considered." One of the personal circumstances the applicant relied on was his reliance on tax professionals, who failed to discharge the responsibilities he entrusted to them. This was, according to the applicant, an extenuating circumstance that warranted remission. To the extent that the Assistant Commissioner's reasons reveal how he considered this factor, he appears to have dismissed it as irrelevant. Given the importance to the applicant's request of the question of whether any errors or omissions by the tax professionals who assisted the applicant could constitute an extenuating circumstance or, more broadly, made it unreasonable or unjust to recover the 2005/2006 debt, it was essential that the Assistant Commissioner explain why he concluded that they did not. Once again, the Assistant Commissioner was not required to find the applicant's argument convincing but, if that argument is to be rejected, the reasons given must explain why. The Assistant Commissioner's reasons do not do this. Since the general rule that the errors or omissions of tax professionals are not considered extenuating circumstances for the purpose of remission admits of exceptions, it is insufficient to simply state the rule without also explaining why an exception should not be made in this case. The failure to give this explanation leaves the decision lacking in justification, transparency

and intelligibility.[1]

The application for judicial review was allowed with costs to the Applicant.

Key Takeaway

The Federal Court found that the remission request was not made strictly in accordance with the framework found in the Remission Guide, but that that was not fatal to the request. The Court found that the grounds for the remission request did fall within the enumerated criteria, despite not explicitly requesting remission under those headings.

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1. Mokrycke v. Canada (Attorney General) 2020 FC 1027, at para. 73.

OJEN NEWS

by Inga B. Andriessen

This quadmester (yes, it's a thing now) the OJEN Halton Committee was called upon by many more teachers than in the previous two quadmesters, who were very excited to have the opportunity to have virtual Courtroom visits and lawyer speakers in the classroom.

We are very grateful to the Honourable Madam Justice Coats and the Honourable Mr. Justice Scott Latimer who have spoken to law classes in the Halton Region.

Additionally, we very much appreciate his Worship, Justice of the Peace Mark J. Curtis, who has been welcoming law classes into Bail Court via Zoom.

In addition to lawyers speaking to classes, we very much appreciate the law librarians, law clerks and paralegals who have given up their time to speak to law classes and provide information on other careers within the Justice sector for students to consider.

If you would like to participate by speaking to a classroom, please feel free to reach out and we will do our best to match you with a class when they request.

<u>Coming up</u>

The Halton Virtual Mock Trial Tournament is set to take place May 7, 2021. We have many new teams competing due to the virtual Trial format.

As part of the tournament, we are working on creating swag bags for the students as well as providing lunch cards.

If your firm is interested in donating to the Halton Mock Trial Fundraising effort, please reach out to me directly so that we can connect on the fundraising.

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HCLA NEWS

Newsletter of the Halton County Law Association

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CALENDAR OF EVENTS

Friday, May 7
Annual Estates & Family Law Webinar
via Zoom
Visit the HCLA website or click here to register!
Spaces available!!

Wednesday May 12
Advanced Quicklaw Training
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Monday, May 17
Child Protection Law Series: The OCL and ADR
4:30-6:30 pm via Zoom
Visit the HCLA website or click here to register.

Thursday, June 10
HCLA Golf Tournament
Hidden Lake
Visit the HCLA website to register or click here.

Friday, June 14
Child Protection Law Series: Expert Evidence
4:30-6:30 pm via Zoom
Visit the HCLA website for details!

Thursday June 17
Virtual Roundtable with The Hon. Madam Justice Suzanne Stevenson, Senior Family Court Justice
4:30 pm via Zoom
Watch for a reminder email with the Zoom link.

Friday, June 25
Family Law Webinar
9:00 am—1:00 pm via Zoom
Register here!

Wednesday, October 27
United Way Sopinka Luncheon
This year's guest speaker will be The Honourable Madam Justice Sheila Martin, SCC
Sheraton Hamilton
Watch for further details coming soon or visit the United Way website!