



# HCLA NEWS

Newsletter of the Halton County Law Association

Volume 11 Issue 3

Summer 2020

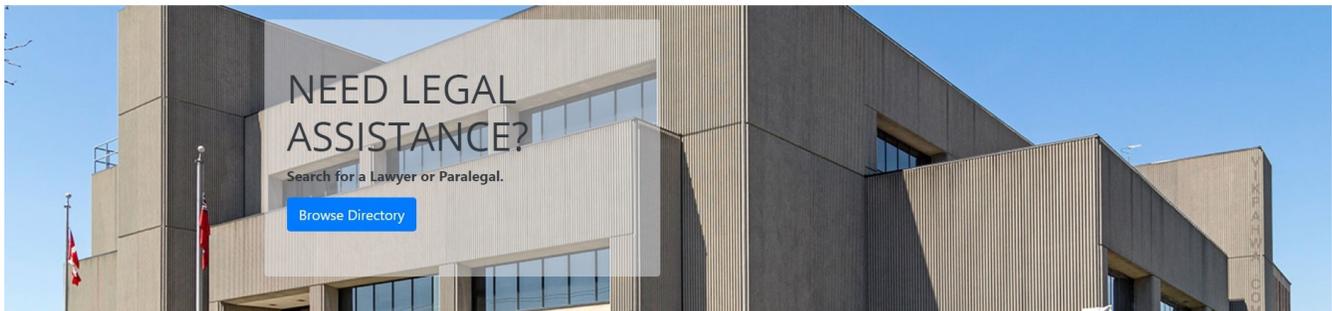


The Halton County Law Association

## New HCLA Website Coming Soon!



Home About Us ▶ News ▶ Jobs Members Join Law Library ▶ Court House Contact Us



COVID-19: Please [click here](#) for updates and resources regarding COVID-19.

**About Us**  
The Halton County Law Association (HCLA) was incorporated in 1951 and is a non-profit corporation with the purpose of administering the facilities of the Association including the Law Library, Barrister Lounge and Robing Rooms and generally of promoting the social, professional and economic interests of the Association and its members.  
The Law Library staff cannot provide legal advice or research assistance to the public. For information on finding legal help in Ontario, please try the Bora Laskin Law Library site. The HCLA's web site contains no...

**Upcoming Events**  
No upcoming events  
**Latest News**  
There are no news posts to display.

**In this issue:**

LSO Elects New Treasurer

COVID-19 updates and changes to Canadian and U.S. Immigration Law and Processing

Maintaining a Wills and Estates Practice During COVID-19 and Beyond

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# PRESIDENT'S REPORT

by Ken Kelertas



This is turning out to be a very memorable year. The COVID-19 pandemic has caused major disruptions in our lives, and has prompted a definite change in the way we look at the world. COVID has also prompted a shift in the practice of law as judges and lawyers come to terms with the fact that in-person meetings and hearings are now not always possible. COVID has also exposed many of the structural flaws in our justice system, including, inflexible processes, inadequate e-filings systems, and out-dated court infrastructure. Clearly, the time has come for a transformation.

The Attorney General Doug Downey and his advisors have certainly grasped the urgency of the situation and have been working with the bench and the bar to devise and implement better ways to improve access to justice. Unfortunately, this movement towards modernization of the legal system in Ontario might have come with a particularly bitter pill for Halton. On May 9<sup>th</sup>, the Attorney General announced the cancellation of the Halton Region Consolidated Courthouse project, citing the urgent need to re-allocate funds to invest in better technology and to update court processes across the province. This announcement was certainly a great disappointment to our members (and to me personally). Consequently, I wrote to the Attorney General shortly thereafter on behalf of the HCLA to ask the government to re-consider its decision. A copy of the letter can be found [here](#).

We have subsequently been advised that the consolidated courthouse project – albeit in a modified form-

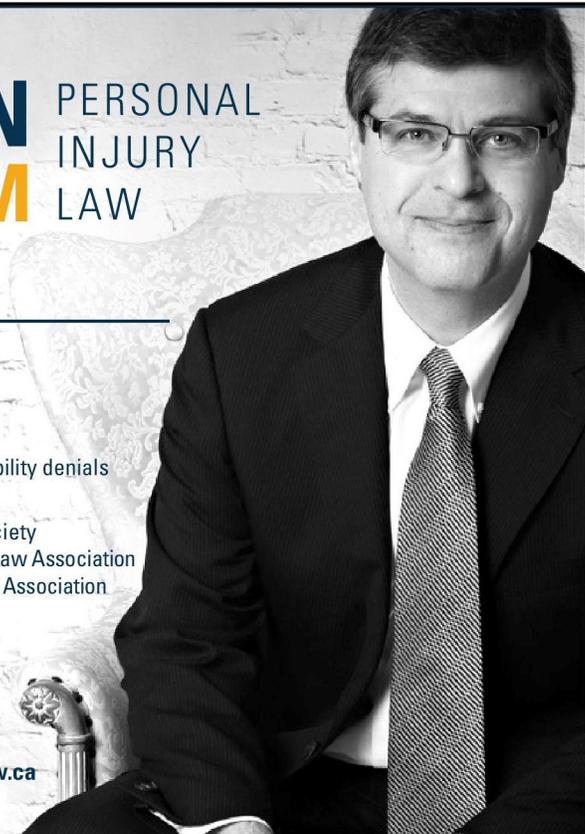
may still be revived before the end of the year. However, given the state of the provincial economy, there are no guarantees. Therefore, our Board remains committed to advocating for the new courthouse- not just a renovation or expansion of the existing Milton and Burlington facilities, but a new justice hub for Halton. I encourage all of our members to write to the Attorney General, to the Premier and to our local MPPs to ensure that Halton's particular need for modern justice infrastructure is not forgotten.

It may be trite to say that the last four months have proven to be very challenging on many different levels- personally, locally, nationally, globally. and professionally. But, there... I've said it. In coping with the fallout from COVID we have all had our own personal struggles. However, in times such as these, lawyers are called upon to be at their absolute best to counsel and support their clients through every type of crisis imaginable. Consequently, the stresses of practice- whether you are a sole practitioner, a member of a firm, in-house counsel, or in the public sector- are amplified. As an Association, we understand what you are going through and so we are in the process of organizing a "Health and Wellness Day" event- tentatively scheduled for September 17<sup>th</sup>- at which we hope to have both health care professionals and financial advisors available to provide you with some strategies to assist you in making your life as a lawyer more manageable and fulfilling.

We have also organized a series of on-line Zoom "socials" to assist you in remaining connected to your

colleagues. The next Zoom social will be held on Thursday, July 30th. I encourage you to drop in during one of the sessions and tell us about your COVID experiences, to share some insights, and to learn from others. You can even share your favorite food and beverage ideas, or let us know what you are going to do first right after all this madness has subsided. I am thinking serious road trip....

In the meantime, I hope that you and your loved ones are keeping well and that you continue to stay safe and healthy.



**STEPHEN ABRAHAM** PERSONAL INJURY LAW

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STEPHEN B. ABRAHAM 2018  
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\*Certified as a Specialist in Civil Litigation by The Law Society.  
 \*Peer reviewed as a Leading Practitioner in Personal Injury Law in Ontario by Lexpert and Best Lawyers in Canada.

# LIBRARY NEWS

by Karen Cooper



The lazy days of summer certainly look quite different this year! The usual summer BBQs and get-togethers with family and friends have been scaled down, weddings have been postponed and life continues to be pretty quiet within our bubbles. I hope you and your loved ones have been finding ways to create great memories over the summer and during this strange time!

The Annual Canadian Association of Law Libraries Conference was held virtually and while the sessions, many centred around adapting to a virtual world, were really excellent, I greatly missed the opportunity to see and catch up with my colleagues.

We held a Zoom Quicklaw training session on June 30th that was both informative and well attended. If you missed it, another session will be planned for later this year, so watch for details.

Members of the HCLA Executive have been working on the development of a new HCLA website through the Wild Apricot platform, which will hopefully be launched later this summer. The new site will offer HCLA members a secure portal and the new site will allow for on-line registration and payment for HCLA CPD and social events. I think a virtual chat feature would be very cool and a convenient way to submit your reference questions. Please let me know if you have any feedback to share.

The new LIRN board is continuing their work to support the County Law Library system and I am pleased to announce that Theresa Leitch has been hired as LIRN's inaugural Managing Director and

will start in August. Staff from the Area (medium-sized) Law Association Libraries have participated in monthly Zoom meetings to share experiences and frustrations with the COVID-19 and the gradual re-opening of the courts.

COVID-19 Active Screening Protocol is currently in effect at all phase 1 courthouses that opened on July 6, for **all** court participants. **All** persons attending a courthouse are required to wear a face mask and will be asked questions regarding recent travel, potential exposure to the virus, and whether they are experiencing any COVID-like symptoms. Answering the screening questions is a pre-requisite for all persons seeking to enter the courthouse, including ministry staff and justice sector partners.

The screening can be completed at anytime/anyplace prior to arrival at the courthouse, online. The screening tool is also available for completion in paper-based format or verbally where required, at the courthouse. Once you have your screening result, all visitors are required to present their screening result to designated entrance monitors as they enter the courthouse. Individuals who are deemed inadmissible through the screening process will be redirected to alternative processes.

Links to the screening tool are available online at: [Ontario.ca/courtscreening](https://Ontario.ca/courtscreening)

I am continuing to work remotely as we modify our library space to be COVID-friendly and am happy to assist virtually with any reference questions.

# BENCHER REPORT

by M. Claire Wilkinson



## The LSO has a new Treasurer!

On June 26, 2020, Teresa Donnelly was elected as Treasurer of the Law Society. It was a contested election, with Phil Horgan running against Ms. Donnelly, but in the end Ms. Donnelly received 31 of 53 votes to secure her victory. Ms. Donnelly is a Crown Attorney, who will be taking a leave from her office to fulfill her duties as Treasurer. She was first elected as a bench in 2015, and was elected for a second four year term in 2019. She has served as Vice Chair of the Government and Public Affairs Committee, Vice Chair of the Litigation Committee, Vice Chair of the Priority Planning Committee, Co-Chair of the Program Review Task Force, Chair of the Audit and Finance Committee, Chair of the Human Rights Monitoring Group, Co-Chair of the Compliance-Based Entity Regulation and a member of the Indigenous Review Panel. That is a lot of committees and a lot of time dedicated to the Law Society of Ontario and its members!

We are in good hands with Teresa Donnelly!

With the election of Teresa Donnelly, Michael Lesage from Central South became the newest Bencher with the LSO. In addition, previous Bencher Gina Papageorgiou was recently appointed as a judge of the Superior Court, and Barbara Murchie was welcomed back to Convocation, having previously been a Bencher and just missing out on re-election in the 2019 Bencher elections. Warm congratulations to Justice Papageorgiou!

The Law Society has put several measures in place to assist lawyers with the financial fall out of COVID

19. Some of these measures include:

- Shortening articling requirements to 8 month terms for 2020-2021
- Allowing administrative calls to the bar for candidates
- Allowing on line licensing examinations
- The filing deadline for licensees' annual reports was extended to July 1, 2020, and the LSO has confirmed that it will not take further action regarding any administrative suspensions until August 15, 2020. The LSO is also offering the option of moving to a monthly payment plan.
- Regarding CPD, although the regular requirements still apply, the LSO has removed the six hour maximum limit applied to watching an archived program without a colleague, teaching, and professional writing.
- The LSO deferred the monthly pre authorized payments from licenses for April, May, June and July 2020. The withdrawals will begin on August 5, 2020. Licensees will be paying the balance of fees owing in equal withdrawals between August and December 2020.
- The AGM has been postponed from May 13, 2020 to August 10, 2020. It has not yet been announced if this meeting is proceeding in person or virtually via zoom. The LSO website advises that more details will be provided to licensees closer to August 10.
- Various measures have been adopted by Convocation to streamline LSO services and reduce costs including mandatory on line filing of annual reports.
- Some older CPD programs are now available to

licensees at no cost.

It was impressive to observe how quickly the LSO and its employees shifted to a work at home arrangement once COVID 19 hit Ontario, and how efficiently the important business of the LSO has carried on through virtual platforms such as Zoom.

In the weeks and months to come, it is my expectation that the LSO will continue to make an effort to streamline services and save costs, so that licensees will enjoy more efficient processes, with the added benefit that the LSO will reduce costs.

If you haven't filed your annual report yet, DO IT NOW!!

# MARTIN & HILLYER ASSOCIATES IN BURLINGTON IS EXPANDING!

We are particularly interested in associating with an experienced lawyer specializing in family or criminal law.

If you are interested in bringing your practice to share space with the lawyers of Martin & Hillyer Associates, please contact our Office Administrator, Traci-Ann Yacoub at [traci-ann.yacoub@mhalaw.ca](mailto:traci-ann.yacoub@mhalaw.ca) or 905-637-5641, ext. 228.

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# FAMILY LAW NEWS

by Kathy Batycky



All lawyers who practice family law need to be aware that, under the auspices of increasing access to justice for people who cannot afford a lawyer, the Law Society has just released a report in which it sets out a framework for paralegals to engage in certain aspects of a family law practice, after certain mandatory training.

The report has just been released.

Now the “access to justice” committee of the LSO is seeking input from lawyers, paralegals, legal organizations, and the public on the proposed licensing framework for a new licence to practice some family law, called the Family Legal Services Provider (“FLSP”) licence.

The report does include questions which they would like answers; they are seeking input with a deadline of November 30, 2020. The report states that “the input received will assist the Law Society in assessing the proposed framework and determining whether this model is the most effective approach to improving access to family law services.”

Below is a link to the chart (Appendix B Tab 5.2) of services from the report, outlining what is proposed to be allowed and not allowed. The report also provides details of the educational program that will need to be completed to ensure the paralegal has the.

Competencies needed to practice family law, before the paralegal will be allowed to practice as a Family Legal Services Provider.

Everyone should read the entire report and provide response.

<https://lawsocietyontario.azureedge.net/media/lsociety/media/about/convocation/2020/flsp-consultation.pdf>

# CRIMINAL DOCKET

by *Brendan Neil*



So here we are in the midst of a pandemic. The last few months have been interesting to say the least.

I will attempt to provide information regarding the courts and where we are with respect to re-opening. It should be clear that many of the comments are my own opinion and should not be considered as the opinions of the HCLA or the CLA. I should also note that information is changing quickly and parts of this report/article may be out of date within hours of it going out.

Since March 16, I have been attending daily meetings with numerous stakeholders at the courthouse, including crowns, legal aid, court services, VWAP, Halton Police, Trial Coordinators, Justice Crawford, and Justice of the Peace Curtis. All of these individuals have been working extremely well together notwithstanding a lack of top down flow of information from the “higher ups”.

With the news that the courts are scheduled to begin opening on July 6, 2020 I took part in a walk through of the Milton courthouse with the risk



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assessor contracted by the government. The assessor made it clear at the beginning and throughout that her mandate was MAG employees and no one else (she was apologetic about this mandate). As such all concerns had to be phrased in terms of how they would affect MAG employees in order to be considered. The walk through involved a sampling of various parts of the building rather than an in-depth review of risk in each location and for each use. The walk through assessment did not incorporate an on-site assessment of the HVAC or air quality in the Milton courthouse. A report has been produced by Infrastructure Ontario regarding the HVAC, however the disclaimer acknowledges it is of limited use as it did not involve any on-site evaluation. As an example there was no assessment done of the lawyer's lounge, robing rooms, or law library as they were not considered as locations where MAG employees would be.

Following the walk through on June 17 and my subsequent review and observations of the "retrofit" I

am of the opinion that much more needs to be done. Of note there are significant issues with the addition of the plexi-glass in the courtrooms scheduled to open (1, 2, 16). The plexi-glass as installed does not extend past edges of the tables/ desks, leaving obvious gaps, the prisoner docks are not plexi-glassed, physical distances are often too close between court participants. There has yet to be PPE delivered to the courthouse for MAG employees notwithstanding that it will be mandatory for all MAG employees when physical distancing is not possible.

All persons entering the courthouse will be required to take part in screening either by way of a downloadable app or a form filled out at the front entrance. All persons in the courthouse will be required to wear a face covering unless they have a medical or religious reason not to.

Numerous hand sanitizers have been installed

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through the courthouse and we are told that enhanced cleaning will be done on “high touch points”, thus far this has meant three times a day.

There will be security guards in the building to remind people of masks/face coverings and social distancing. There are also numerous tape indicators of distance now on the floors of the courthouse.

It is unclear how the next few weeks will go as there are numerous stakeholders all with different organizations and concerns that are reviewing and analyzing their positions on whether or not it is safe to return to the courthouse. Of note the Association of Crown Counsel’s of Ontario have filed an injunction application expressing safety concerns province wide on the re-opening.

I am no doctor or scientist but given what I have seen and not seen I am very skeptical about the safety of re-opening, it seems to me that the government is attempting to get three months of preparation done in

three weeks and as a result many things are being pushed to the side.

Anyone that has questions or would like to see the assessment report please feel to contact me at [Brendan@neillawson.ca](mailto:Brendan@neillawson.ca).

Also, and separate from the above I would like to congratulate Justice Calsavara on her appointment to the bench in Milton OJC Criminal, filling the vacancy left when Justice Harris retired.

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*Brendan Neil is certified by the Law Society of Upper Canada as a Specialist in Criminal Law and sits on the Board of the Criminal Lawyers’ Association. Comments in the above piece are his alone and should not be considered as the position of the HCLA or it’s respective members.*

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# CIVIL LITIGATION LAW NEWS

by James Page



## How is COVID-19 Affecting the Civil Justice System in Milton?

A lot has changed in the civil justice system since the last edition of our newsletter. I thought I would give all the non-family civil litigation lawyers out there a brief update as to what is happening with motions, pre-trials and trials in Milton.

All the Superior Court of Justice Notices can be found at <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/>.

The two most recent notices from our Central West Region are from May 13, 2020 and June 25, 2020 and can be found on that page.

Here's the Readers' Digest version.

## Motions/Applications

Milton is continuing to hear urgent matters, consent motions, and motions/applications in writing.

If your motion was effectively canceled due to the suspension, you can write an email to [SCJHaltontrialoffice@ontario.ca](mailto:SCJHaltontrialoffice@ontario.ca) for a new date.

When asking for the new date, make sure you include:

- Title of proceedings and court file #
- The email addresses of the parties/lawyers and the names of the parties
- If the matter is a long or regular motion
- A time estimate for the motion

All motions scheduled between July 6 and September 11 will proceed by way of video conference as scheduled, unless ordered otherwise. Motion materials must

be filed to [MiltonSCJCourt@ontario.ca](mailto:MiltonSCJCourt@ontario.ca).

The last two notices only address the procedure for applications in writing. But I would think the procedures in place for urgent matters and consent motions also apply to urgent applications and consent applications.

## Urgent Matters

If you think your matter is urgent, email the Milton Courthouse at [SCJHaltontrialoffice@ontario.ca](mailto:SCJHaltontrialoffice@ontario.ca).

In your email, you must set out the relief requested and the reasons why the matter is urgent. You also must include draft Orders and confirm the matter can be heard by videoconference. There are limitations to the size and length of your materials.

See the May 13<sup>th</sup> notice for additional details.

## Consent Motions

Consent motions includes rule 7 motions on consent. Materials must be sent to [SCJHaltontrialoffice@ontario.ca](mailto:SCJHaltontrialoffice@ontario.ca).

Materials must include Consent of all parties, draft orders, and email addresses of all parties/counsel.

## Contested Motions in Writing

Parties must agree that the contested motion can be heard on written materials only (no teleconference or video conference). Parties must also agree to a timetable for the exchange of materials.

There are strict size and page limitations. The size limitations for each party can be exceeded only with

leave. It seems like the page limitations cannot be exceeded.

Motion materials are to be sent to [SCJHal-tontrialoffice@ontario.ca](mailto:SCJHal-tontrialoffice@ontario.ca).

Materials must include:

- Relevant orders and endorsements
- Facta
- Email addresses of parties/counsel
- Written confirmation by all parties that the matter can proceed in writing

See the May 19<sup>th</sup> Notice for more details.

### **Undertakings to be Given**

For all motion materials being filed, you must include an undertaking to file written material when court operations resume and pay applicable court fees at that time.

### **Pre-Trials**

In the April 2<sup>nd</sup> notice, any pre-trials that were canceled in March due to the pandemic would be rescheduled at the request of the parties. However, the parties had to certify that the case was capable of settlement with the assistance of a pre-trial Judge.

All pre-trials scheduled between June 1 and July 3<sup>rd</sup> will proceed by teleconference or videoconference, unless parties/counsel are otherwise advised.

All pre-trials scheduled between July 6 and September 11 will proceed by virtual conference as scheduled, unless ordered otherwise.

Briefs have to be refiled to [MiltonSCJCourt@ontario.ca](mailto:MiltonSCJCourt@ontario.ca).

### **Assignment Court**

If you were on the assignment court list for April 6, May 11, June 1, July 6 or August 4, and only the trial record has been filed, your assignment court will be held by videoconference on August 31 at 10:00 AM.

Assignment court can be jointed via Zoom at <https://zoom.us/j/2305538836>.

You can also join by telephone. The call number and Meeting ID is as follows:

Telephone Access: 1-855-703-8985 (Toll free)/1-647-558-0588 (Local)  
Meeting ID: 2305538836

### **Civil Trials**

Civil trials that were adjourned between March 16 and June 30 due to COVID-19 should have been transferred to assignment court. The hearing was held July 6<sup>th</sup> by videoconference.

If you missed this assignment court, I suggest you email [MiltonSCJCourt@ontario.ca](mailto:MiltonSCJCourt@ontario.ca) and if that does not work, try emailing [SCJHal-tontrialoffice@ontario.ca](mailto:SCJHal-tontrialoffice@ontario.ca). That's my advice and not on any of the notices.

### **Jury Trials**

For any civil jury trials scheduled to take place between March 16, 2020 and August 31, 2020, lawyers should have received an email offering a JPT. If you have not received this email write to [SCJHal-tontrialoffice@ontario.ca](mailto:SCJHal-tontrialoffice@ontario.ca).

### **Gowning**

There is still no requirement to gown.

### **Re-Opening of the Physical Courtrooms**

Courthouses across Ontario will be opening in phases. July 6<sup>th</sup> was the first phase, followed by September 15 (Phase 2) and November 1<sup>st</sup> (Phase 3).

As of July 6<sup>th</sup>, courtroom #5 is supposed to be open for Superior Court of Justice matters. That courtroom is supposed to be shared for criminal, family and civil litigation.

Generally speaking, additional courtrooms are supposed to be open on September 15 and November 1<sup>st</sup>. At this time, I do not know if that will be the case for the Milton courthouse.

The Ministry of the Attorney General (MAG) performed a health assessment walkthrough of the courthouse on June 17. The purpose of the visit was to assess the health and safety of the courthouse for MAG employees. The protection of the

public generally was not part of the scope, which is concerning. From what I have read, it was not a completely comprehensive walkthrough. Many areas were not examined. Nevertheless, a number of safety recommendations were made on the basis of the walkthrough and assessment.

On that note, MAG has recently published a best practices protocol to help limit the spread of the virus in the courthouses across the province. It addresses matters like face coverings, physical distancing, caps on the number of people in a given space, etc. The guide and a useful summary of the recommended safe practices can be found [here](#).

**James Page** is a lawyer at **Martin & Hillyer Associates** in Burlington. He was called to the Bar in 2010

*and practices personal injury and civil litigation. James currently sits on the Executive for the Board of Directors of the Halton County Law Association. He is the Past President of the Brain Injury Association of Peel and Halton (BIAPH).*

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# IMMIGRATION LAW NEWS

by *Melissa Babel*



## COVID-19 updates and changes to Canadian and U.S. Immigration Law and Processing

### Canada Temporary Residence (Work/Study/Visit)

In response to the COVID-19 pandemic, the Canadian government has placed restrictions on entry to Canada at our land border with the U.S. and our air and seaports. These restrictions have come into effect through 'Orders in Council' and there have been several changes made to the border restrictions from March 2020 to present.

**The high-level view is that travel to Canada is highly restricted** and limited to only individuals who fall within the exemption from the general restriction on the entry of foreign nationals. Canadian citizens, permanent residences, persons registered under Canada's Indian Act and Protected Persons are permitted to travel to and enter Canada but are required to quarantine.

There are different limitations for foreign nationals (non-citizens/PRs) entering from the U.S. and elsewhere in the world, and there is the additional logistical issue of the lack of international flights and restrictions on which airports in Canada are receiving flights. Under the current definition, essential, or 'non-discretionary' travel to Canada includes entry to Canada for work and to study, as well to be granted permanent resident status in Canada. **Workers coming into Canada must be able to show that their position is still being offered** (i.e. they have not been laid off or terminated) and that they are able to meet the quarantine requirements. There are significant compliance concerns for employers of foreign workers who do not

support their workers' obligation to quarantine.

**All recreational travel, or non-essential travel continues to be restricted, with the exception of the entry for the 'immediate family member' of a Canadian citizen or permanent resident.** An immediate family member is defined as the spouse or common-law partner, dependent child, dependent grandchild, parent or step-parent and 'guardian or tutor' who is staying in Canada for at least 15 days and who can provide a satisfactory quarantine plan on entry.

### Canada Permanent Residence

One of the many COVID-19 related impacts to permanent residence ("PR") applications in Canada is the lack of language testing, which is a pre-requisite to creating and Express Entry Profile. Simply put, what this means, is that **new candidates for PR cannot apply for permanent residence until they are able to take a language test.** The impact of this logistical issue is that the continued 4 monthly rounds of invitations are emptying out the Express Entry pool of candidates at a higher rate than new candidates are able to enter.

However, this is a temporary phenomenon which results from the pandemic, and it is important to anticipate that there is **very significant backlog of candidates waiting to get into the pool.** Once the issues surrounding language testing are resolved, we expect the pool of candidates to be full again, which is likely to drive the CRS points needed to be invited back up to high levels, similar to what we

have seen through 2019 and early 2020. Additionally, there have been no invitations issued to Federal Skilled Workers (those without the one year of Canadian work experience required for the Canadian Experience Class) since the pandemic started. Simply put - there is significant demand for PR under Express Entry, and we encourage candidates and their employers to begin planning for higher CRS Points in the fall, and to **take action** to be ready to submit applications as soon as this becomes possible.

### **United States Immigration Update (nonimmigrant – Work/Study)**

On June 22, 2020, President Trump signed the '**Proclamation Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak.**' The Proclamation took effect at midnight on June 24, 2020 and will last until at least December 31, 2020.

The Proclamation bans the issuance of new visas under **H1-B** ("specialty occupations"), **L-1** (intra-company transfers) and certain **J-1** nonimmigrants as well as their spouses and dependents (**H-4, J-2, and L-2**). The ban does not impact individuals who were in the U.S. on the effective date (June 24, 2020) or who hold valid U.S. visas or other travel documents.

There are several other exemptions, including the spouse and child of a U.S. citizen, U.S. lawful permanent residents, and those who are determined by the Department of State to be entering 'in the national interest' of the U.S.

It was originally unclear whether Canadians, who are visa-exempt to the U.S., would be impacted. It was now been clarified that **Canadians entering as H, L or J nonimmigrants are exempt from the Presidential Proclamation of June 22, 2020.** Guidance has been provided to local Customs and Border Protection ("CBP") ports on this issue. The Proclamation does not make mention of TN visas, and it is understood that **TN visas continue to be issued to Canadians.**

### **U.S Immigration – Permanent Residence (immigrant applications)**

This proclamation is the second major announcement on immigration made by this administration since the

pandemic began. It follows up on the April 22, 2020 '**Proclamation Suspending Entry of Immigrant Who Present Risk to the U.S. Labor Market During the Economic Recover Following the COVID-10 Outbreak**'. This proclamation suspends the entry of any individual seeking to enter the U.S. as an immigrant (permanent resident) who:

Is outside the United States on the effective date of the proclamation (April 23, 2020)

Does not have a valid immigrant visa on the effective date **and**

Does not have a valid official travel document on the effective date or issued on any date thereafter that permits travel to the U.S. to seek entry or admission.

There are exemptions from the proclamation including Lawful Permanent Residents (LPR) of the United States, individuals seeking entry to the U.S. to help combat the spread of COVID-19 and essential workers, individuals applying under the EB-5 immigrant investor program, the spouse and minor children of U.S. citizens and some other narrow exemption where the entry of the individual as an immigrant is in the national interest of the U.S.

There are overall systemic shortages in visa processing for both Canada and the U.S. and a wide ranging, and complex web of rules and policies in place over and above the usual travel considerations. Canadian and U.S. citizens who are accustomed to relatively free and unlimited travel across the border are expected to continue to see interruption in their ability to travel for some time.

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# ESTATES NEWS

by Suzana Popovic-Montag and Nick Esterbauer



## Maintaining a Wills and Estates Practice During COVID-19 and Beyond

As a result of COVID-19, lawyers across the country have had to temporarily alter their practices. In a profession where in-person meetings are expected by clients and/or necessary to see to the proper execution of legal documents, social distancing has forced the legal system to rapidly adapt to allow us to continue serving our clients in these unprecedented circumstances. This has posed a challenge for members of the Estates Bar in particular, as client meetings, will signings, hearings, and mediations have all been affected. During this time, however, it remains crucial that estate lawyers continue to help clients in creating or amending estate plans and in moving estate litigation matters forward. Familiarizing ourselves with the tools that have recently become available can be of great assistance in this regard during the pandemic and as we continue to develop and evolve our practices into the future.

## Ordinary Execution and Witnessing of Testamentary Documents

Ontario has strict rules regarding the execution of a will. Unlike many other provinces, Ontario is not a "substantial compliance" jurisdiction, which would allow a court to validate a will that has not been executed in strict compliance with formal legislative requirements.

Section 4 of the *Succession Law Reform Act*, RSO 1990, c S.26 (the "**SLRA**"), outlines the execution requirements of a will. According to subsection 4(1) of the SLRA, a will is not valid unless:

it is signed at its end by the testator or by some other person in his or her presence and by his or her direction;

the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and

two or more of the attesting witnesses subscribe the will in the presence of the testator.

Similarly, the *Substitute Decisions Act, 1992*, SO 1992, c 30 (the "**SDA**"), requires a continuing power of attorney for property or a power of attorney for personal care to be executed in the presence of two witnesses, who are also required to sign the document (subsections 10(1), 48(1)).

Under normal circumstances, a lawyer would meet with an estate planning client to directly supervise the execution of wills and powers of attorney, and often supply the witnesses (typically the lawyer him/herself and one of his/her staff). In a COVID-19 world, where many of us are working remotely with limited, if any, in-person contact with clients, the "in the presence of" requirement for the execution of testamentary documents is particularly challenging. At the time of execution of a will or shortly thereafter, the lawyer will commission an affidavit of execution sworn by one of the witnesses to the will. The affidavit of execution is later filed as part of the application for a Certificate of Appointment of Estate Trustee with a Will (also known as a "probate application") after the testator's death.

## Virtual Witnessing, Execution in Counterpart Now Permitted

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# THE DEFINITIVE RESOURCES FOR ESTATE LITIGATION IN CANADA

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## Information on wills and estates?

### We wrote the book(s)

- *Macdonell, Sheard and Hull on Probate Practice, Fifth Edition:* Ian M. Hull, Suzana Popović-Montag
- *Challenging the Validity of Wills, Second Edition:* Ian M. Hull, Suzana Popović-Montag
- *Feeney's Canadian Law of Wills, Fourth Edition:* Ian M. Hull, James MacKenzie, Suzana Popović-Montag
- *Advising Families on Succession Planning: The High Price of Not Talking:* Ian M. Hull
- *Power of Attorney Litigation:* Ian M. Hull



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On April 7, 2020, in recognition of the barrier to the ability to obtain lawyer assistance in estate planning resulting from the requirement that witnesses be physically present with the testator/grantor at the time of execution or attestation, which has been exacerbated by the COVID-19 pandemic, an emergency Order in Council was made pursuant to subsection 7.0.02(4) of the *Emergency Management and Civil Protection Act*, RSO 1990, c E.9, to permit the virtual commissioning and execution of wills and powers of attorney. Under the April 7, 2020 Emergency Order, the “in the presence of” requirement imposed by both the SLRA and the SDA may now be satisfied by “audio-visual communication technology”. The Emergency Order defines “audio-visual communication technology” as any electronic method of communication in which participants are able to see, hear, and communicate with one another in real time.

As of April 22, 2020, wills and powers of attorney can now not only be virtually executed and witnessed, but also executed and witnessed in counterpart. A further emergency Order in Council made under the *Emergency Management and Civil Protection Act*, RSO 1990, c E.9, on April 22, 2020, revoked and

replaced the previous Order dated April 7, 2020, to provide that identical copies of these documents may be executed in counterpart, with the copies together constituting the complete “Will” or “Power of Attorney”. While physical, “wet” signatures are still required (digital signatures are still not permitted), each signatory can execute a different physical (but identical) copy of the will or power of attorney, avoiding the need to circulate the same copy for execution by multiple people.

In order for virtual execution and witnessing and/or the execution and witnessing of a will or power of attorney in counterpart to be valid, one of the witnesses must be a licensee of the Law Society of Ontario.

Precautions should be exercised to ensure that the correct document is being executed and witnessed, as there may otherwise be some risk that the signed documents are not identical, leading to uncertainty regarding the validity and/or content of the document. Checklists outlining best practices in the virtual execution and witnessing of a will or power of attorney in counterpart are available here: [Will Execution in Counterpart](#)



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### [Checklist, Power of Attorney Execution in Counterpart Checklist.](#)

In the circumstances of the execution of a document in counterpart, it may be advisable to update the attestation clause to refer to the execution and witnessing of the will or power of attorney in this manner. A precedent attestation clause is available [here](#).

Furthermore, the existence of multiple copies that together form a complete will necessitates a different form of affidavit of execution, with each complete copy attached as an exhibit. A precedent affidavit of execution in respect of the virtual execution and witnessing of a will in counterpart is available [here](#).

These updates to the execution and witnessing requirements for wills and powers of attorney have eliminated significant safety concerns relating to the necessity of in-person meetings and the delivery of the same document from the client to each witness. These new developments are intended to remain effective during the current period of emergency. For the time being, these updates are welcome and have significantly enhanced our ability to assist clients with estate and incapacity planning during this period of uncertainty.

There remains an important distinction between the impact of the Emergency Order and the doctrine of substantial compliance. In substantial compliance jurisdictions, courts will typically review the will on a case-by-case basis, necessitating a legal proceeding to address the issue of the validity of the will, notwithstanding its procedural abnormalities. The Emergency Orders, however, simply permit a new procedure for the execution and witnessing of a will, without the need for an application to obtain validation by the court.

Innovative software, such as [Hull e-State Planner](#), can assist lawyers in gathering information from clients, obtaining and documenting their instructions, illustrating an estate plan, and formulating a draft will in a timely manner. Once the draft will is prepared, video-conferencing software can also allow lawyers to “meet” with clients virtually to review draft estate planning

documents prior to video execution with the witnesses in the testator's virtual presence. These tools can greatly enhance a drafting solicitor's ability to fulfill the planning needs of clients during the pandemic.

### **Holograph Wills**

In limited circumstances where a client may not have access to or may not be able to use audio-visual communication technology, lawyers can consider providing clients with the [information that they need to prepare their own holograph will](#), in accordance with section 6 of the SLRA. If this option is pursued, it is important to meet with the client once it is safe to do so to review the holograph will and, in most circumstances, prepare a more comprehensive, formal will to replace it.

The SDA does not include a provision for holograph powers of attorney. Accordingly, a continuing power of attorney for property or a power of attorney for personal care written entirely in the grantor's handwriting and unwitnessed is invalid. However, the SDA does include a curative provision that may permit some leniency in respect of documents that do not strictly comply with the formal execution requirements set out in the legislation (subsections 10(4), 48(4)).

### **Commissioning of Affidavits**

According to section 9 of the *Commissioners for Taking Affidavits Act*, RSO 1990, c C.17, “every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public.” The Law Society of Ontario states that the best practice for commissioning documents remains for the lawyer acting as commissioner to be in the physical presence of the deponent to commission the document(s). However, until further notice, the Law Society is interpreting section 9 as not requiring the lawyer to be in the physical presence of the client. An alternative means of commissioning, such as a video conference, will be permitted. If virtual commissioning is used, lawyers should be aware of and attempt to manage the risks associated with this method of communication.

## Estate Arbitration Litigation Management

In an effort to move estate matters forward during this period of instability, we have spearheaded an initiative called [Estate Arbitration Litigation Management \("EALM"\)](#). As part of the initiative, senior members of the Estates Bar assist the parties as arbitrators in determining various procedural (and certain substantial) issues. The issues are set out in an EALM agreement, which is signed by each party before the arbitration. The arbitrations are conducted via teleconferencing or video conferencing. If the decision of the arbitrator requires a court order to become effective (*i.e.*, the appointment of an estate trustee during litigation), the parties will agree to file a consent motion in writing to obtain the necessary order. Once court operations are resumed, the parties may return to court to address substantive issues or they may elect to proceed to arbitration or mediation.

A precedent EALM agreement is available [here](#). A list of arbitrators prepared to assist lawyers and their clients with EALM is available [here](#).

While the function of the courts is expected to expand on July 6, 2020, one can only expect that hearing dates will be in high demand. EALM may remain a suitable, flexible, and cost-efficient alternative to formal litigation even as the courts resume normal operations.

## Re-Execution of Wills After COVID-19?

After the pandemic has passed, lawyers are encouraged to meet with clients and review any estate or incapacity planning documents executed in compliance with the relaxed formal requirements during the state of emergency to ensure that the documents have been properly executed and witnessed. If there are any doubts in this regard, drafting solicitors may wish to have their clients re-execute wills and powers of attorney to ensure their validity.

While formally valid, there may also be some complications in terms of the application for a Certificate of Appointment of Estate Trustee with a Will in respect of a will that is virtually witnessed and/or executed in counterpart. Specifically, there is not yet

any certainty with respect to the form of affidavit of execution that will be accepted by the courts as part of a probate application. This may be another consideration in determining whether planning documents executed during COVID-19 should be replaced, in an effort to prevent expense and delay in an estate administration down the road.

## Concluding Thoughts

COVID-19 has resulted in some temporary limitations to the way that we can practice law. However, legislative amendments and innovative tools, including those referred to above, provide the opportunity to limit the disruption to an estates practice so that we can continue to assist clients during this period of uncertainty. Even after the pandemic passes, the planning practices and tools that we are seeing emerge may continue to assist us in serving our clients the best that we can in a variety of circumstances.

# OJEN NEWS

by Inga B. Andriessen



While the pandemic did result in the cancellation of the in-person Mock Trial High School Tournaments in Halton, OJEN created a virtual Mock Trial that allowed students to compete in a modified format and our Halton legal community stepped up, as always, to support this initiative.

We thank the many Halton lawyers who volunteered to answer questions for high school students, help them in drafting submissions, as well as play roles in the video portion of the Tournament.

In addition to assisting with the virtual Mock Trial, Halton County Law Association members also have been assisting law teachers by answering questions posed to them by their students and supporting the teachers in their virtual classrooms.

Many of the students were curious to know how the practice of law was continuing during the pandemic and we were all happy to provide our first-hand accounts to them.

As with everything, the 2020/2021 school year remains up in the air. As a result, the 2021 Mock Trial format has still not been decided.

However, there will be continuing opportunities for all members of the HCLA to volunteer to assist with a variety of initiatives for the OJEN Halton Committee. Keep an eye out for requests to help: they go quickly !

We thank all of you for your donations of time and assistance.

## CLASSIFIED ADS

### Looking for a Will

Anyone with information regarding a Will for Brenda Jane Whitfield of Burlington (dob April 9, 1956), who passed away in January 2020 is asked to contact her daughter, Nicole Gellie at [bjwhitfield1269@gmail.com](mailto:bjwhitfield1269@gmail.com)

### Looking for a Will

Anyone with information regarding a will for David John Young (DOB May 1, 1956) is asked to contact his daughter Ashley Grant at 905-869-0952 or by email at [agrantrm@gmail.com](mailto:agrantrm@gmail.com)

### Looking for a Will

Anyone with information regarding a Will for William John Stewart of 348 Kingsleigh Court, Milton, who passed away on May 29, 2020 is asked to contact Tammy Cranston at Wolfe, Smith & Forster at 519-843-3650 or email [tcranston@wolfelawfirm.com](mailto:tcranston@wolfelawfirm.com)



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# HCLA NEWS

*Newsletter of the Halton County Law Association*

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