HCLA NEWS

Newsletter of the Halton County Law Association

Volume 14 Issue 3 Summer 2023

A look back at this year's AGM and HCLA award recipients!

Justice Gray - Justice Douglas K. Gray Award for Excellence in Civil Litigation
Cathryn Paul - Justice Victoria Starr Award for Excellence in Advocacy for Families and Children
Stephen MacDonald - Eric M. Swan Award for Civility
Nigel A. Gunding - Alan B. Sprague Award for Excellence

PRESIDENT'S REPORT

by Kathy Batycky

Hello everyone!

We are well into the wonderful warm days of summer, and your Association has a new policy regarding use of your emails, and an upcoming event to announce.

We would like to thank all members who took the time to respond to our survey about use of members' emails. We have now created a policy for the use of the HCLA email list.

Each member can now choose which emails they wish to subscribe to, by utilizing the email subscriptions option in the Membership Profile. When registering as a member each member is subscribed to HCLA-related emails. HCLA-related emails are emails for HCLA CPDs, events, notices, and membership-related matters (such as membership renewal) as well as LSO CPDs, events and notices. By entering your email address when signing up as a member, you have consented to receive HCLA-related emails. However, all members have the right to unsubscribe by selecting unsubscribe at the bottom of the email message or by contacting the HCLA directly at info@haltoncountylaw.ca. Once you unsubscribe you will not receive any emails from the HCLA, and renewal of membership notices will be sent by ordinary mail. If a member wishes non-HCLA related emails, such as events that are not an HCLA-event, you can do so by going into your member profile and checking off the different options.

In addition, it is now required that any member who wishes an email to go out to the members who choose to subscribe to non-HCLA-related events, that the notice of the email makes it clear that the event is not an HCLA event, and a contact name and information is provided for any concerns or information needed regarding that specific event. This new policy is now in effect.

I would like to thank everyone who attended our annual Charity Golf event at the Lionhead Golf Club. Thanks to the generosity of all those who attended, and our gracious sponsors Martin & Hillyer and SB Partners, we raised $2,500 for the Women's Centre of Halton.

Don't miss out on the second annual HCLA Family Fun Day. This fun packed event for the whole family is back again this year and is being held on Saturday September 16, 2023 from 10:00 a.m. to 12:30 p.m. in Bronte Park. There will be snacks, games and painting instruction for all guests. Come join us and not only have your family enjoy the playground and park, but also have the chance to create an artwork that you can take home. Registration is free and all families are welcome.

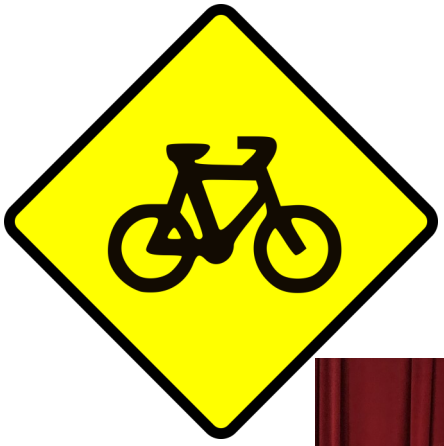
Arielle has outlined some of our other events coming up in the fall in her report.

Congratulations are in order for one of our members, Jennifer Gold, who was elected as the Central West Regional Bencher for the Law Society. Congratulations to Jennifer! Jennifer's first report as our CW Bencher is located on page 4.

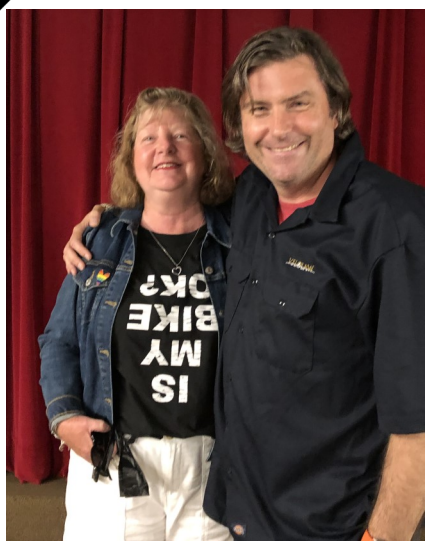
Finally, I would be remiss if I did not correct the information given in my report for the winter newsletter about the construction that had been ongoing on the west side of the courthouse. That is not yet the "CUE hub", but was updating entrances. We are hoping that the CUE Hub construction will start soon and we will provide any updates on that when we receive an update from the government.

Enjoy the rest of the summer!

Cycling and the Law

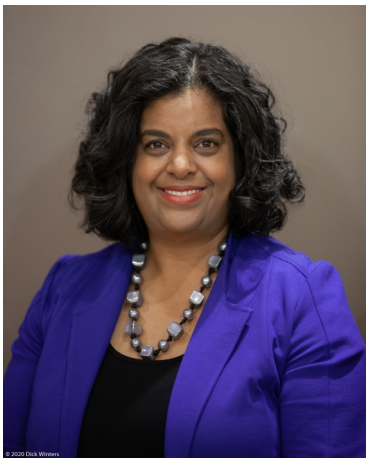


Thank you to Ian Brisbin, of Martin & Hillyer Associates and Velo Law, who recently offered a very informative seminar entitled The Law of Cycling. The session was held at Burlington Public Library Central Branch on Thursday, July 13th and provided an overview of the rules of the road and best bike safety strategies. The information session also covered the rights and responsibilities of cyclists and also how to become a better advocate for safe cycling in your community.



BENCHER'S REPORT

by Jennifer Gold



Now that the 2023 Bencher election is over, the real work begins. New Benchers have attended orientation sessions and two meetings of Convocation. While most of the Benchers ran as a coalition for the election, I can assure you that we have independent ideas and opinions that we do not hesitate to share. We are alert to our fiduciary duty, the public interest and supporting the professions. My hope for the next four years is that we meaningfully support excellence in the professions, improve access to justice and meet the challenges posed by artificial intelligence. I welcome your feedback regarding issues facing the professions. I can be reached by email at jennifer@woodgold.ca if you would like to share your thoughts and concerns.

Five Exemplary Individuals Honoured with LLDs

The Law Society honoured six distinguished individuals with degrees of Doctor of Laws, *honoris causa* (LLD) at Call to the Bar ceremonies held in June. They are the Right Honourable Richard Wagner, P.C., Chief Justice of Canada, the Honourable Kathryn N. Feldman, the Honourable Bruce G. Thomas, Kimberly R. Murray and Mark J. Sandler.

An LLD is awarded in recognition of outstanding achievements in the legal profession, the rule of law or the cause of justice. Read more about these Honorary LLD recipients and their notable contributions to the Canadian legal community on the Gazette.

Call for Applications: External appointments

As part of its mandate, the Law Society recommends and makes appointments to a variety of boards, councils and committees. The Law Society is currently seeking applications from qualified lawyers for the following:

- Civil Rules Committee
- Ontario Judicial Council

Visit the external applications page for more information and to apply by July 28, 2023.

Seeking Feedback: Consultation for Certified Specialist Program

The Law Society is seeking feedback on the future of the Certified Specialist Program. The consultation currently underway is seeking feedback on a list of targeted questions that will help determine whether the Certified Specialist Program should remain as is, be modified or eliminated.

The Law Society is seeking insight and input from lawyers, paralegals, legal organizations and members of the public. Following the conclusion of the consultation on October 1, the Professional Development and Competence Committee will review submissions and make recommendations to Convocation before the end of 2023.

Visit the LSO website to learn more about the Certified Specialist Program and share your feedback by completing our online questionnaire or by emailing PolicyConsultation@LSO.ca.

Request for Applications: Coaches and Advisors

The Law Society's Coach and Advisor Network (CAN) is seeking applications from licensees interested in becoming a coach or advisor.

Through the CAN program, volunteer coaches and advisors can hone their skills, stay connected to the profession and earn time toward CPD requirements, all while helping other licensees improve their professional competence.

Time commitments are as little as one 30-minute phone call for advisors or four hours over a three-

month term for coaches. Learn more about how to become a coach or advisor and submit your application online.

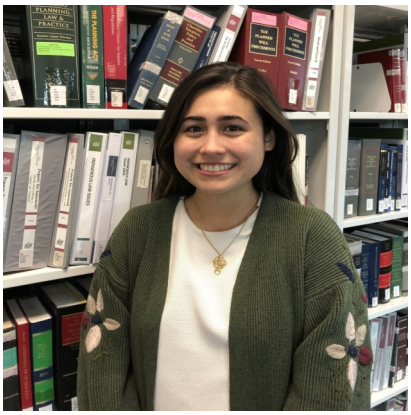
Guide to Experiential Training for Licensing Candidates, Principals and Supervisors

The Law Society recently released the Guide; a new series of online learning modules, videos and resources to help experiential training candidates (such as articling students) acclimate to legal practice and to prepare supervisors and principals to orient their candidates using effective practice management techniques. Explore the Guide today.

I wish all of you a restful summer and look forward to seeing you at some of the Halton County Law Association events in September!

LIBRARY NEWS

by Arielle Vaca



I hope all Halton County Law Association members are having a safe and happy summer!! Here is a list of HCLA CPDs and events to look forward to in the fall.

HCLA Family Fun Day – September 16, 2023

The Halton County Law Association invites all HCLA Members and their families to join us for some fun in the sun… with snacks, outdoor games/activities, and a painting instruction for all guests! The Family Fun Day will be held on Saturday, September 16 from 10:00 am – 12:30 pm at Bronte Park in Oakville. Click here for more details and to register.

Lexis Advance Quicklaw & Practical Guidance Training – September 27, 2023

The Halton County Law Association presents a hybrid training session at the HCLA library located within the Milton Courthouse on Wednesday, September 27 from 12:00 pm – 1:30 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). Click here to register.

Thomson Reuters Westlaw Canada Training Session – October 25, 2023

The Halton County Law Association presents a virtual training session on Wednesday, October 25 from 12:00 pm – 1:00 pm. Join us with Thomson Reuters trainer Jeremy Dunn to focus on the content and functionality found within the CriminalSource, FamilySource, and Estates&TrustsSource subscriptions that are available to all members and visiting counsel in the HCLA library. This FREE training session is exclusive to our HCLA Members and will provide 1.0 Professionalism Hour(s). Click here to register.

Annual Family Law Seminar - November 3, 2023

Join us on Friday, November 3 at Rattlesnake Point Golf Club. There will be lunch with registration from 12:00 pm - 1:00 pm, and the session starts from 1:00 pm - 4:30 pm. A Zoom option is available! Click here for more details and to register.

SAVE THE DATES – More details and registration to come soon

· HCLA Mentor Social – Thursday, September 28 Beertown, Oakville

· HCLA Holiday Party – Thursday, November 16 at Paletta Mansion, 4250 Lakeshore Road, Burlington, L7L 1A6

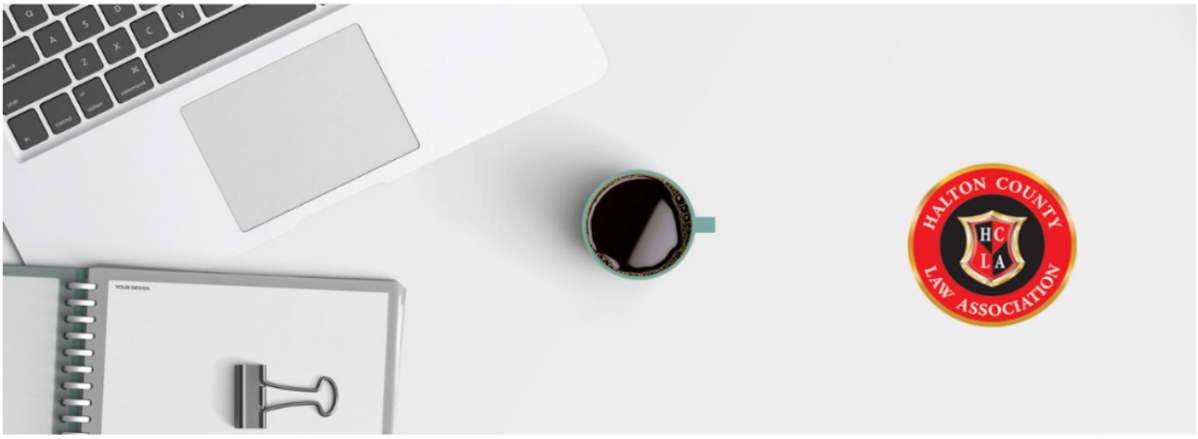
· HCLA Open House – Thursday, December 7 at the Milton Court House, HCLA Library & Lounge

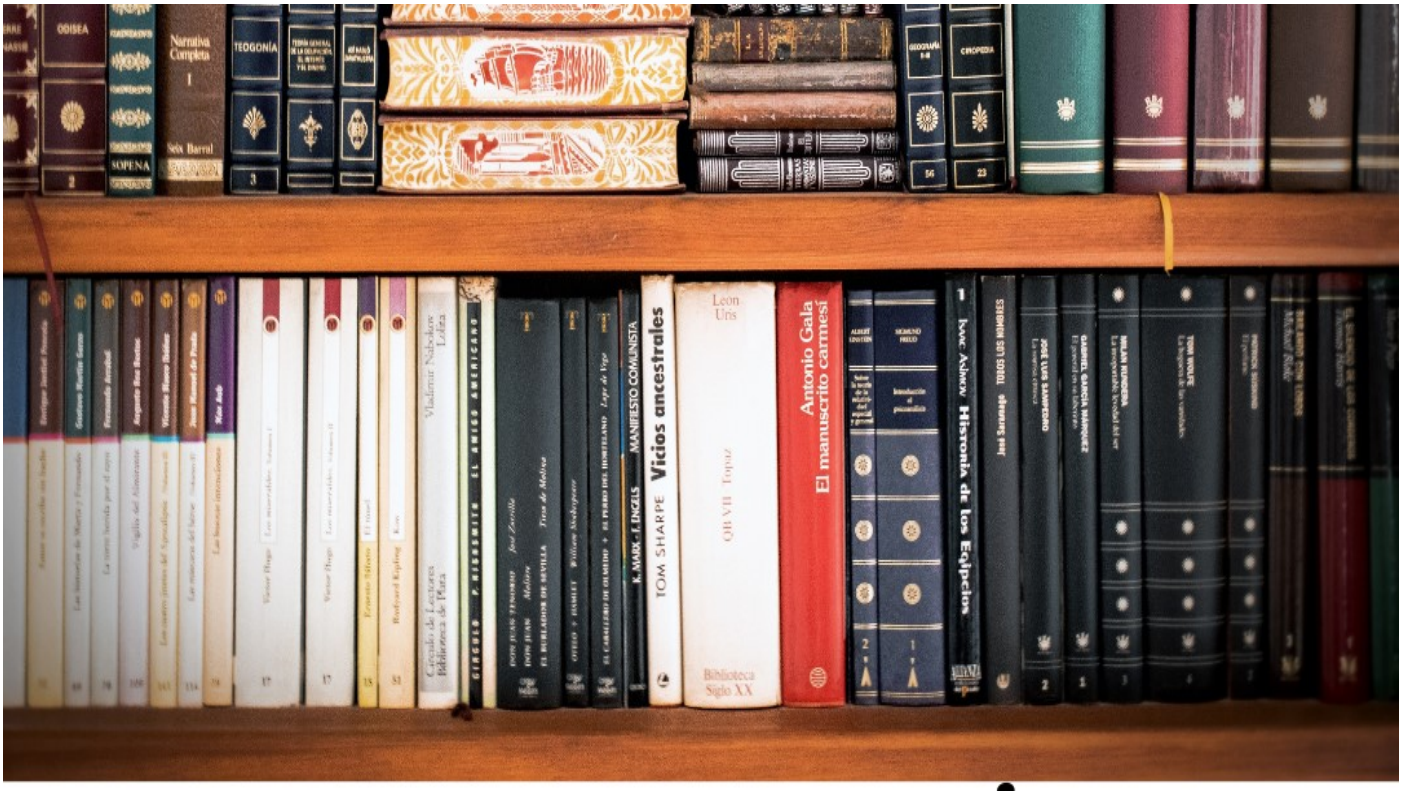
Westlaw Canada has shared their training calendar for Ontario lawyers in September and November. Please click here to register. These programs contain 1.0 hour(s) of Professionalism content. Please note, these training sessions are not affiliated with the HCLA, and staff will not be able to assist you with the registration process.

FREE HCLA MEMBERSHIP

for Articling Students!

For more information, please contact the Librarian at 905-878-1272
E: info@haltoncountylaw.ca | www.haltoncountylaw.ca





LAW SOCIETY OF ONTARIO
accredited

This program contains 1.5 Professionalism Hour(s).

This organization has been approved as an Accredited Provider of Professionalism Content by the Law Society of Ontario.

Join us!

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

WEDNESDAY SEPTEMBER 27 2023

12:00 - 1:30 PM

REGISTER ONLINE OR CALL 905-878-1272

FREE PIZZA LUNCH FOR IN-PERSON ATTENDEES!

HCLA

Family Fun Day!

Bronte Creek Provincial Park

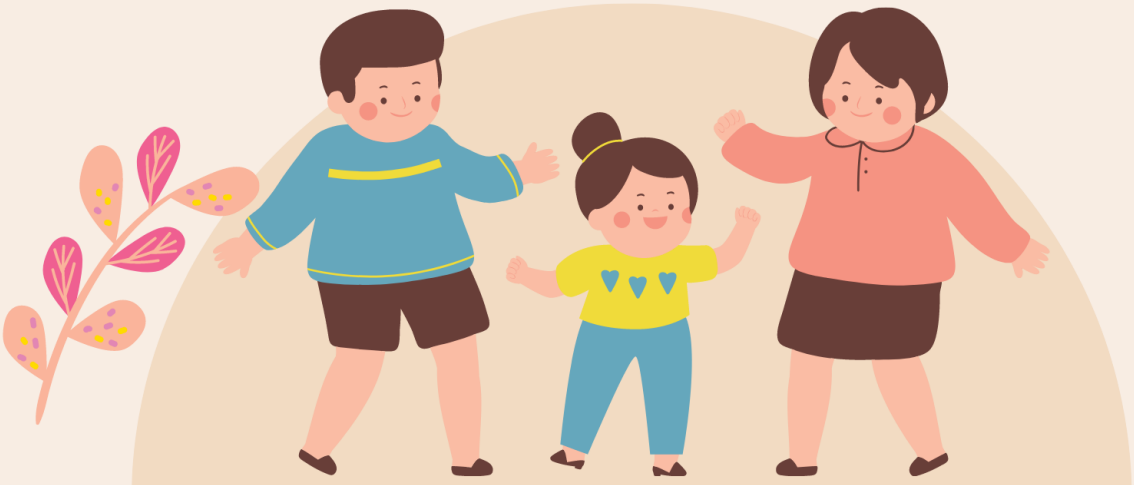
1219 Burloak Dr, Oakville, ON L6M 4J7

Saturday, September 16th | 10:00am - 12:30pm

Join the HCLA for some fun in the sun...
with snacks, games & a painting instruction for all guests!!

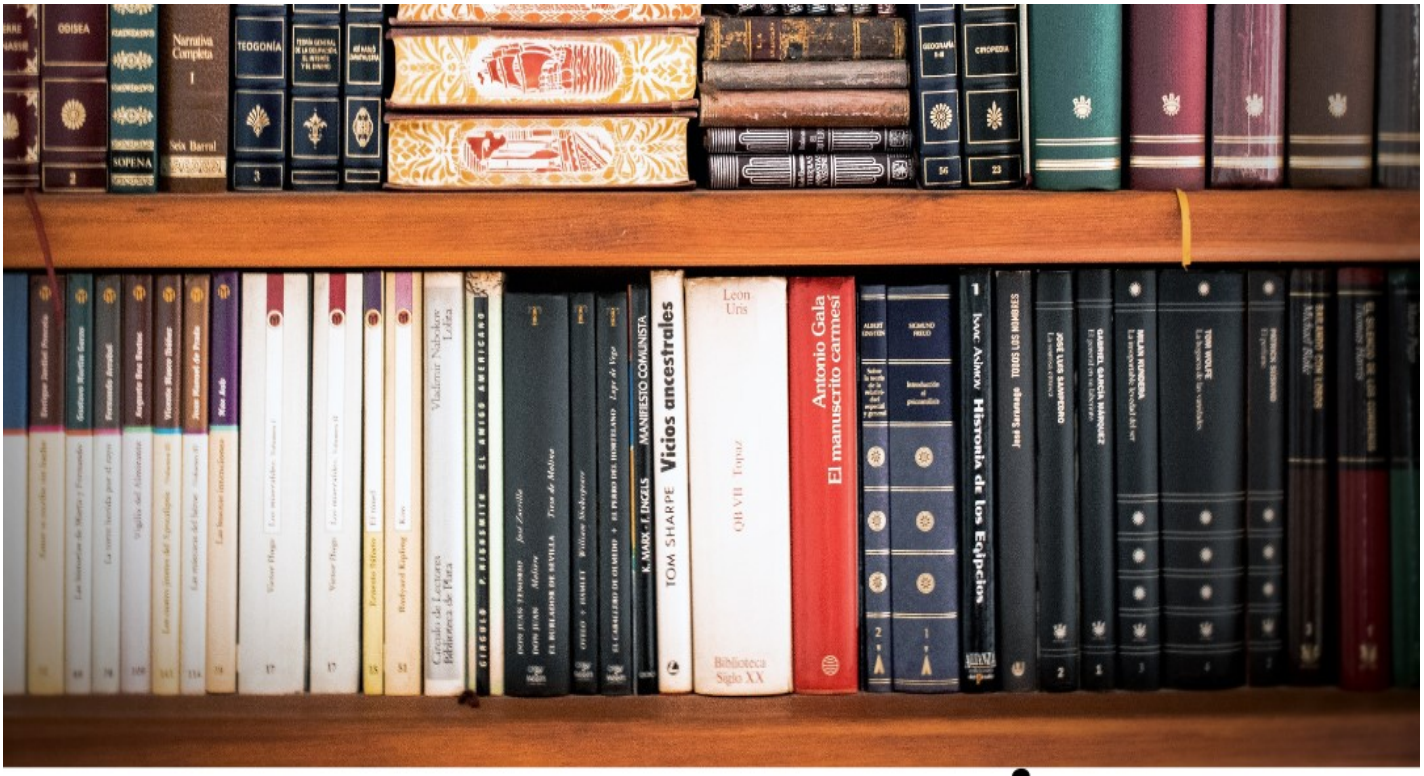
Registration is free & everyone is welcome to attend!!

Provincial Day Parking: $18 per vehicle



PLEASE NOTE THAT IN THE EVENT OF INCLEMENT WEATHER, ALL ACTIVITIES WILL BE CANCELLED.

Online register through the HCLA website www.haltoncountylaw.ca



LAW SOCIETY OF ONTARIO
accredited

This program contains 1.0 Professionalism Hour(s).

This organization has been approved as an Accredited Provider of Professionalism Content by the Law Society of Ontario.

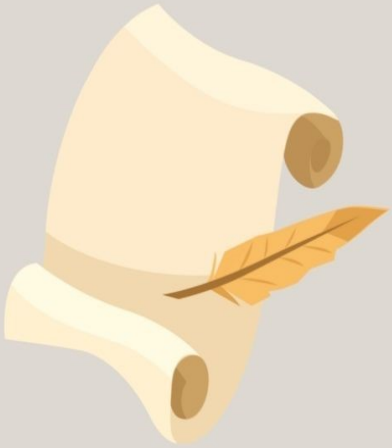
Join us!

Thomson Reuters Westlaw Canada Training Session on Zoom

WEDNESDAY OCTOBER 25 2023

12:00 - 1:00 PM

REGISTER ONLINE OR CALL 905-878-1272



HAVE YOU RECENTLY TAKEN OVER A LAW PRACTICE?

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

Please let us know by emailing the
librarian at: info@haltoncountylaw.ca

CIVIL LITIGATION NEWS

by James Page

THERE'S NO TORT OF FAMILY VIOLENCE – EXISTING TORTS ARE SUFICIENT

On July 7, 2023, the Ontario Court of Appeal delivered its decision in *Ahluwalia v. Ahluwalia*. It found that there is no tort of family violence because existing torts are sufficient to deal with patterns of long-term emotional or physical abuse. The court also found that existing torts (such as assault and battery) can be pursued as part of the family law litigation. Separate personal injury lawsuits do not have to be initiated.

Summary of Facts

The parties were a former husband and wife. The marriage was characterized by a patten of physical and emotional abuse and financial control by the husband over his wife. They were married in 1999 and separated in 2016. There were three specific instances of violence during the course of the marriage. In 2000, the husband punched and slapped his wife causing extensive bruising on her arms and body. In 2008, he slapped his wife, pulled her hair, and strangled her. In 2013, the husband was drunk, restrained his wife by her wrists, shook her, and slapped her across the side of the head. The husband also controlled the finances, closely monitored his wife's spending, and closed their joint accounts and credit cards in contemplation of separation.

Despite this history of abusive and controlling behavior, Ms. Ahluwalia did not leave the relationship because of family expectations, her children, and because she was socially and financially dependent upon her husband. Her husband also used physical violence during the marriage to control her and condition her to his control.

Ms. Ahluwalia brought an action for divorce, child support, spousal support, and property equalization, but also claimed damages because of her husband's abusive and controlling behavior during the marriage. She sought $100,000 in damages.

Trial Decision

The trial judge held that the *Divorce Act* was not a complete statutory scheme for addressing all legal issues in a marriage. For instance, spousal support awards were narrowly focused on compensation to remedy the financial disparity between the parties following the end of a marriage. It was not about a party's fault or misconduct. She created the tort of family violence to address the harms that cannot be compensated through spousal support awards.

According to the Trial Judge, a plaintiff could prove the tort of family violence by establishing any one of three elements:

1. Intentional conduct that was violent or threatening.
2. Behaviour calculated to be coercive and controlling of the plaintiff.
3. Conduct the defendant would have known with substantial certainty would cause the plaintiff to subjectively fear for their own safety or that of another person.

However, there had to be a pattern of conduct that included more than one incident of wrongful behaviour.

Her Honour found that the husband was liable for the tort of family violence (on all three potential modes) and in the alternative found that he was lia-

ble for assault, battery, and intentional infliction of emotional distress. Her Honour awarded damages to the wife of $150,000 - $100,000 for general and aggravated damages, and $50,000 for punitive damages. She also awarded the wife retroactive and ongoing child support, retroactive and ongoing spousal support, and an equalization payment. The wife was awarded the entire net proceeds of the matrimonial home as a result.

The Trial Judge held that the new tort was warranted in part because existing torts do not adequately address patterns of conduct which when looked at cumulatively, rather than as individual discrete incidents, cause harm worthy of compensation, even where the individual incidents are not tortious in and of themselves.[1]

Positions on Appeal

In the appeal, the wife argued that the tort of family violence should exist, or in the alternative, a narrower tort of coercive control should exist. Coercive control would be made out where a person,

1. In the context of an intimate relationship,
2. Inflicted a pattern of coercive and control behaviour,
3. That when looked at cumulatively was reasonably calculated to induce compliance, create conditions of fear and helplessness, or otherwise cause harm.

The husband admitted he was liable in damages for his conduct, but argued among other things that (a) liability should be restricted to existing torts, (b) the new tort should not exist because it is too easy to prove and would create a floodgate of litigation, (c) the damages awarded were too high, and (d) there was no basis set out for the punitive damages.

Decision on Appeal

The Ontario Court of Appeal found there was no tort of "family violence" and no tort of "coercive control" either. New torts can only be created where they are necessary to address a wrong. Existing torts were sufficient to address the wrongs the Trial Judge was concerned about.

In this case, the husband committed battery, assault, and intentional infliction of emotional harm.

Battery is made out when there is a direct interference with one's person.[2] The interference must be harmful or offensive. The husband committed battery by punching, slapping, shaking, and strangling his wife, and by pulling her hair.

Assault is made out where the defendant intentionally creates the apprehension of imminent harmful or offensive conduct. Living under the shadow of harm or offensive conduct can be enough to meet the imminent standard. Ms. Ahluwalia lived in a near constant fear of imminent harm because of her husband's constant threats which were "solidified" by the actual physical and emotional harm she suffered at his hands.

The tort of intentional infliction of emotional harm is satisfied where (a) the defendant's conduct was flagrant and outrageous, (b) the conduct was calculated to harm, and (c) the conduct caused the plaintiff to suffer a visible and provable illness.[3] In this case, Ms. Ahluwalia suffered from depression, sleep disturbances and emotional distress because of her husband's obviously flagrant and outrageous behaviour – and this was enough to meet the third element of the tort.

Nevertheless, part of the Trial Judge's basis for creating the new tort was because existing causes of action did not adequately address patterns of wrongful or concerning conduct that may not be tortious in and of themselves. The Court of Appeal, however, disagreed. According to the ONCA, patterns of behaviour, when looked at cumulatively, can help establish liability for existing torts, they can provide a foundation for higher damage awards, and they are relevant to elevated costs awards – and this is documented in existing case law.

With respect to damages, the Court of Appeal found that the Trial Judge's assessment of general and aggravated damages ($100,000) was warranted, though on the higher end. But it found that punitive damages should not have been awarded. Punitive damages are about denunciation and deterrence and $100,000 was enough to achieve those goals. Respectfully, I disagree with the Court – I find $100,000 an insufficient sum. Mr. Ahluwalia physically and emotionally abused his wife. He punched her, slapped her, strangled her, and controlled her. He also insulted and belittled his wife about her appearance and her difficulties conceiving. He threat-

ened to leave her and their children penniless. She was in an almost constant state of fear. He caused her to spiral into major depression. With all that said, I suspect the facts that the husband had criminal charges pending and limited remaining finances were part of the Court's calculus.

While many aspects of this decision were very interesting, for me, the most interesting part of it was this: the Court held that existing torts can be claimed and pursued in the context of a family law proceeding. Yes, that's right. A separate civil action does not have to be initiated. This, in my view, is a massively significant pronouncement by the ONCA. For reasons beyond me, it does not seem to be getting the same press as the Court's refusal to sanction the tort of family violence. This pronouncement drastically changes what was thought to be the typical landscape before *Ahluwalia*.

And for lawyers intending to include personal injury torts in their family law proceedings because of this decision, I would caution you to become very, very familiar with the applicable limitation periods and the Ontario *Limitations Act*.

In the meantime, we will see if this latest ruling gets appealed to the Supreme Court of Canada.

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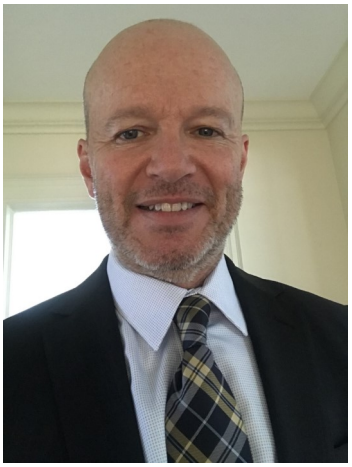
1. This is my understanding.
2. The interference is direct if it is the immediate consequence of a force set in motion by the defendant.
3. A visible and provable illness does not require expert medical evidence. Further, a plaintiff does not need a psychiatric diagnosis to establish a visible and provable illness. It's the symptoms and effects of a mental injury that are important. See *Ahluwalia v. Ahluwalia*, 2023 ONCA 476 at para. 70. Also see *Saadati v. Moorhead*, 2017 SCC 28 (CanLII) at paras. 29-35, & 38.

CRIMINAL NEWS

by Russell W. Browne



The "***Taylor Test***" still stands - at least for now

Despite a recent challenge at the Ontario Cour of Appeal[1] in ***R. v. Bharwani,***[2] the ***Taylor Test***[3] remains the leading case governing the interpretation of the fitness provisions contained in s. 2 of the ***Criminal Code***[4] - at least for now.

Under ***Taylor***, an individual is fit to stand trial if they have "limited cognitive capacity". Primarily functional in approach with a low threshold, s. 2 as interpreted by ***Taylor*** essentially asks whether an accused has sufficient mental fitness to participate in the proceedings in a meaningful way.[5]

In ***Bharwani***, the appellant was joined by the intervenor, the Criminal Lawyers Association in seeking to convince the ONCA to carve out an exception in s. 2 for self-represented accused by applying a separate test coined the "analytic capacity test" in a contexualized and purposeful analysis of fitness.

In March of 2017, following a ten-week jury trial, the self -represented Mr. Bharwani was convicted of first - degree murder.[6]

In January 2013, the 18-year-old offender moved out of his family's home following several years of deteriorating mental health. He moved into a basement apartment with three other tenants, including a 23-year-old female international student named Nyumai Caroline Mkurazhizha. Tragically, only five days later, he killed her by striking her with a fireplace poker and then strangling her to death. After the homicide was he diagnosed with schizophrenia.[7]

The proceedings were unduly complicated as Mr. Bhawrani's fitness to stand trial was squarely in issue. After the preliminary inquiry, he fired his counsel and continued thereafter self-represented.[8] During the lead up to the trial, he was subject to multiple court-ordered assessments, a treatment disposition and two fitness hearings.[9] Yet during the trial, his mental health challenges continued to manifest but no one suggested a halt to conduct further fitness inquiries.[10]

On appeal, the suitability of the ***Taylor Test*** to self-represented accused was litigated. The appellant and intervenor contended that unrepresented individuals suffering from serious mental illnesses like schizophrenia such Mr. Bharwani ought to be assessed under a separate regime that would involve a more contextual and purposive approach so that only accused who have the capacity to communicate rationally and make rational decisions in their own best interests would be found fit.[11]

Such an approach would involve the trier of fitness in enquiring into a much broader and more nuanced range of factors than that currently provided for in the ***Taylor Test*** including the complexity of the proceedings, the anticipated length of the trial, whether there are co-accused and whether the accused is self-represented. Rational decision-making and best-interests would be injected into the analysis.[12]

In dismissing this proposal, the ONCA upheld ***Taylor's*** use of a "single test for fitness that is applied equally to all accused.[13] It found that the wording of s. 2 already accommodates both represented and unrepresented accused.[14] [15] The two-track system was rejected on two grounds. First, it was too unwieldly for its potential to draw the Court beyond the narrow confines of the statute into a wide-ranging exploration into inappropriate questions such as the self-represented accused 's capacity to make rational decisions regarding fundamental issues concerning the conduct of their defence. Secondly, hinging the choice of the test on the status of an accused would be too cumbersome given the likelihood that

an accused's status might frequently fluctuate between representation and dismissal of counsel.[16]

Nevertheless, despite maintaining the status quo, until hearing from the SCC, ***Bharwani*** nevertheless provides helpful clarification for counsel in gauging fitness, noting that an accused:

- must have a reality-based understanding of the nature and object and possible consequences of the proceedings" and
- be able to "understand relevant information, apply that information in the context of [their]decision-making, and
- intelligibly communicate" with counsel or the court (if unrepresented).

However, while an accused "must have the ability to make decisions", these need not be made "in their own best interests".

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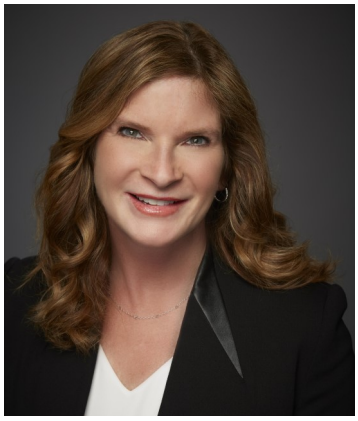
1 Hereinafter "ONCA".
2 2023 ONCA 203 (CanLII), hereinafter "Bharwani".
3 R. v. Taylor, 1992 CanLII 7412, hereinafter "Taylor".
4 RSC 1985, c C-46, hereinafter "s. 2".
5 Para. 98, Bharwani.
6 Para. 10, Bharwani.
7 Paras. 3-4, Bharwani.
8 Para. 5, Bharwani.
9 Para. 42, Bharwani.
10 Para. 8, Bharwani.
11 Para. 126, Bharwani.
12 Paras. 134, 139-140, Bharwani.
13 Para. 138.
14 Para. 92, Bharwani.
15 "Bharwani - Taylor Test Summary - Important Points," Shukariy Law, criminallawyers.ca accessed July 1, 2023.
16 Paras. 135-138
17 Supreme Court of Canada.

ESTATES NEWS

by Suzana Popovic-Montag & Nick Esterbauer



ENFORCING A SUPPORT ORDER AFTER DEATH

Suzana Popovic-Montag, Hull & Hull LLP

In Ontario, if a person who provides financial support to one or more dependants passes away, the law is well settled that the person's estate may be required to continue to provide financial support after the payor's death. Part V of the *Succession Law Reform Act* (the "***SLRA***") expressly addresses when an estate can be ordered to pay dependant's support.[1] However, if there is already an order for child support or spousal support in place at the time of death, it can be unclear whether it is necessary to seek dependant's support under the *SLRA*. Accordingly, this article addresses when pre-existing support orders may still be enforceable after death.

Types of Support Orders

Courts may order the payment of child support and spousal support under either the *Divorce Act*[2] or the *Family Law Act* (the "***FLA***").[3] For married couples, support can be obtained under both pieces of legislation. The *Divorce Act* applies when a married couple seeks a divorce and support is ordered as part of the divorce proceedings, but a support order ought to be obtained under the *FLA* rather than the *Divorce Act* if a couple

has separated but are not yet divorcing, or have not yet commenced divorce proceedings. It is also interesting to note that if a support order is issued under the *FLA* before the couple is divorced, that order may remain enforceable after the divorce is complete if the issue of support is not adjudicated as part of the subsequent divorce proceedings.[4]

Overall, the *FLA* has much broader application than the *Divorce Act* because it is not limited to married couples. Common law partners may be ordered to pay support under the *FLA*,[5] and, in the context of child support, a parent or someone standing in the place of a parent can also be ordered to pay support.[6]

When Support Orders Will Bind an Estate

In 2014, the Ontario Court of Appeal confirmed in *Katz v. Katz* that, as a general rule, a payor's obligation to pay support or maintenance pursuant to an order issued under the *Divorce Act* will end when the payor dies.[7] In other words, a support order under the *Divorce Act* will not usually bind the payor's estate. However, there are exceptions to this general rule. If an order expressly states that it is binding upon the payor's estate, the order will remain enforceable after death. Alternatively, if the order states that it is to be in force for a set period of time, it may also be enforceable after the payor passes away (or cease to be effective at some other time, including long before the payor's death).[8] The court may also include a clause in a support order to address how support that, at the time of the payor's death, is not yet due and payable, ought to be handled.[9]

While the *Divorce Act* was updated in 2021,[10] after the Court of Appeal confirmed the general rule in *Katz*,[11] none of the amendments to the *Act* address whether a support order should be enforceable against the estate of a payor.[12]

Unlike the *Divorce Act*, the *FLA* expressly provides that support orders are binding on the payor's estate unless the order directing the payment of support provides otherwise.[13]

Sometimes it may not be clear whether a support order was issued pursuant to the *Divorce Act* or the *FLA*. For example, in *Appleyard v. Zealand*,[14] the court was asked to enforce a support order against an estate made in a proceeding in which the applicant sought relief under the *Divorce Act*, and under

the *FLA* in the alternative. Under those circumstances, the Court of Appeal held that the doctrine of paramountcy generally gives rise to a presumption that the order was made under the federal legislation, meaning that the support order was granted under the *Divorce Act* and, as a general rule, was not binding on the estate.[15]

Applying for a Support Order After the Death of the Payor

If there is no support order in place under the *FLA* or the *Divorce Act* at the time of death, it is advisable for a dependant to seek support from the estate under Part V of the *SLRA*,[16] rather than applying for support under family law legislation. In the words of Justice Herold, "[a] claim for support … must be made against a spouse, not a deceased spouse."[17]

This rule also applies if an interim order for support has already been granted under the *FLA* – a final support order cannot be issued after the payor has died, and an application for such an order under the *FLA* will simply abate. The correct procedure is to instead seek a final determination of the deceased's support obligations under the *SLRA*.[18]

There does, however, appear to be an exception to this general rule that post-death support is to be sought by way of application under the *SLRA* - a support application may be determined after the death of the payor if the proceedings were commenced when the payor was alive. In *Hillock v. Hillock Estate*, for example, when faced with an application for interim support under the *Divorce Act*, which was served prior to the spouse's death, the court held that it could order the estate to pay support under the *Divorce Act* rather than the *SLRA*, even though the court no longer had jurisdiction to grant a divorce.[19] Under these circumstances, the court ordered the estate to pay a lump sum of support rather than make periodic payments, as there was no advantage to keeping the estate open to pay support.[20]

Support Arrears Enforceable Against an Estate

If the deceased owed support arrears at the time of

death, those arrears typically will remain enforceable against the estate, even if the support order from which the arrears arise ceases to require support payments after death.[21]

Advantages of Enforcing Pre-Existing Support Orders

The question of whether an estate can be compelled to honour a pre-existing support order may seem pedantic in light of the fact that a dependant can simply apply for support out of the estate under Part V of the *SLRA*. However, there are a number of factors which may make enforcing a support order preferable. For example, it likely makes more sense fiscally to enforce an existing order providing for adequate support, particularly if the proceedings that yielded the support order were contested and expensive for the dependant to pursue. Commencing new proceedings under the *SLRA* may require the dependant to incur additional, and perhaps unnecessary, costs, particularly if the existing order can simply be enforced.

Another factor to bear in mind is that if a dependant brings an application for support under the *SLRA* rather than enforcing an existing support order, there is a risk that the quantum of support will be reduced. Section 62(1) of the *SLRA* requires the court to consider a variety of factors when determining the amount and duration of support, if any, payable, including competing claims against the estate.[22] The courts in Ontario have also directed that a dependant's entitlement to support must be considered in light of claims that other dependants may pursue, in addition to whether non-dependent persons have a legal or moral claim to the estate.[23] Given these additional considerations, a support order under the *SLRA* may not match an order made against the payor prior to his or her death. The outcome of a dependant's support application is impossible to predict, whereas the relief available upon the successful enforcement of an existing support order is clear.

Support Orders May Be Varied Following the Death of the Payor

If there is a support order in place that binds the estate, the personal representative of the estate may apply to vary that order.[24] It may be necessary for the estate to seek this relief if, for example, it has limited assets. The law is clear that if there are insufficient assets to provide for any or all of the dependants of a deceased person, the court may exercise its discretion and use the limited assets for the benefit of only the minor dependants.[25] However, as noted by the Court of Appeal in *Dagg v. Cameron Estate*, there is not yet case law addressing whether an estate may move to vary the amount of support payable under a support order for the purpose of calculating the amount of support payable to a dependant under the *SLRA*, specifically subsection 72(7).[26]

A support order issued under the *Divorce Act* in Ontario may not be varied retroactively following the death of the payor unless the original order indicates that it will bind the payor's estate.[27] However, it is interesting to note that the estate of the payee spouse may continue an application to vary a child support order under the *Divorce Act* if the payee spouse dies before the application is heard.[28]

Ensuring a Support Order Is Honoured Following the Death of the Payor

While the focus of this article has been the enforceability of support orders following the payor's death, it merits noting that there is a simple way to avoid the difficulty of enforcing a support order against an estate, regardless of whether the order is issued under the *Divorce Act* or under the *FLA*. If the order includes a clause that requires the payor to maintain a policy of life insurance to cover outstanding support obligations in the event of the payor's death, a dependant should not need to wrangle with the payor's estate regarding support as long as the payor actually maintained a policy with sufficient proceeds to cover those support obligations.[29] Since the obligation to pay support will give rise to a creditor-debtor relationship, it may not be possible for other dependants to claw the policy funds needed to satisfy the deceased's support obligations back into the estate to be shared with other dependants.[30]

Conclusion

The issue of maintaining financial support after a loved one has passed away can present an untimely challenge, particularly if a dependant is grieving their loss. If the deceased was already paying support pursuant to a court order at the time of death, a good first step would be to investigate whether that order can be enforced against the estate or, alternatively, whether the payor was required to obtain and maintain insurance to cover the support obligation. While there are some general rules as to when a support order will bind an estate, it is ultimately necessary to examine each support order on a case-by-case basis. Where terms of existing court orders fall short in providing adequate support for dependants, courts also have broad discretion to order support under Part V of the *SLRA*.

1 Succession Law Reform Act, R.S.O. 1990, c. S.26, Part V – Support of Dependants [SLRA].
2 Divorce Act, R.S.C. 1985, c.
3 (2nd Supp.), ss. 15.1, 15.2. 3 Family Law Act, R.S.O. 1990, c. F.3, Part III – Support Obligations [FLA].
4 FLA, supra note 3, s. 36(3).
5 Ibid. See s. 29 "spouse," which includes persons who are not married to each other but have cohabitated continuously for three years. See also s. 1(1) "cohabit".
6 Ibid. See s. 1(1) "parent", which includes "a person who has demonstrated a settled intention to treat a child as a child of his or her family"
7 See Katz v. Katz, 2014 ONCA 606 [Katz] at para. 72; see also Appleyard v. Zealand, 2022 ONCA 570 [Appleyard] at para. 63.
8 See Brubacher v. Brubacher, 1997 CanLII 24449 (ON SC) [Brubacher] at para. 16.
9 See Daecan v. Daecan, 2013 ONCA 218 at paras. 70, 77.
10 The Divorce Act, supra note 2 was amended by Bill C-78, Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act, S.C. 2019, c. 16.
11 Katz, supra note 7.
12 See Government of Canada, "The Divorce Act Changes Explained" (February 2022), online: <https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/index.html>.
13 FLA, supra note 3, s. 34(4).
14 Appleyard, supra note 7.
15 Ibid. at para. 63.
16 Ibid.
17 See Brubacher, supra note 8 at para. 8.
18 See McElligott Estate v. Damecour, 2005 CanLII 13995 (ON SC). The court also held that if only an interim support order has been issued, the court may make a final determination of support under the SLRA, supra note 1, rather than enforce the interim order against the estate.
19 See Hillock v. Hillock Estate, 2001 CanLII 28148 (ON SC) at paras. 11-12.
20 Ibid. at paras. 19, 24, 25.
21 See Brubacher, supra note 8 at para. 5. Also see Dagg v. Cameron Estate, 2017 ONCA 366 [Dagg] at paras. 67, 77.
22 SLRA, supra note 1, s. 62(1)(o).
23 See Earl v. McAllister, 2021 ONSC 4050 at paras. 36-37.
24 FLA, supra note 3, s. 37(1)(c). Also see Dagg, supra note 21 at para. 68.
25 Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate, 2008 ONCA 39, leave to appeal refused 2008 CanLII 39167 (SCC).
26 Dagg, supra note 21 at para. 86.
27 See Blacklock v. Tkacz, 2021 ONCA 630. Also see Brubacher, supra note 8 at para. 8.
28 See Lesser v. Lesser, 1985 CanLII 2049 (ON SC). 29 The FLA specifically provides the court with authority to make an interim or final order requiring "a spouse who has a policy of insurance as defined under the Insurance Act [to] designate the other spouse or child as the beneficiary irrevocably". See the FLA, supra note 3, s. 34(1)(i). Similar relief can be ordered under the Divorce Act, supra note 2: see Katz, supra note 7 at para. 71.
30 See Dagg, supra note 21 at para. 75.

HALTON COUNTY LAW ASSOCIATION

MENTORSHIP PROGRAM

THE HCLA IS PROUD TO ANNOUNCE OUR MEMBERS ONLY MENTORSHIP PROGRAM. THE BENEFITS AND GOALS OF THE PROGRAM ARE AS FOLLOWS:

- CONTINUE TO CREATE A STRONG, INFORMED AND COLLEGIAL HALTON LEGAL COMMUNITY
- ENCOURAGE HALTON LAWYERS TO CONTACT FELLOW MEMBERS IN THEIR SPECIFIC PRACTICE AREA FOR INFORMATION, ADVICE AND GUIDANCE
- CONNECT WITH SKILLED AND EXPERIENCED LAWYERS IN OUR COMMUNITY
- BUILD A NETWORK OF CONTACTS TO STRENGTHEN PERSONAL AND BUSINESS RELATIONSHIPS
- MENTORS CAN CLAIM UP TO 9 SUBSTANTIVE HOURS FOR CPD CREDITS

THE BASIC DETAILS OF THE PROGRAM ARE AS FOLLOWS:

- MENTORS WILL HAVE THEIR NAMES, CONTACT INFORMATION AND AREA OF PRACTICE ON THE HCLA WEBSITE THAT CAN BE ACCESSED BY FELLOW MEMBERS ONLY
- MEMBERS MAY ALSO BE PLACED ON OR TAKEN OFF THE MENTOR LIST AT ANY TIME BY EDITING THEIR PROFILE ON THE HCLA WEBSITE
- MEMBERS MAY CONTACT MENTORS BY MAKING A PHONE CALL OR SENDING AN EMAIL TO THE MENTOR
- DISCUSSIONS CAN BE BY PHONE OR EMAIL OR OTHERWISE (E.G. OVER LUNCH)
- DISCUSSIONS CAN BE AS BRIEF OR LENGTHY AS NEEDED OR AS SCHEDULING PERMITS
- MENTORS CAN BE AS INVOLVED AS THEY CHOOSE TO BE

IF YOU ARE INTERESTED IN LEARNING MORE ABOUT THE PROGRAM PLEASE EMAIL JILL EDWARDS AT JILL@EDWARDSPOLLARD.CA OR JAMES PAGE AT JAMES.PAGE@MHALAW.CA.
GO TO THE HCLA HOME PAGE. LOG IN. CLICK ON “MEMBERS” – “MY PROFILE” – “EDIT PROFILE” AND THEN SELECT “YES” TO BEING ADDED TO THE MENTOR LIST.

FAMILY LAW NEWS

by Kassandra Kelertas

We have a new SCJ Consolidated Provincial Practice Memorandum for Family Matters which came into effect on June 15, 2023 and applies province wide. In case you missed it, the Memorandum can be found at: New Consolidated Provincial Practice Directions for Family Proceedings

This memorandum covers a wide range of information in its 53 pages including: Appropriate communication with the Court, Filing Electronically, Naming Protocols, Court Fees, Caselines (now Case Centre), Financial disclosure (and the new automatic disclosure orders), rules and protocols around conferences, motions, adjournment restrictions, mediation and court connected resources, virtual hearings, how to determine the mode of proceeding and new pilot projects.

The naming protocol sets out a specific way a document must be named when filing including that it should be saved as follows: [Document type including form number-Type of party submitting the document-Name of party submitting document-and Date in the format D-M-Y]. For example, "Financial Statement Form 13.1– Respondent– K. Kelertas – 15- MAY-2023"

The memorandum further indicates that materials must be uploaded to Caseline at least 5 days in advance of the hearing or at the same time as any filing deadlines that are less than 5 days out by rule of the court. You must also upload documents into the specific bundle created for the hearing such as Pleadings, Conference, Endorsements, Orders and not into the master bundle. **Documents uploaded to CaseLines without service on, or consent of, the opposing party and/or not accepted by the court for filing, will not be reviewed by the presiding judge.** If a document has been inappropriately uploaded by an opposing party to Caselines indicate so on your confirmation form to the court or advise the court during your hearing.

For those of us who are still confused about electronic filing or have self represented litigants on a matter, you or any member of the public can call the Ministry's Contact Centre for Online Services: at 1-800-980-4962 or 647-438-0403 (TTY 1-833-820-0714 or 416- 368-4202) or send questions to FamilyClaimsOnline@ontario.ca.

Pursuant to Rule 8.0.1 of the *Family Law Rules,* the court is now issuing automatic orders both in OCJ and SCJ when financial claims are made in an Application, Motion to Change or Answer for disclosure. The expectation is that family litigants will exchange full and frank disclosure as early as possible including in advance of the case conference. Pursu-

ant to subrule 13 (11.01) of the *Family Law Rules* if disclosure has not been resolved prior to the case conference, the party seeking that disclosure must include in their materials a list of the outstanding disclosure. If a party has not complied with their disclosure obligations, costs may be awarded against that party.

With respect to filing materials for conferences, all documents should be prepared using at least 12-point font and double spacing. In SCJ, Case Conference Briefs must be 8 pages or less (plus permittable attachments as set out in the practice direction) and Settlement Conference Briefs must be 12 pages or less (plus permitted attachments). The direction indicates litigants may remove portions of the form that are not applicable to their situation.

Dispute Resolution Officer (DRO) Program and Early Case Conferences:

DROs are senior family lawyers appointed to conduct select family case conferences in SCJ. DRO conferences provide litigants in family proceedings with an early evaluation of their case by a neutral third party and can assist the parties in identifying, resolving or settling outstanding issues on consent and assist parties in organizing their issues and disclosure. The dispute resolution officer can often narrow the issues in dispute and can facilitate settlement. If parties are able to reach a consent order, the DRO can then forward the consent order or minutes of settlement to a judge to be incorporated into an order. If you wish to have a DRO assist your matter, you can request a date from the court (or through Calendly, when it arrives in Milton). DRO conferences in Milton are available by zoom video conference every Friday and during the trial blitz weeks in March and October.

Early Case Conferences are also available and are held every Monday. These conferences are before a judge and typically are to address urgent single issues to reduce the wait time for parties before their initial conference. If you wish to have an early case conference you can request a date from the court.

Legal Aid, the Mediation Center and Referral Services

Family Duty Counsel Services are available by phone and appointment and all client's will be financially tested in accordance to Legal Aid Ontario's policy. Typically, LA provides 20 minutes of advice, even if the client does not financially qualify. Clients can call the Legal Aid service line at 1-800-668-8285 or the Family Duty Counsel line at 905-693-6539 for assistance or more information about eligibility. Family duty counsel are typically located on the OCJ side near courtrooms 2 and 3 in person (or by phone/zoom videoconference).

On site (at the courthouse) mediations are being conducted in person on Mondays and Thursdays by mediators, Susan O'Rourke and Anisa Ali and mediations are available virtually on all other days. On site mediation services are free. To schedule a Mediation appointment please email dcf.halton@lao.on.ca or call 905-693-6539 with your request.

Offsite mediation services are also available through the Mediation Centre in person or by zoom conference and can be lawyer assisted or not. This mediation service is for all issues and there are payment options on a sliding scale based on your client's income. If you wish to book a mediation with the Mediation Centre contact 905-849-0417 *or* mhall@mediation.on.ca.

For information about services available to families experiencing separation or divorce feel free to call the Information and Referral Coordinator (IRC) at 905-878-7281 x3439 whom can assist with recommending services at no cost to your client.

Child and Youth Informed Mediation (CYIM) Project

The Child and Youth Informed Mediation (CYIM) is a Pilot Project which is designed to bring the views of children (ages 7-18) into court-connected mediation cases with the assistance of the Office of the Children's Lawyer (OCL). It is currently not available in Milton but is currently running in Brampton and Orangeville.

In order to qualify for CYIM, parties must:

a) have an open family file (excluding CAS files) with the Brampton or Orangeville SCJ;
b) have obtained a court order for OCL representation for child/ren between the ages of 7 -18 who are the subjects of a family court proceeding;
c) have provided their consent to participate in the CYIM Pilot Project;
d) be either involved in the mediation process with Peel Family Mediation Services (PFMS) or be willing to attend family mediation with PFMS; and
e) participate with mandatory screening for family mediation to determine if the file is appropriate for mediation.

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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.

Contact: Karen Cooper
telephone: 905-878-1272 ● email: info@haltoncountylaw.ca
Halton County Law Association
491 Steeles Avenue East
Milton, ON L9Y 1Y7

CALENDAR OF EVENTS

Saturday, September 16, 2023
Family Fun Day
Bronte Park
Register here!

Wednesday, September 27, 2023
12:00-1:30 pm
Lexis Advance Quicklaw & Practical Guidance Training Session
Law Library
12:00 noon-1:30 pm
Available in-person or on Zoom and FREE to HCLA members!
Join Lexis trainer, Gordon Brough as he explores Advance Quicklaw and Practical Guidance! These products are available free at the law library. Includes a pizza lunch.
Register here!

Thursday, September 28, 2023
5:30 pm
Lawyers' Social
Beertown, Oakville

Wednesday, October 25, 2023
Westlaw Canada Training Session
Join Jeremy Dunn to explore Family Source, Criminal Source and Estates Source, which are now available for free at the law library.
12:00 noon-1:00 pm
on Zoom. Register here!

Friday, November 3, 2023
Annual Family Law Seminar
Register here!

Thursday, November 16, 2023
Holiday Party
Paletta Mansion
Watch for further details

Thursday, December 7, 2023
Holiday Open House
HCLA Law Library
Milton Court House
Watch for further details!

Friday, May 10, 2024
9:00 am—12:00 pm
Annual Estates Seminar
Program co-chairs: Ian Hull and Suzana Popovic Montag
Watch for further details!

CLASSIFIED ADS

Downtown Oakville Office Space Available for Sub-Lease

Large office in a chambers setting available in downtown Oakville for sublease. Office is in Royal Bank Building. Space includes assistant station, reception and boardroom. Underground parking also available at additional monthly cost. Contact Rishi Bandhu if interested: rishi@blpc.ca