



# HCLA NEWS

*Newsletter of the Halton County Law Association*

Volume 14 Issue 2

Spring 2023



HALTON COUNTY LAW ASSOCIATION

## ANNUAL CHARITY GOLF TOURNAMENT

in support of the Women's Centre of Halton



**TUESDAY JUNE 6, 2023**



**THE WOMEN'S CENTRE OF HALTON**

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# PRESIDENT'S REPORT

*by Kathy Batycky*



Hello everyone! It's hard to believe that spring is finally here. And with spring comes our new Board. I want to welcome our new Board of Directors: James Page, Vice President, Jasmine Sweatman, Treasurer, Jill Edwards, Secretary/Library Chair and the Directors Kathleen Broschuk, Russell Browne, Kaleigh Dryla, Fay Hassaan, Nazifa Islam, Kassandra Kelertas, Michael Kril-Mascarin, Meghan Walker, and our Past President Melissa Fedsin.

Our new Board is in the midst of planning two great years of CPDs and events for all our members to enjoy. Keep an eye open for announcements! For this spring we have several wonderful events and CPDs organized.

We are again holding the HCLA annual charity golf day. This year, it is being held on Tuesday, June 6th and we have booked a great golf course, at the Lionhead Golf Club, located just minutes away from Milton. I understand from our golfers that this is an excellent golf course that should not be missed. The Charity we are supporting this year is the Women's Centre of Halton. Please come out, have a great day of golf and then enjoy our dinner and silent auction dedicated to this very worthy cause. If you cannot make the golf, or are not a golfer, you are welcome to come to the dinner and participate in the silent auction.

On Friday May 12th, we are holding the annual Estates Seminar, which is annually chaired by Ian Hull and Suzana Popovic-Montag. This "in person" seminar is being held at the Oakville Golf Club, which does provide a lovely backdrop for the discussions and what is new and important to know about Wills and Estates. Come on out for a great learning experi-

ence and earn those professionalism and substantive hours to add to your LSO CPD portal.

Of utmost importance for all of us to pay attention, is the Law Society Benchers election. This election is of great importance for our Association and especially our Library. I encourage everyone to inform themselves of the candidates and their platforms. As one of our Central West benchers, Justice Claire Wilkinson has recently been appointed to the bench (Congratulations Justice Wilkinson!) that familiar name from our Region will not be on the ballot. There are several new candidates stepping forward as Candidates for benchers – please take the time to get to know them and what each of them is all about.

The HCLA is holding a Benchers Open House so that we can all meet the candidates running in Central West, on Thursday April 20, 2023 at 4:30 - it is a hybrid event so there is plenty of opportunity to meet the candidates, whether it be in person or on zoom. However you do learn about the candidates, make sure you take the time to vote. Voting is now open and runs from April 19 to April 28, 2023. FOLA has created a web page with summaries of all the Candidate profiles, which can easily be found [here](#).

Finally, for those of you who have been at the courthouse, you will have noticed the construction on the West side of the building. This is the creation of a new entrance for the courthouse, with the fancy name "CUE hub" ( Customer User Experience Hub). Once completed, this entrance will certainly provide all users of the courthouse a new experience – which will include easier access to both the SCJ and OCJ floors, and information kiosks to help everyone get to where they need to go in the building. We can only

hope that this construction is completed quickly, so that we have the benefit of its use as all court services come back to normal post pandemic.

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# LIBRARY NEWS

by Arielle Vaca



As spring is upon us, so is the 2023 Bencher election! Voting is open from Wednesday, April 19 - Friday, April 28. The voting systems will shut down at 5 p.m. EDT on April 28, 2023. Please see the [Voting Guide for Lawyers](#), provided by the LSO, on voting information and a list of Candidates. Take a moment to review the responses from all Candidates who responded to FOLA's survey [here](#). Learn more about

the voting process on [FOLA's Bencher Elections webpage](#).

The Halton County Law Association invites HCLA Members to join us in our Lawyers' Lounge and HCLA library within the Milton Courthouse on Thursday, April 20 from 4:30 pm – 6:00 pm as we host an Open House for all 2023 Central West

Bencher Candidates. The confirmed Bencher Candidates attending are Hogarth Clauzel, Jennifer Gold, Gary D. Graham, and Cathi Mietkiewicz. Although it will be a hybrid experience, we hope to see our members in-person to meet, ask questions and chat with the Central West Bencher Candidates. There will be stationary bites and refreshments available for all attendees. Click [here](#) for more information and to RSVP.

## Annual Charity Golf Tournament – Tuesday, June 6

Attention Golfers! With golf season here, we are pleased to announce the 2023 Halton County Law Association Charity Golf Tournament will be held

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# LIBRARY NEWS con't



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## Advanced Quicklaw and Practical Guidance Training Session in the Halton Library & Zoom!

THURSDAY APRIL 27 2023

12:30 - 2:00 PM

REGISTER ONLINE OR CALL 905-878-1272

**FREE PIZZA LUNCH AND GIVEAWAYS FOR IN-PERSON ATTENDEES!**

on Tuesday, June 6 at Lionhead Golf Club & Conference Centre. This year our chosen charity is The Women's Centre of Halton (TWC). TWC is a charity that provides a safe place for all women to learn, grow and get support in a non-judgmental way. TWC provides a wide range of services and programs to empower women in their journey to a fresh start and to increase their options, such as Peer Support, Life Skills Coaching, Legal Clinic, and Trauma and Abuse Counseling. We invite you to help us support this great cause that supports the women in our Halton community. The tournament includes 18 holes in a shotgun start format with "assistive devices" available to help lower your group's score, a lunch, refreshments, and buffet dinner as well as contests and gifts for all. We promise that it will be another fabulous success!

Click [here](#) for more details and to register! **Early Bird Registration Closes April 30!**

View our golf tournament hole sponsors webpage [here](#).

### Lexis Advance Quicklaw & Practical Guidance Training

The Halton County Law Association presents a live and in-person training session at the HCLA library located within the Milton Courthouse on Thursday, April 27 from 12:30 pm – 2:00 pm. Join us with LexisNexis trainer and product specialist, Gordon Brough, and learn to navigate Quicklaw and Practical Guidance with precedents, drafting materials, textbooks, case search, and much more! This FREE training session is exclusive to our HCLA Members and will provide 1.5 Professionalism Hour(s). Although this session is a hybrid experience, we encourage HCLA Members to register for in-person as you will receive a FREE pizza lunch and Lexis giveaways for attendance. Don't miss out!! Click [here](#) to register today.

### New LSO CPDs Available!

Please see the list below of LSO CPDs recently added to the HCLA library collection. Please note, borrowing privileges are restricted to HCLA Members and all borrowed materials must be signed out in the



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binder located across from the Librarian's office.  
*Borrowing privileges do not extend to Reference Books, Indices or Case Law Reports.*

11th Human Rights Summit 2022, LSO.

27th Intellectual Property Law: The Year in Review 2023, LSO.

30th Immigration Law Summit (Day One) 2022, LSO.

30th Immigration Law Summit (Day Two) 2022, LSO.

The Annotated Powers of Attorney for Property and for Personal Care 2023, LSO.

The Annotated Will 2023, LSO.

Civil Appeals: The Year in Review 2022, LSO.

Impaired Driving 2022, LSO.

The Six-Minute Family Law Lawyer 2022, LSO.

The Six-Minute Real Estate Lawyer 2022, LSO.

#### **NOTICE: CaseLines is now Case Center**

CaseLines will be changing its name to [Case Center](#). Thomson Reuters and Ontario are excited to be working together to improve the CaseLines (Case Center) user experience by releasing a new and improved interface that is coming later this year (Version 7). There will be no interruption to CaseLines (Case Center) services and availability. Questions regarding the new version of CaseLines (Case Center) should be directed to Thomson Reuters: 1-800-290-9378 or by email. Members of the public and profession should check the Ontario Superior Court of Justice and Ontario Court of Justice CaseLines (Case Center) notices often to find out more information about when the new version will be implemented. Links: [Superior Court of Justice](#) and [Ontario Court of Justice](#).

The [LSO created an Introduction webpage & FAQs](#) for your reference.

The [LSO CPD also offered courses on CaseLines](#) - Search by Filter: CaseLines to view [REPLAYS](#)

For additional information about what Case Center is, including tutorials, videos, etc. Click [here](#).





## **HAVE YOU RECENTLY TAKEN OVER A LAW PRACTICE?**

We get frequent requests  
for information regarding the  
transfer of Wills & POAs.

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Please let us know by emailing the  
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# CIVIL LITIGATION NEWS

by James Page



## UPDATED NOTICE TO THE PROFESSION AND PARTIES FOR CENTRAL WEST SUPERIOR COURT OF JUSTICE

On March 31, 2023, HCLA members were sent an email an updated notice from Regional Senior Justice Ricchetti for Superior Court matters in Central West. The notice is effective May 1, 2023.

I have reviewed the notice and decided to highlight the updates to **civil proceedings** for **Milton cases**. The highlights are as follows:

**1. Case Center.** CaseLines will be updated and re-named Case Center. It's unclear to what extent Case Centre will be different from the current iteration of CaseLines, but I suspect there will be ongoing changes to try to improve the program.

### 2. Uploading documents to Case Centre.

- a) Only court documents accepted for filing may be uploaded to Case Center.
- b) Parties are responsible for ensuring the Case Center invite is forwarded to new counsel / new parties and to counsel / parties whose contact information is incorrect. Former counsel also have this responsibility if they are given the Case Center invite.
- c) Upload all the appropriate materials to the proper Case Center bundle for the hearing. Judges will not have access to the entire court file so do not assume they

will when considering what to include in your materials and what to upload.

d) Motion materials for motions in writing and basket motions do not have to be uploaded to Case Center (see below).

e) Case Center will not be used for Assignment Court (see below).

### 3. Electronically filed document standards.

See 4.01 to 4.12 of the Ontario *Rules of Civil Procedure* ("Rules") for the e-filing standards. Only documents accepted for filing may be uploaded to Case Center. Documents that do not comply with the standards set out in the *Rules* will not be accepted for filing and therefore cannot be uploaded to Case Center. This means documents that exceed maximum page limits will not be accepted.

**4. Presumptive modes of hearing.** There is a helpful chart on page 7 of the notice that outlines the presumptive mode of hearing for various civil proceedings. For example:

- a) Trials (jury and non-jury) are presumptively in person.
- b) Long motions are presumptively in person.
- c) Consent and unopposed motions are presumptively in writing.
- d) All other matters are presumptively virtual (e.g. Assignment court, short

motion, pre-trials, assignment court, etc.).

### **5. Changes to presumptive modes of hearing.**

Any party seeking to change the presumptive mode of hearing must make a request for a virtual conference to seek the change. If the request is granted, the hearing will be adjourned to a new date (so think twice before you make the request).

### **6. Pre-Trials.**

- a) It appears that in Milton, pre-trial dates will no longer be obtained at Assignment Court as they have been. See p. 34 of the notice. They are to be obtained by the parties from the Trial Coordinator's Office. The notice states, "the parties should contact the Trial Coordinators Office to obtain a pre-trial date, at which they will receive an Assignment Court date or trial date." It is unclear to me if the parties will be given an Assignment Court date or trial date by the Trial Coordinator's Office at the same time that they are given a pre-trial date, or if the Assignment Court date will be given at the pre-trial itself. I suspect it is the former (historically in Halton a Notice of Assignment court is given first before any pre-trial dates though I understand the times may be a-changing so to speak). It is also unclear if the request for a pre-trial date must be made by a certain deadline (e.g. within a certain number of days of filing the trial record for instance).
- b) Parties are to cooperate in completing the Civil Pre-Trial Form (see more details below about the form).
- c) Failure to deliver an expert report on time prior to the pre-trial will likely attract a cost sanction. Also, other directions and terms may be imposed prohibiting the expert testimony.

- d) Where possible pre-trial dates will be scheduled within 120 days of the first day of trial or of trial sittings.

**7. The Civil Pre-Trial Form.** All parties are required to complete a Civil Pre-Trial Form in advance of any pre-trial date. Counsel are expected to work together in filling out the form. To the extent that parties cannot agree on certain items in the form, each party may file his/her own form highlighting only the areas that remain in dispute. There can be cost consequences or an unwanted adjournment of the pre-trial date if the parties do not cooperate to complete the form. The form is attached to the notice. The pre-trial Judge is not bound to any agreement between counsel that is noted in the form.

### **8. Assignment Court.**

- a) Assignment Courts will not sue Case Center (unless a judicial order or endorsement states otherwise).
- b) At Assignment Court the action will either be placed on a trial list or struck from the list, unless there are exceptional circumstances. If struck from the list the parties must obtain an order granting leave from a Judge to restore the matter to the trial list. An order may be obtained in writing or on consent confirming all parties are ready for trial. If an order is obtained, the matter will likely be placed on the next assignment court without further attendance.

**9. Motions to transfer.** These motions must be brought to the region to which the moving party seeks to transfer the proceeding.

### **10. Motions in writing.**

- a) If parties agree that a motion is to be in writing then the parties must also agree upon a timetable for when all

motion materials will be read and file the timetable.

- b) Motions in writing do **not** have to be uploaded to Case Center. They will be sent to a Judge as expeditiously as possible.

### 11. Basket motions.

- a) These are for motions that are simple, procedural, on consent or uncontested. Basket motions are not for contested motions.
- b) These motions do **not** have to be uploaded to Case Center.
- c) Draft order in Word format must be filed.

### 12. Short motions (less than 1 hour).

- a) These are to be scheduled by emailing [SCJHaltontrialoffice@ontario.ca](mailto:SCJHaltontrialoffice@ontario.ca)
- b) Confirmations
  - i. Must be uploaded to Case Center
  - ii. Must be filed by moving parties by 2 PM five (5) days before the hearing
  - iii. Must be filed by Responding parties by 10 AM three (3) business days before the hearing
  - iv. Must list specific issues to be decided
  - v. Must indicate the materials to be reviewed by Judge. References must be specific (volume #, tab #, page #).
  - vi. Must include accurate time estimates
- c) If confirmations are not filed by at least one party, the short motion will not proceed and the date will be vacated
- d) If a party chooses not to make a submission on an issue then the Court is entitled to assume the issue has been abandoned

### 13. Long motions (1 hour or more).

- a) Counsel should carefully review pages 30 -32 of the notice as there are very de-

tailed rules about

- i. Scheduling long motions/applications
- ii. Consent adjournments more than 21 days before the hearing
- iii. Opposed adjournment more than 21 days before the hearing
- iv. Adjournments within 21 days of hearing
- b) Facta and Compendiums
  - i. These are required – and if the moving party does not file a factum the hearing date will be canceled
  - ii. 20 page maximum limit (except with leave)
  - iii. Moving party's factum must be served and filed 3 weeks before hearing
  - iv. Responding party's factum must be served and filed 2 weeks before hearing

### 14. Urgent motions / applications.

- a) Moving parties must provide a letter to the Court Office, without arguments or submissions, setting out:
  - i. Why the matter is urgent
  - ii. Nature of relief sought
  - iii. Whether matter will be on notice or not
  - iv. Whether motion materials are ready
  - v. Time estimate for motion
  - vi. Draft Order
- b) Where possible the moving parties should provide the motion materials for the Judge to review
- c) Materials filed for urgent motions will be reviewed by a Judge. The Judge will determine whether the motion is in fact an urgent one. The Judge's decision will be rendered on an endorsement. The Trial Coordinator's office will advise the moving parties of the Judge's decision.

- d) Moving parties must serve the urgent motion materials and the endorsement forthwith on the other parties.



e) Non-urgent motions must go through the ordinary procedure.

**15. Uncontested trials.** As with all trials, upload the trial materials to Case Center. Uncontested trials are no exception.

**16. Motions to get off the record.** Only motion materials that have been redacted to eliminate privilege are to be uploaded to Case Center. Unredacted copies of motion materials should be made available to the presiding Judge (but not through Case Center).

**17. Costs in motions / applications.** Parties should resolve costs prior to a hearing. Parties are to advise the Judge of any resolution or if they have been unable to come to an agreement prior to the hearing. If there is no agreement, the party seeking costs must have a costs outline with him/her as per rule 57.01.

**18. Releasing Orders / Endorsements.** Court staff may release orders / endorsements to Case Center instead of sending them by email (unless Judge orders otherwise). Lawyers and parties will receive a notification that Case Center has been updated following the hearing. That is the signal that the order / endorsement is uploaded and can be obtained (downloaded or printed).

Please review the notice for the full details of what is expected of counsel – as this is merely a summary of the highlights from my perspective. But I nevertheless hope this summary is of some assistance to the Halton bar in digesting and getting accustomed to the new rules.

# CRIMINAL NEWS

by Russell W. Browne



**“Hypothetically Speaking”:**  
**R. v. Hills**, 2023 SCC 2 (CanLII)<sup>1</sup>

## Key Words:

Criminal law; Constitutional law; Section 12 of the **Charter of Rights**; Cruel and unusual treatment or punishment; Sentencing - Mandatory minimum sentence; Rehabilitation; Human dignity

In its recent decision in **R. v. Hills**, the Supreme Court of Canada (SCC) both clarifies the use of hypothetical scenarios when mounting s. 12 **Charter** challenges as well as stresses the need to consider rehabilitation when crafting sentences in order to accommodate offenders living with addictions or mental health challenges in furtherance of human dignity.

## Facts and prior judicial history

In 2014, Mr. Hills left his home in Lethbridge, Alberta after consuming a large quantity of prescription medication and alcohol. He then smashed the windows of a parked car with his baseball bat and shot out the living-room window of a residential home with his big-game hunting rifle, perforating an interior wall and causing the occupants to flee to the basement. When the homeowner opened his front door to investigate further, Hills shot off several more rounds. No one was injured.

Following his plea of guilt to discharging a firearm into or at a house contrary to s. 244.2(1)(a) of the **Criminal Code** which carried a mandatory minimum sentence of four years imprisonment, the offender launched a s. 12 **Charter** challenge to said minimum as grossly disproportionate in reasonably foreseeable scenarios, thereby constituting cruel and unusual punishment.<sup>2 3 4</sup>

The sentencing judge found that while not grossly disproportionate in Mr. Hills’ own circumstances, the mandatory minimum was in a hypothetical scenario that in-

involved a youthful culprit who discharged a firearm that was incapable of penetrating a typical residential wall. A fit and proportionate sentence for that scenario was 12 months’ probation. Finding the minimum grossly disproportionate to the fit sentence, the sentencing judge found it contrary to s. 12, and sentenced Hills to three-and-a-half years imprisonment.

The Alberta Court of Appeal (ABCA) upheld the minimum while the dissent favoured a sentence of six not four years.<sup>5</sup> The ABCA went on to urge the SCC to excise the use of reasonably foreseeable scenarios from its s. 12 framework for their “troubling...air of unreality” that “would leave Canadians ‘aghast’ that adjudicators [would] rely on ‘make-believe’ scenarios to evaluate the constitutionality of a sentencing provision”.<sup>6 7</sup>

At the SCC, the majority allowed the appeal and reinstated the original three-and-a-half year sentence while emphatically reaffirming its s. 12 jurisprudence together with its use of reasonably foreseeable hypothetical scenarios.

However, a strongly worded dissent rejected the defendant’s hypothetical as both factually deficient and insufficiently culpable. It found that Parliament surely must have intended to “target only the use of those air-powered rifles or pistols...capable of inflicting serious or deadly consequences”.<sup>8</sup> “[M]ere probation was not a fit and proportionate sentence in a reasonably foreseeable application of the [impugned] provision.”<sup>9</sup>

While providing important guidance regarding the use of hypothetical scenarios in **Charter** challenges, **Hills** also affirms that the rehabilitation needs of offenders living with addictions and mental health conditions ought to be accommodated when crafting sentences as demonstrated in the following quote:

“a sentence that entirely negates the penal objective of rehabilitation violates human dignity and, therefore, contravenes s. 12 [of the **Charter**].”<sup>10</sup>

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1. Hereinafter referred to as **Hills**.
2. Para. 18, **Hills**.
3. Para. 1, **Hills**.
4. The section had been repealed following the date of the hearing before the SCC.
5. Para. 300, *ibid*.
6. Paras. 27-28, 67-75, **Hills**.
7. Para. 28.
8. Para. 207, **Hills**.
9. Paras. 211-212, **Hills**.
10. Para. 34, **Hills**.

# KMB LAW



We are a full-service Canadian law firm devoted to serving and empowering individuals and businesses with focused legal solutions that work and propel you forward.

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# ESTATES NEWS

by Suzana Popovic-Montag & Nick Esterbauer



## **Re Sandhu and the Role of Capacity Assessments in Court**

Assessments of mental capacity are important tools in matters where there is a dispute as to capacity, whether that is the central issue in the litigation or a side issue that arises and interrupts the next steps. For example, in an estate litigation practice, we often see the challenge of gifts or testamentary documents made at a time when someone's mental capacity may have been diminished. A capacity assessment, typically by a designated capacity assessor, is also often the key piece of evidence in an application to appoint a

guardian of property and/or personal care as a substitute decision maker for someone who is alleged to be incapable of making their own decisions.

In the context of an aging population where medical conditions tied to declines in mental capacity are on the rise as Canadians are living longer, yet there is a presumption that all adults are capable of managing their own property, we can only expect the tool of capacity assessments to become increasingly important. Case law provides us with some guidance as to best practices when relying on this important type of evidence.

## **A Recent Example in Re Sandhu**

## **Megan Mutcheson**

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A recent decision of the British Columbia Supreme Court revisits the principles to be considered by a court when determining whether or not to direct the assessment of a person's capacity in the context of a guardianship proceeding.

In *Re Sandhu*<sup>1</sup>, an adult son and only child of the respondent sought to have his father declared incapable of managing his property and his corresponding appointment as guardian of his father's property (under British Columbia's *Patients Property Act*<sup>2</sup>, a "committee" of the person's "estate"). The father and mother jointly responded, opposing their son's application. The British Columbia Public Guardian and Trustee took no position.

Under the *Patients Property Act*, two opinions of medical doctors are required in support of a declaration of incapacity to manage property.<sup>3</sup> While the materials before the court in this matter did include multiple medical opinions, the doctors' views as to whether the father was capable of managing his own property differed.

The father had previously been assessed while at

hospital by a geriatric physician, who had expressed concern regarding the father's medical condition and its impact on his capacity. The physician did not directly opine on whether the man remained capable of managing his property. Another assessment of the father's capacity to manage property was organized by the son and conducted with the son's involvement and the assistance of an interpreter after the father's release from the hospital. The assessment arranged by the son supported that the father was incapable of managing his own property. The father's own lawyer subsequently arranged a further capacity assessment, to which Justice Shergill referred as a "comprehensive independent medical examination"<sup>4</sup>, conducted in the father's native language of Punjabi.

Notwithstanding the concerns expressed by the son regarding some of his father's recent behaviour, which were echoed and supported by the physicians who conducted the first two capacity assessments, Justice Shergill favoured the more recent capacity assessment, in which the assessor concluded that the father was capable of managing his own affairs without assistance, and did not consider there to be any serious question regarding the fa-

## Does your client have a municipal law issue?



M. Virginia MacLean, Q.C., L.S.M.

Refer the case to an expert and save time and money. I am a sole practitioner Certified Specialist in municipal law, local government, land use planning and development law. My practice is restricted to these areas. Let me work with you to help your client find the most practical and cost effective answer to those nagging municipal issues such as:

- defence of by-law offence charges and statutory offences charges under the *P.O.A.*
- property standards orders, charges and appeals
- expropriations advising and acting for the property owner
- planning matters including committee of adjustment advice, applications, attendances and appeals to OLT and in Toronto, TLAB
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ther's capacity warranting a further assessment.

Not only was the son's application for appointment as guardian of his father's property dismissed, but the father was not ordered to submit for a further assessment of his capacity to manage property.

This case is a recent example of the court's efforts to preserve autonomy and independence, and its respect for the presumption of mental capacity<sup>5</sup>, where there is insufficient evidence in support of allegations of mental incapacity or that evidence is rebutted by evidence of capacity that the court finds more reliable. This decision also features an important review of (1) reasons why a capacity assessment may be viewed as less reliable than others, and (2) principles relevant to compelling an individual to submit for a capacity assessment, which we review in further detail below.

### Guidance for Requesting and/or Conducting Effective Capacity Assessments

From the decision of the British Columbia Supreme Court in *Re Sandhu* and, specifically, its comments re-

garding the three capacity assessments, one can glean elements of a capacity assessment than may more likely be accepted as reliable by a court, regardless of jurisdiction, in the context of a guardianship application or other dispute involving allegations of mental incapacity.

As reviewed above, there were three capacity assessments considered by the Court in reviewing whether there was a serious concern as to the father's mental capacity to manage his own property, which can be very briefly summarized and contrasted as follows:

1. The first assessment performed at the hospital by a geriatric physician:
  - a) General concerns expressed regarding physical health and possible impact on mental capacity;
  - b) No clear opinion as to capacity to manage property was provided;



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- c) Assessment conducted over a year before the hearing;
2. The second assessment organized by the applicant son:
- a) Conducted with the assistance of an interpreter;
  - b) The assessor relied on background information provided by the applicant son and drew certain inferences from the father's disagreement with that version of events;
  - c) The son was in a different room in the father's home, but within ear-shot;
3. The third assessment preferred by the Court:
- a) Organized by the father's lawyer;
  - b) Viewed by the Court as being "comprehensive" and "independent";
  - c) No involvement of the son;
  - d) Some responses were considered relative to the education of the father, without the assumption that they were linked to any decline in capacity;
  - e) Conducted in the father's native language of Punjabi and in the comfort of his home.
- assessment. The Court's comments serve as a reminder that an assessment of capacity should:
- Be current;
  - Take into account the patient's background, including education;
  - Be conducted in a language that the patient is comfortable with;
  - Be conducted in a location comfortable to the patient, such as their home or another familiar setting;
  - In the event that background information is provided to the assessor, it should be neutral to avoid any tainting of the assessor's opinion;
  - Provide a clear opinion regarding the patient's capacity to make a certain (type of) decision.
- Capacity assessors and the lawyers working with them may wish to consider these factors when making arrangements for a formal capacity assessment. It may be wise to consider these issues (regions served, languages spoken, etc.) when assisting clients in selecting an appropriate capacity assessor.
- When lawyers are retaining a capacity assessor on a client's behalf, it is best to clearly indicate and explain the legal capacity standard in question in respect of which the assessor's opinion is sought. This will assist in ensuring that the assessor's report available to the court applies the same mental capacity standard that the court is being asked to consider.

### Court-Ordered Assessments of Mental Capacity

As mentioned above, the relief sought by the son in *Re Sandhu* included an order requiring the respondent father to submit for a further capacity assessment. With the presumption that an individual is capable of managing their own property, it is important to remember that there is no automatic right to have an individual submit for a capacity assessment and, in fact, it can be very difficult to obtain a court order compelling them to do so, as this recent British Columbia decision demonstrates.

As reviewed in *Re Sandhu*, when considering applications under the *Patients Property Act*, in which declarations of incapacity may be sought, courts in British Columbia may order a medical examination using their inherent jurisdiction, albeit only in exceptional circumstances.

Mental capacity is time, task, and situation-specific. It follows that the manner in which a capacity assessment is conducted can directly impact an assessor's opinion and render that opinion of lesser assistance to the court.

The qualifications of none of the assessors were questioned, with the primary differences in their value resulting from the different ways in which the assessments were conducted. Specifically, the passage of time and absence of a clear opinion in the first assessment, and the reliance of the second assessor on controversial background information provided by the son, resulted in the weight of those assessments being discounted, with a clear preference for the third capacity as-



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Generally, in British Columbia, the evidence must establish: (1) that there are serious questions to be tried as to the person's capacity, and (2) that there are serious questions to be tried as to the person's need for protection.<sup>6</sup>

In Ontario, the *Substitute Decisions Act* addresses the ability of the court to order that a person submit for a capacity assessment "*If a person's capacity is in issue in a proceeding under this Act and the court is satisfied that there are reasonable grounds to believe that the person is incapable...*"<sup>7</sup> The related case law makes clear that the existence of both of these conditions does not necessarily mean that a capacity assessment will be ordered, with courts reviewing matters on a case-by-case basis and considering their merits. Given the intrusive nature of a capacity assessment, courts tend to exercise their discretion to order that a person submit for an assessment of their capacity with caution.

As we saw in *Re Sandhu*, even where there is evidence suggestive of at least some degree of capacity issues, a court may not be satisfied that what the judge referred to as "the extraordinarily intrusive remedy"<sup>8</sup> of a capacity assessment is warranted absent clear and compelling grounds to believe that the person is incapable. When assisting clients with matters where orders compelling capacity assessments are being requested, it would be prudent to consider Justice Shergill's words in *Re Sandhu*: "...it is imperative that the court take care to exercise its power of inherent jurisdiction under proper circumstances, as compelling a person to submit to a medical examination intrudes on their personal autonomy, and implicates several Charter values."<sup>9</sup>

## Conclusion

The *Re Sandhu* decision is a recent example of the respect that the courts have for the personal autonomy of older adults and the presumption of mental capacity, even where there may be legitimate concerns as to a person's mental capacity raised by supportive family members. It is consistent with the courts' preference for the least intrusive option.

There is no automatic right to have someone submit for a capacity assessment. If concerns have been raised and addressed in some satisfactory way, the court may decline to compel someone to undergo a capacity assessment and to appoint a guardian of property and/or personal care. At the same time, a report from a designated capacity assessor is typically required if a guardianship appointment is being re-

quested because the evidence needs to be clear before someone is deprived of their independence in decision making.

It will be interesting to see how courts in Ontario and other Canadian provinces continue to balance the interests of preserving the autonomy of older adults with signs of some decline in mental capacity with the reality that many older Canadians may eventually lose the mental capacity to manage their own property, and to see developments in the use of capacity assessments in estate and capacity litigation, as well as other areas of law.

- 
1. 2022 BCSC 2027.
  2. RSBC 1996, c 349.
  3. *Ibid*, s 3.
  4. *Re Sandhu*, *supra* note 1 at para 28.
  5. In Ontario, a statutory presumption of mental capacity is set out under the *Substitute Decisions Act*, 1992, SO 1992, c 30, s 2 [*Substitute Decisions Act* or SDA].
  6. *Re Sandhu*, *supra* note 1 at para 46.
  7. SDA, *supra* note 5, s 79.
  8. *Supra* note 1 at para 76.
  9. *Ibid* at para 49.



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# FAMILY LAW NEWS

by Michael Kril Mascarin



## Where's the Money Honey? A Commentary on Attribution of Corporate Income for Support Purposes

It should be no surprise to counsel that the starting point to determining a party's income for child or spousal support purposes is found at Sections 15 to 20 of the *Child Support Guidelines*. In cases of an employed individual, the exercise of determining income is usually straightforward, with Section 16 of the *Guidelines* prescribing that a spouse's annual income is their "total income" (now Line 15000) on their Income Tax Return with any necessary adjustments under Schedule III of the *Guidelines*. In those cases, family law counsel might be only faced with a simple task of inputting readily ascertainable income figures into a calculator to determine appropriate quantum for child and/or spousal support. Ah, if only it was always that easy.

Alas - in many cases, a spouse's income for support purposes is not so straightforward. Specifically, their "total income" is not reflective of their true income for support purposes. Enter Sections 18 and 19 of the *Guidelines*, which come into play where the application of s. 16 would not result in a fair determination of a spouse's income. Section 18 allows the Court to attribute corporate income to a spouse where s. 16 does not fairly reflect all income available for payment of support, whereas section 19 provides the Court with the discretion to impute income to a spouse in order to achieve a fair result.<sup>1</sup>

Self-employed spouses are not a rarity, and in many cases they operate using a corporate structure. That structure may be as simple as a solitary corporation of which the spouse is the sole shareholder and directing mind. In other cases, the corporate structure may be

far more complex involving a dizzying web of corporations and other shareholders with varying interests.

By controlling the wages or salary they are paid by the corporation or the amount of dividends the corporation issues, a shareholder spouse is able to decide, to some extent, what their income at a personal level will be in any given year. This creates the need for family law counsel to perform a careful examination of that spouse's true income for support purposes. Depending on the complexity of the business and corporate structure, this can be a daunting task. Often, counsel will engage financial professionals (CBVs) to assist with that analysis.

Drawing from the language of s. 18, the analysis of whether corporate income should be attributed to a spouse focuses on what income is *available* for the payment of support. The factors that Courts have considered when determining whether to include



Adam Rumball  
Consultant





corporate income in a party's income have been distilled as:<sup>2</sup>

- a) The historical pattern of the corporation for retained earnings.
- b) The restrictions on the corporation's business, including the amount and cost of capital equipment that the company requires.
- c) The type of industry the corporation is involved in, and the environment in which it operates
- d) The potential for business growth or contraction.
- e) Whether the company is still in its early development stage and needs to establish a capital structure to survive and growth.
- f) Whether there are plans for expansion and growth, and whether the company has in the past funded such expansion by means of retained earnings or through financing.
- g) The level of the company's debt.
- h) How the company obtains its financing and whether there are banking or financing restrictions.
- i) The degree of control exercised by the party over the corporation, and the extent if any to which the availability of access to pre-tax corporate income is restricted by the ownership structure.
- j) Whether the company's pre-tax corporate income and retained earnings levels are a reflection of the fact that it is sustained primarily by contributions from another related company.
- k) Whether the amounts taken out of the company by way of salary or otherwise are commensurate with industry standards.
- l) Whether there are legitimate business reasons for retaining earnings in the company. Monies which are required to maintain the value of the business as a going concern will



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not be considered available for support purposes.

If the corporation(s) has more than one shareholder, the extent of the spouse's interest may also be relevant. On more than once occasion, the author has seen the argument that the spouse is not able to draw further income from the corporation because they are not a controlling shareholder, even where they are a 50% shareholder of a closely held corporation. In such cases, counsel should consider the distinction between legal and *de facto* control.

When counsel analyze the issue of attribution of corporate income for their clients, they should be mindful that a strict "checklist" approach using the above considerations might not yield a fair result that accords with the fundamental purposes of the family law legislation.

Imagine a scenario where the spouse operates a real estate investment business involved in acquiring, developing, leasing and selling real property. That business is structured with a number of corporations, in most cases designed to own single assets. A substantial portion of the rent paid to the business is used to pay down the principal owing on loans (even at an accelerated rate) and a large extent of the income (including capital gains) is used to acquire new assets. In that scenario, relying on the above considerations, it can be argued that the payment of debt and making capital acquisitions are legitimate business purposes and thus the income generated by the corporations is not available for support. This however allows the spouse to build potentially limitless wealth within the corporate structure while shielding it from being included in their income for support purposes because it is not technically "available". That spouse therefore has the opportunity to defer bringing that corporate income into their personal income until after their support obligations have ended.

In the author's view, a finding other than the attribution of corporate income in the above scenario would be entirely unfair. To demonstrate that unfairness, consider that 100% of the income generated would be included in the party's income *but for* the corporate structure. There appears to be a gap in the relevant jurisprudence and to the author's knowledge, there is no reported decision where a Court has decided similar facts.

Given the opportunity for spouses to manipulate their incomes using corporate structures, counsel should pay close attention to these issues. Parties facing such issues would be wise to retain counsel who have a firm grasp of business and financial matters to avoid an outcome that leaves available income untapped.

- 
1. There are a number of reasons why it might be appropriate to impute income to a spouse under s. 19. This commentary focuses on spouses who attempt to insulate income using a corporate structure.
  2. *Thompson v. Thompson*, 2013 ONSC 5500 at para. 92.

# IMMIGRATION LAW NEWS

by Melissa Babel



## NEXUS - New interview option coming - Spring 2023

On January 25, 2023, the Canada Border Services Agency (CBSA) and the U.S. Customs and Border Protection (CBP) announced that they are moving forward with a new option to increase the enrollment capacity for new and renewing NEXUS members. The new enrollment option for air travelers is expected to be available by Spring 2023 and will include CBSA interviews at reopened airport enrollment centers in Canada and separate CBP interviews at Canadian airport preclearance locations for applicants departing for the United States. This is welcome news for many Canadians who have been waiting for renewals of NEXUS or the ability to apply at a Canadian airport.

To Read More: <https://www.cbp.gov/newsroom/national-media-release/canada-and-united-states-announce-new-nexus-interview-option-expand>

## New Federal Immigration Pathway: Economic Mobility Pathways Pilot (EMPP)

On March 27, 2023, Minister Sean Fraser, Minister of Immigration, Refugees and Citizenship, announced a new Economic Mobility Pathways Pilot Program. The program will help employers to hire skilled refugees and facilitate their entry to Canada. This new pathway will launch this summer and cater to various skilled applicants in in-demand occupations including nurse aides, personal support workers, software engineers, web designers, mechanical and electrical engineers and technicians, teachers, tourism and hospitality workers and truck and delivery service workers.

To read more <https://www.canada.ca/en/immigration-refugees-citizenship/news/2023/03/tackling-the-labour-shortage-by-helping-more-skilled-refugees-and-other-displaced-people-build-their-careers-in-canada.html>

## Canada Announces Extension of Post-Graduation Work Permits

On March 17, 2023, The Honourable Sean Fraser announced that international graduates with expired or expiring post-graduation work permits now qualify for extensions of up to 18 months to stay in Canada for a longer duration. As of April 6, 2023, post-graduation

work permit holders wanting to remain in Canada for a longer period or wish to extend their work permit will be able to log into their online IRCC account to update their personal information and facilitate the process of extending their current work permits. To read more: <https://www.canada.ca/en/immigration-refugees-citizenship/news/2023/03/canada-announces-extension-of-post-graduation-work-permits-for-up-to-18-months-to-retain-high-skilled-talent.html>.

## U.S. Immigration Update

### USCIS Completed FY 2024 H-1B Cap Selection Process

USCIS has received enough electronic registrations during the initial registration period to reach the H-1B cap of 85,000. This includes regular and advanced-degree selection lotteries. USCIS has not yet released the final number of cap registrations. The petition filing period will be from April 1 to June 30, 2023.

If USCIS does not receive enough H-1B cap petitions during this period, there may be subsequent lottery selections.

To read more: <https://www.uscis.gov/newsroom/alerts/fy-2024-h-1b-cap-season-updates>

### USCIS Announces end of COVID-19 Flexibilities

On March 23, 2023, U.S. Citizenship and Immigration Services announced that flexibilities set in March 2020 to address the Covid-19 pandemic have now ended. Applicants are urged to respond to any notices dated after March 23, 2023, by the deadlines listed on the notices or request.

This includes:

- Request for Evidence;
- Continuances to Request Evidence (N-14);
- Notices of Intent to Deny;
- Notices of Intent to Revoke;
- Notices of Intent to Rescind;
- Notices of Intent to Terminate regional centers;
- Notices of Intent to Withdraw Temporary Protected Status; and

Motions to Reopen an N-400 Pursuant to 8 CFR 335.5, Receipt of Derogatory Information After Grant.

[-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions/express-entry-rounds.html](#)

To read more: <https://www.uscis.gov/newsroom/news-releases/uscis-redesigns-green-card-and-employment-authorization-document>

### Express Entry Update March 2023

This month saw three all-program Express Entry Draws, with IRCC issuing a total of 7,000 invitations to apply in each round. On March 15, 2023, invitations to apply were issued to candidates with a **CRS** score of 490 or higher, on March 23, 2023, invitations to apply were issued to candidates with a **CRS** score of 484 or higher and on March 29, 2023, invitations to apply were issued to candidates with a **CRS** score of 481 or higher.

As an alternative strategy to the Express Entry route, a number of Provincial Nominee Programs are actively issuing invitations and processing applications. On March 14, 2023, the Ontario Immigrant Nominee Program ("**OINP**") held two draws under the International Student Stream. In the first draw, a total of **606** invitations were to candidates in healthcare and technology occupations, with a **CRS** Score range of **70** or higher. The second draw had a total of **300** invitations were to candidates in skilled trades occupations with a **CRS** score range of **74** or higher.

The BC Provincial Nominee Program ("**BCPNP**") had numerous draws throughout March for applicants in Targeted draws such as **Childcare, Healthcare, Tech**, and other priority occupations. Their latest draw was a General Draw, which took place on March 21, 2023, 202 invitations were issued to applicants in this category.

To read more: <https://www.canada.ca/en/immigration-refugees>

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# TAX LAW NEWS

by Amit Ummat



## Federal Court Finds Minister's CRB Decision Unreasonable

<https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/522843/index.do>

### Moncada v. Canada (Attorney General) 2023 FC 114

#### Summary

The Canada Recovery Benefit ("**CRB**") provided direct financial support to eligible people residing in Canada and who were affected by the COVID-19 pandemic for any two-week period between September 27, 2020 and October 23, 2021.

Residents had to meet the eligibility requirements for each of the two-week periods. The eligibility requirement at issue in this judicial review was the Income Eligibility Requirement set out in paragraphs 3(1)(d) to (f) of the Canada Recovery Benefits Act ("**CRBA**") which requires an applicant to show they had at least \$5,000 in income in 2019, 2020, or in the 12 months before the date of their first application.

The Applicant provided sufficient information, but the CRA Officer made no mention of it in their refusal decision. The Court agreed with the Applicant that enough information had been provided.

#### Facts & Decision

The Applicant, Giuseppe Moncada ("**Mr. Moncada**") challenged a decision made by a CRA benefits validation officer ("**Officer**"). The Officer denied his application for the CRB because Mr. Moncada failed to demonstrate that he met the requirements of subparagraph 3(1)(d)(ii) of the CRB Act, namely, that he had earned at least \$5000 in 2019, 2020, or 12

months prior to his first application for CRB ("**Income Eligibility Requirement**").

Mr. Moncada's position was that the Officer breached procedural fairness in refusing his application before he was able to obtain further documents requested by the Officer, and that the Officer unreasonably came to their conclusion that he did not meet the Income Eligibility Requirement.

#### Background

In 2020, Mr. Moncada applied for and received CRB for the four two-week periods from September 27, 2020 to November 21, 2020. Upon applying for the next CRB two-week period for November 22 to December 5, 2020, the CRA told Mr. Moncada he was being audited.

Mr. Moncada provided three invoices for general trade and renovation work for three clients, totaling \$5,380 (which was his stated income in his 2019 tax return).

The officer conducting the first review of Mr. Moncada's application determined in February of 2021 that Mr. Moncada was not eligible to receive the CRB on the basis that he did not reside in Canada and did not meet the Income Eligibility Requirement.

Mr. Moncada requested a second review in March of 2021. In the second review process, the Officer asked Mr. Moncada to obtain more evidence to corroborate he had performed the work he claimed he had performed. The Officer issues a refusal decision approximately five weeks after the work

verification letter was requested.

The Officer refused the application on the basis that Mr. Moncada did not meet the Income Eligibility Requirement, stating that there was “insufficient doc’s to support income, ie bank stmt, ltrs of work verification.”

The Court indicated that the decision letter makes no mention of the three invoices filed by Mr. Moncada. Mr. Moncada’s invoices state who the service was for, the name of the applicant, the type of service rendered, and the amount charged for the service. The Officer did not list these invoices among the documentation reviewed in their notes that form part of the reasons of their decision.

A critical point is that one of the ways that the CRA guidelines “Confirming CERB, CRB, CRSB and CRCB Eligibility” (“**CRB Guidelines**”) state that a self-employed applicant may be able to show acceptable proof of income to meet the Income Eligibility Requirement is invoices for services rendered. It seems then that Mr. Moncada’s invoices could have satisfied this quite easily. But the Officer failed to explain any concern with the invoices Mr. Moncada provided, despite invoices being one of the ways an applicant can demonstrate fulfillment of the Income Eligibility Requirement. The Court found that a lack of justification for rejecting a form of proof contemplated by the CRB Guidelines can render a decision unreasonable.

The Court found that the Minister’s decision was unreasonable because it did not reference the invoices and therefore did not explain why the invoices were insufficient to meet the eligibility requirements.

### **Takeaway**

Decisions made by the CRA or the Minister are for the most part predicated on the materials reviewed. If the CRA did not review something important, it affects the integrity of the assessment or decision. Keep this in mind when challenging CRA Assessments. It is important to be aware of precisely what was reviewed during the assessment or decision-making process.

# OJEN NEWS

by Inga B. Andriessen



We are about to start Mock Trial season in Halton this month and appreciate all the members who have volunteered to Judge Tournaments.

We do expect the need for backup Judges, so if you are able, please reach out to me and tell me if you can be a backup for :

Halton Catholic Senior – April 11, 2023 Halton Catholic Junior – April 14, 2023 Halton Public/Private Junior – April 21, 2023 Halton Public/Private Senior - April 28, 2023 Championship – May 5, 2023

The Catholic tournaments will be held at QE Park in Oakville.

The Public tournaments are being held at Oakville Trafalgar High School.

The Championship will be at the Milton Court House.

This is my last school year as Chair of our committee as I have resigned effective the end of June after over 14 years of volunteering to work with the schools.

It has been a wonderful opportunity to help be the bridge between legal education in the Court Room and I know that there are many other awesome volunteers who will continue to do this important work in the Halton Region: the committee is in good hands.

Inga B. Andriessen, Chair, OJEN-Halton Committee

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# HCLA NEWS

*Newsletter of the Halton County Law Association*

## Advertising Rates

Size	Dimensions	Per Issue Rate	Annual Rate
Business card:	2"h x 3.5"w	\$90.00	\$310.00—save \$50.00
Half page:	4.5"h x 7"w	\$150.00	\$500.00—save \$100.00
Full page:	9"h x 7"w	\$300.00	\$1,000.00—save \$200.00

Classified ads: \$5.00 per line

- The HCLA E-Newsletter is published four times per year and is distributed electronically to members of the Halton County Law Association by email.
- Estimated circulation: 300
- Advertising rates do not include the cost of preparing artwork.
- Artwork costs are the responsibility of the advertiser. Artwork is accepted in PNG or JPEG formats.
- Artwork may be in colour or black and white.
- HST Extra
- Annual rate applied when the same ad runs for four consecutive issues and is invoiced in full at time of initial placement of the advertisement.

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Halton County Law Association  
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# CALENDAR OF EVENTS

Thursday, April 20, 2023

## **Bench Open House**

Come out and hear from the bench candidates from Central West. Attend in person or virtually!

Register [here](#)!

Thursday, April 27, 2023

12:30—2:00 pm

## **Advanced Quicklaw and Practical Guidance - Live & in-person!**

Law Library, Milton Court House

More event information can be found on page 5. Register through the HCLA website [here](#)!

Friday, May 12, 2023

9:00 am—12:00 pm

## **Annual Estates Seminar**

Program co-chairs: Ian Hull and Suzana Popovic Montag

Oakville Golf Club

Register [here](#)!

Thursday, May 18, 2023

## **Civil Litigation Webinar**

Watch for details!

Tuesday, June 6, 2023

**Annual Charity Golf Tournament** in support of The Women's Centre of Halton

Lionshead Golf Club

Register [here](#)!