



HCLA NEWS

Newsletter of the Halton County Law Association

Volume 13 Issue 1

Winter 2022

Please join us!!



Annual General Meeting

Thursday March 3rd 2022

AGM: 5:00 pm

Social: 6:00 pm



zoom

on Zoom

*Register through the HCLA website
or click [here](#).*

PRESIDENT'S REPORT

by *Melissa Fedsin*



Well friends, it would seem that 2022 is off to a rocky start with high hopes for new beginnings already buried under another wave of the COVID-19, court delays, school closures and about four feet of snow.

The present state of the justice sector infrastructure in Halton is little exception to the challenges that we continue to face.

Despite the provinces' promises to 'modernize the justice system in Ontario' and 'develop courthouses of the future,' there has been little development on this front. This spring will mark the two-year anniversary of both when ground was supposed to break on the Halton Consolidated Courthouse and when that project was canceled.

In the fall, there appeared to be some forward movement, when the Association was very pleased to receive an invitation from the Ministry to participate in a series of Innovation Workshops and discuss aspects of the future of the existing courthouse. However, without any parameters or clarity regarding the province's intended financial commitment to the existing structure, discussions were handicapped by an inability to reconcile how the aging infrastructure could support the advancements in technology and the needs of this jurisdiction. Unfortunately, the workshops ultimately broke down and were canceled after two sessions.

To date, the Ministry has not provided any further update on next steps or their commitment to making the existing courthouse structure suitable for the proper administration of justice in this region. There does appear to be some indication that a new entrance renovation is planned at this point, but without any confirmed details or timeline for construction.

The Association will continue to advocate on behalf of

Halton for improved justice sector resources and infrastructure, including at the upcoming Lobby Day hosted by FOLA on February 23, 2022. If you have any other issues you think should be raised at the upcoming Lobby Day, please do not hesitate to contact me.

In the interim, the remediation efforts at the Milton Courthouse appear to be on track for completion by March 7, 2022, though we note that these kinds of timelines have always been subject to change. Upon return, we are advised that the COVID-19 related safety measures currently in place at the temporary space will continue and that members can expect some additional improvements to the WiFi service in the building. We will continue to keep members abreast of any further update.

In what now appears to have been a few brief moments of reprieve from the relentlessness of the pandemic, many of us were able to once again spend some quality time together at the in-person socials and Holiday party held last year. These flecks of light on the dismal landscape of recent history remind us of the importance of connection within our profession and how our Association can serve as a foundation to support and rebuild those connections, which have been so weathered in the past few years.

While we had expected to resume our in-person social events for 2022, in light of the current state of the pandemic, our Annual General Meeting scheduled for March 3, 2022 will again be held virtually this year. While we are hoping that this will be our last virtual event out of necessity and mark the end of this chapter, we are looking forward to an evening to celebrate another year of perseverance with the added bonus of a little entertainment (spoiler alert: Mr. Aaron Paterson, illusionist extraordinaire will be making a guest appearance for an interactive experience).

Please stay tuned for further details.

While it has been a long road to get here and many of us are still holding our breath that 2022 is more than just "2020 too", let us never lose sight of our blessings and that with challenge comes the opportunity for growth, change and new beginnings. Wishing everyone a happy and healthy 2022.

In memory of

Sara Kun (1984 - 2021)



With deep sadness, we advise our membership of the untimely death of Sara Kun. Sara was an accomplished young lawyer and past member of the Halton County Law Association, who spent many of her formative years of practice here in Halton.

Many who practice here in Halton had the tremendous privilege and pleasure of getting to know Sara's vivacious spirit and generous heart as well as her love for her young daughter, Sophie. She was well-respected by peers as a lawyer of talent, integrity and passion with an undoubtedly great career ahead of her.

There are no words to express the depths and shock of this loss, which was compounded by the loss of Sara's mother on the same day. Our hearts go out to Sara's friends and family, and especially her little Sophie, during this tragic time.



HALTON COUNTY LAW ASSOCIATION

MENTORSHIP CPD WEBINAR ON ZOOM

THE HCLA IS PROUD TO OFFER A CPD PROGRAM FOR
MEMBERS ABOUT THE NEW MENTORSHIP PROGRAM
FRIDAY FEBRUARY 25, 2022
12:00-12:45 PM

This CPD webinar will cover the basic details of the HCLA mentorship program and let you know how you can get involved.

Speakers: James Page (Martin & Hillyer Associates)
Jill Edwards (Edwards Pollard)

Learn about:

- *How easy it is to sign up as a mentor*
- *The obligations of a mentor and mentee and what is involved*
- *How mentors are to calculate their CPD professionalism hours*
- *The importance of this program*

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LIBRARY NEWS

by Karen Cooper



Reminder: HCLA 2022 Membership Dues are Due!

If you have not done so, kindly visit the HCLA website to renew your membership. Please take a moment to review your information.

to ensure it is correct!

www.haltoncountylaw.ca

Thank you!

remind you of a little shortcut that you may have not used in a while and then have forgotten about.

New Books

The following new titles have been purchased:

Canadian Family Law (8th ed)

Criminal Procedure (4th ed)

Dictionary of Canadian Law (5th ed)

Distress: A Commercial Landlord's Remedy (2d ed)

Happy New Year!! I hope you and your loved ones stayed safe and healthy over the holidays.

While these past two years has been very challenging on so many levels, I hope you were able to take some time to reflect and focus on something positive that perhaps this crazy pandemic has taught us and I hope you were able to enjoy some of the simple pleasures that often get overlooked as we seem to rush through our daily routines.

Lexis Advance Quicklaw and Practical Guidance Training

A one and one-half hour FREE for HCLA members QL and Practical Guidance training session has been set up for Tuesday, April 5th at 12:30 pm. The session will qualify for professionalism CPD hours, so be sure to join us. Please either register through the HCLA website, or email me at info@haltoncountylaw.ca.

Trainer Gordon Brough is sure to have a trick or two up his sleeve that he is willing to share to either enhance your legal research skills or

continued on page 6

STEPHEN ABRAHAM

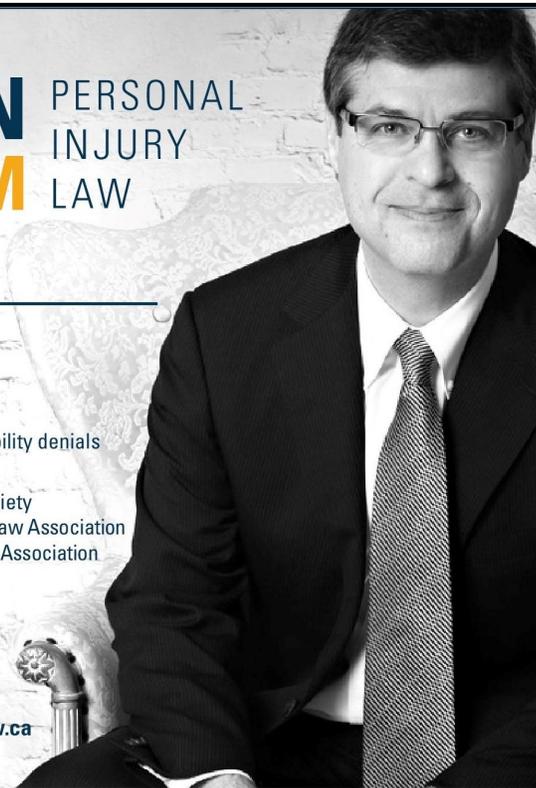
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*Certified as a Specialist in Civil Litigation by The Law Society.
 *Peer reviewed as a Leading Practitioner in Personal Injury Law in Ontario by Lexpert and Best Lawyers in Canada.

LIBRARY NEWS con't

Family Law Arbitration in Canada (4th ed)
Fundamental Justice: s.7 of the Canadian Charter of Rights and Freedoms
Honsberger's Bankruptcy in Canada (5th ed)
Information & Privacy Law in Canada
Law of Contracts (3d ed)
Law of Search & Seizure in Canada (12th ed)
Law of Torts (6th ed)
Oosterhoff on Wills (9th ed)
Ontario Guardianship Law
Principles of Administrative Law (7th ed)

New LSO CPD Titles:

4th Motor Vehicle Litigation Summit (2021)
10th Human Rights Summit (2021)
22nd Employment Law Summit (2021)
24th Estates & Trusts Summit (2021)
Commercial Real Estate Transactions (2021)
Impaired and Over 80 (2021)
Practice Gems: Administration of Estates (2021)
Safeguarding Real Estate Transactions (2021)
Six Minute Family Law Lawyer (2021)



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TUESDAY APRIL 5, 2022 | 12:30-2:00PM

Register online through the HCLA website at www.haltoncountylaw.ca or for additional information, please email info@haltoncountylaw.ca
Thank you

CIVIL LITIGATION NEWS

by James Page



\$150,000 PUNITIVE DAMAGES AWARD UPHELD THOUGH EMPLOYEE CONTRIBUTED SIGNIFICANTLY TO HIS OWN INJURY

In *Eynon v. Simplicity Air Ltd.*¹, the Court of Appeal addressed a significant punitive damage award in a case where the plaintiff contributed considerably to the incident that caused his injury.

SUMMARY OF THE FACTS

The plaintiff was injured in his workplace. After being challenged by a colleague, he climbed a 14-foot chain hoist and caught the crotch of his pants on a hook which pierced his scrotum necessitating surgical repair. The jury awarded the plaintiff \$75,000 for general damages plus damages for lost wages, which was reduced by 75% for the plaintiff's contributory negligence. The jury also awarded punitive damages against the employer in the amount of \$150,000 with no reduction for plaintiff's careless conduct.

According to the plaintiff, he was screaming in pain right after he hurt himself, but his supervisor laughed at him and refused to look at the injury and refused to call him an ambulance. A manager also became involved and instead of calling an ambulance, he wanted to arrange for someone to drive the plaintiff home. The plaintiff eventually refused to be driven home after calling his father who told his son to insist on going to the hospital. Before leaving for the hospital, the manager told the plaintiff to say that the injury happened at home. The plaintiff's supervisor drove the plaintiff to the hospital but did not help him inside. He merely dropped the plaintiff off.

The plaintiff testified that he received no safety training and no WHMIS training from his employer. His employer assigned him to drive a forklift without proper certification and regularly failed to properly train him for the dangerous tasks given to him. He was never trained to use the chain hoist and there was no supervisor on the floor at the time he climbed it.

The defendant employer appealed the jury's punitive damages award on a number of issues, including: (a) a range should have been left with the jury; (b) the award was too high; and (c) that the punitive damages award should be reduced for the plaintiff's contributory negligence.

The Court of Appeal ("ONCA") restated the law on punitive damages, finding that punitive damages are reserved for high-handed, malicious, arbitrary, or highly reprehensible misconduct that markedly departs from the ordinary standards of decency. The purpose of the award is to deter similar misconduct in the future. The ONCA also found sufficient evidence for a properly instructed jury, acting reasonably, to award punitive damages. 1 2021 ONCA 409 The supervisor's instructions to falsely report that the injury happened at home in and of itself warranted the award. Those instructions contravened the Workplace Safety and Insurance Act.

THE ONCA'S RULING ON KEY ISSUES

(a) Should the trial judge have provided guidance to the jury on an appropriate range for an award of punitive damages?

No. A range should only be left if counsel agree upon the range. There was no such agreement.

(b) Was the punitive damage award too high?

No. Appellate courts may only intervene where the award, when added to the compensatory damages, is so inordinately large that it exceeds what is rationally required to punish the defendant. The defendant had not been penalized in any other forum to warrant a reduced award. The award was not inordinately high. The instructions to falsely report the accident alone warranted \$150,000 in punitive damages.

damages award for a plaintiff's own contributory negligence, even if that negligence is significant. A finding otherwise is inconsistent with the very definition and purpose of punitive damages.

1. 2021 ONCA 409

(c) Should the punitive damages be reduced because of the plaintiff's contributory negligence?

No. When it came to punitive damages, the trial judge instructed the jury to consider the superiors' conduct after the incident and not before. The plaintiff's conduct was not part of the determination of whether punitive damages were warranted. There was no basis to reduce the award for contributory negligence.

This seems to possibly suggest that, had the jury taken into account the defendant's behaviour before the incident, then the punitive damages could be reduced in accordance with the plaintiff's contributory negligence.

My own thoughts on this potential issue are as follows. Even if the jury took into account what led to the incident, there should still be no reduction because the plaintiff's careless behaviour. The very purpose of punitive damages is to punish the defendant for the defendant's own reprehensible conduct. The focus is always on what the defendant alone did or did not do that is highly offensive, and nothing else. Any carelessness by the plaintiff is irrelevant to the determination.

WHAT TO TAKE FROM THIS CASE?

First, this is quite a significant punitive damages award and the ONCA seems to be trending towards approving higher damages awards (see *Moore v. 7595611 Canada Corp*, where the same court approved a \$250,000 award for a loss of care, guidance and companionship when the highest prior award for that type of loss was \$150,000).

Second, from a nuts-and-bolts perspective, counsel cannot leave a range for punitive damages with the jury unless counsel agree on the range.

Third, in my view, there is no basis to reduce a punitive

CRIMINAL DOCKET

by *Brendan Neil*



Happy New Year!

Here we are in a new year with new restrictions due to the pandemic. There have been a number of changes since the update.

Halton has had two Justices appointed to the OCJ following Justice Brown's transfer to Hamilton. Justice Campitelli and Justice Puddington join the Halton bench following their time with the Public Prosecution Service of Canada (PPSC).

Also notable is the move by Mark Miller to join the PPSC in Peel, working out of the Brampton courthouse.

In terms of a courthouse update, the Milton court is still scheduled to open back up in March, however at the time of writing there are no windows in the building. We shall see if the timing holds. In the mean time the Oakville Convention Centre has been leased to hold jury trials. Related to the pandemic all jury trials have been suspended until February 7th province wide pending further restrictions/precautions.

It was a busy year for the Supreme Court of Canada with the court hearing numerous matters. Hopefully some clarification will come with regards to the 276/278 (Prior sexual conduct/3rd party records) regime. Also, clarification on the use of extreme intoxication as a defence should be interesting.

We will also be saying goodbye to a fixture in Halton, Pam Jazvac, judicial secretary for the Ontario Court of Justice will be retiring this year. Thank you Pam for all of your help over the years, you will be missed, particularly when something needs to be fixed.

Brendan Neil is certified by the Law Society of Ontario 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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ESTATES NEWS

by Suzana Popovic-Montag



New Estate Forms for Ontario

When dealing with an estate administration, the estate forms are a crucial part of daily practice. Previously, there were over 80 forms, but that number has now changed. New estate forms have now come to Ontario,¹ effective as of January 4, 2022.²

New Forms Will Simplify the Probate Process

23 new estate forms will replace 56 of the previous forms.³ The new forms are expected to make it easier to apply for probate and streamline the process. While several forms are simply being updated,⁴ others are being consolidated, so that only one form will be necessary for each component of the probate process. Going forward, applicants will only be required to complete one form for:

- a certificate of appointment – Form 74C;⁵
- granting consent to an application for a certificate of appointment – Form 74H;⁶
- court orders – Form 74I;⁷ and
- applications to be appointed as estate trustee after probate proceedings have already been initiated – Form 74J.⁸

Each of these forms consolidates six to 10 of the current forms.

Other Changes Coming with the New Forms

Form 74A: Updated Application for a Certificate of Appointment

Of all the new forms, Form 74A has the most noteworthy changes. Form 74A consolidates six of

the current forms,⁹ and will be the only form an applicant will be able to use to apply initially for a certificate of appointment of estate trustee, regardless of whether the applicant is a person or a corporation, or whether or not the deceased left behind a will.

Form 74A will also seek additional information about the deceased that the current forms do not request. Applicants will have to indicate if the deceased married before January 1, 2022, and whether the deceased was separated from his or her spouse when the deceased passed away. The new information sought simply reflects amendments to the Succession Law Reform Act (the “SLRA”) that also come into effect in the new year – specifically that marriage will no longer revoke a will, and that bequests to a spouse will not be honoured if the couple was separated at the time of death, unless the deceased expressed a contrary intention.¹⁰

Other changes to Form 74A include:

- beneficiaries' email addresses are to be included on the application, which is logical given that an application may be served on beneficiaries via email;¹¹ and
- applicants must confirm that the application has been served on the Children's Lawyer if an unborn child or unascertained person may have an interest in the estate. While this requirement is not new,¹² the previous forms did not refer to it.

Forms 74D & 74E: New Requirements for the Remote Execution of Wills

In light of recent amendments to the SLRA permitting the remote execution of wills,¹³ additional information is being requested for affidavits addressing the execution of a will (Form 74D) or the condition of a will (Form 74E). Lawyers or paralegals who assist with remote execution and swear either type of affidavit will have to confirm that they are licensed by the Law Society.

Form 75.1: Extra Details Requested on Notices of Objection

The new Notice of Objection form requests details about the grounds for an objection. Given that meritless objections may be struck,¹⁴ the additional information provided could prove helpful for determining whether or not an objection has merit.

Forms 74.1A & 74.1E: Changes to Small Estates forms

If an applicant is seeking probate for a small estate and a minor or an incapable adult is a beneficiary, the applicant will now have to set out the estimated value of that beneficiary's interest in the estate on Form 74.1A. Service of this information on the Public Guardian and Trustee or the Children's Lawyer will also be required.

Another noteworthy change to Forms 74.1A and 74.1E is that both have been updated to guide applicants to more free online resources.

Amendments to the Estate Rules

In addition to the new estate forms, the estate rules in the Rules of Civil Procedure¹⁵ – Rules 74, 74.1 and 75 – have been amended. Many of the amendments,

which came into force on January 1, 2022¹⁶, simply update the names of the forms in the Rules.¹⁷ However, three Rules will be revoked entirely and replaced. Rules 74.04 and 74.05, which set out the procedure for applying for a certificate of appointment of estate trustee, will be replaced with a new Rule for initial applications to obtain a certificate of appointment.¹⁸ Rule 74.06, Certificate of Appointment of Succeeding Estate Trustee with a Will, will also be replaced with a re-worded version of the same Rule.

Conclusion

Given how integral the estate rules and forms are to seeking probate, we look forward to both the new estate forms and the amended estate Rules coming into force in 2022 as part of an updated, streamlined process for applying for probate.

1 Ontario Court Forms, online: <<http://ontariocourtforms.on.ca/en/rules-of-civil-procedure-forms/pre-formatted-fillable-estates-forms/>>.

2 See the summary of "Reg. 194 under the Courts of Justice Act (Rules of Civil Procedure)," online: Ontario's Regulatory Registry <<https://www.ontariocanada.com/registry/view.do?postingId=39310&language=en>>.

3 Of the 56 current forms, Forms 74.7 and 74.17 will not be replaced, as the requirement to provide notice of an application for a certificate of appointment is being eliminated.

4 See Forms 74.1A, 74.1B, 74.1C, 74.1D, 74.1E, 74.1F, 75.1,



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and 75.8.

5 Form 74C will consolidate 10 forms – Forms 74.13, 74.13.1, 74.20, 74.20.3, 74.23, 74.23.1, 74.26, 74.28, 74.29, and 74.31.

6 Form 74H will consolidate six forms – Forms 74.12, 74.12.1, 74.19, 74.22, 74.22.1, and 74.25.

7 Form 74I will consolidate eight forms – Forms 74.13.2 and 74.36 to 74.42.

8 Form 74J will consolidate six forms – Forms 74.20.1, 74.21, 74.21.1, 74.24, 74.27, and 74.30.

9 Form 74A will replace Forms 74.4, 74.4.1, 74.5, 74.5.1, 74.14, and 74.15.

10 Sections 15(a) and 16 of the Succession Law Reform Act, RSO 1990, c S.26 (the “SLRA”) will be repealed as of January 1, 2022 as per Bill 245, Accelerating Access to Justice Act, 2021, 1st Sess, 42nd Leg, Ontario, 2021, Schedule 9, ss 2-3 [Bill 245]. The SLRA is also being amended to include ss 17(3) and (4).

11 See the Civil Rules of Procedure, RRO 1990, Reg 194, r 74.04 (7) (the “Ontario Rules”).

12 Ontario Rules, *ibid*, rr 74.04(5) & (7).

13 See Bill 245, *supra* note 10, and the SLRA, *supra* note 10, s 4 (3).

14 *Dessisa and Wolde v Demisie*, 2020 ONSC 641.

15 *Supra* note 11.

16 The amendments to the Ontario Rules, *ibid*, were approved on October 13, 2021, and filed on October 15, 2021: Ontario Regulation 709/21, made under the Courts of Justice Act, RSO 1990, c C.43. In addition to amending Rules 74, 74.1 and 75, Rules 1.03(1) and 14.05(1) have also been amended to reflect the

new forms.

17 There will be some substantive changes to the Ontario Rules. For example, the amended version of Rule 74.1.03(6.1) will require service of the estimated value of a beneficiary’s interest in an estate on the Public Guardian and Trustee or the Children’s Lawyer if the beneficiary is a minor or incapable adult, as noted with respect to Forms 74.1A and 74.1E.

18 The new Rule will take the place of Rule 74.04. There is no new Rule replacing Rule 74.05.



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- *Feeney's Canadian Law of Wills, Fourth Edition:* Ian M. Hull, James MacKenzie, Suzana Popovic-Montag
- *Advising Families on Succession Planning: The High Price of Not Talking:* Ian M. Hull
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FAMILY LAW NEWS

by Kathy Batycky



Justice Victoria Starr Award for Excellence in Advocacy for Families and Children

The HCLA has created a new award to honour Justice Victoria Starr and thank her for all her advocacy for Halton families and children. The creation of the award is to recognize Justice Starr's outstanding contribution to families and children of Halton, not only in her role as a Judge of the Ontario Court of Justice (family) presiding over domestic family law and child protection cases daily, but also in her tireless efforts to educate and act as a mentor for the bar, promoting excellence in advocacy for families and children whether in the family court process, or in other dispute resolution processes.

The award will be presented at the HCLA AGM on March 3rd, 2022.

Come join us to celebrate Justice Starr's recognition.

Halton Family Law Lawyers – Legal Aid needs you!

While 2021 has ended, and we are in a new year, the difficulties of legally aided clients with certificates to find legal help still exists. I understand that clients who have received legal aid certificates for family law matters cannot find lawyers who will readily take on the case. If there are lawyers who are currently on the Legal Aid Ontario roster for family law have any space in their practice for more work, please consider accepting a few more of the clients with their certificates. If you are a lawyer who would like to join the roster, check out the following website, that will help guide you:

<https://www.legalaid.on.ca/lawyers-legal-professionals/interested-in-doing-legal-aid-work/>

Do you have any questions about Legal Aid accounts or certificates?

If any lawyers have questions about legal aid accounting, authorizations for certificates, if you have a matter awaiting authorization, or if you are a young lawyer who

wishes some mentoring on preparing legal aid accounts, Samantha Keser is happy to mentor you. You can contact her at kesers@lao.on.ca

Good news for 2022: The lawyer assisted application (LAA) program is being expanded. Lawyers will be able to apply for certificates on behalf of a client involved in Child Protection proceedings, or domestic family proceedings involving Domestic Violence as well as refugee proceedings. Although the client still must qualify, with the new form the lawyer can now submit the application. Keep a watch on the legal aid website, as the new form will be up soon.

Looking for suggestions for A new HCLA comprehensive list of family law professionals

The Halton County Law Association is planning to put together a comprehensive list of professionals in Halton in the family law field. This will include mediators, arbitrators, Parenting Coordinators, assessors, to name a few.

If you are a family mediator/arbitrator/PC or assessor, or similar role, or know of someone who is, send an email to kathy@scfamilylaw.ca so we can include the information in our list.

Newest case in family law from the SCC: Is confidentiality in family mediations absolute?

In December 2021, the Supreme Court of Canada released a decision regarding confidentiality in family mediations. Although it was a case from Quebec, which has some specific rules related to family mediations, it may still have a huge impact on family mediations across Canada.

In *Association de médiation familiale du Québec v Bouvier*, [2021 SCC 54](#) (CanLII), the Supreme Court of Canada reviews the issue of confidentiality and the concept of settlement privilege in the context of

family mediation (as opposed to civil or commercial mediation).

In this case, the common law couple participated in family mediation with a certified mediator, to resolve their disputes arising out of their separation. The Quebec rules on mandatory mediation prohibit lawyers from participating in the mediation process. The mediation contract signed by the parties included the following terms:

8. *We acknowledge that the content of our meetings, of the interviews and of our file is confidential. We commit ourselves to not use as a proof in front of a court any document contained in the file, including the Summary of Mediated Agreements, without the consent of both parties. The mediator cannot communicate this information to anyone except when the law expressly orders it.*
- ...
 10. *We are informed that the Summary of Mediated Agreements prepared at the end of the mediation process will not constitute a legal document nor an enforceable agreement. It will serve to help the legal advisers who will be retained to prepare the appropriate legal documents. We are also informed that the signature of the Summary of Mediated Agreements produces legal effects, even if it is not enforceable, and that it is preferable to obtain independent legal advice [before] signing it.*

At the end of the mediation, the mediator prepared a “summary of mediated agreements”, which is the term used in the standard family mediation contract in Quebec. After the mediation, the parties had discussions between themselves on the apparent resolutions made, and some payments were made in accordance with the terms in the summary (one party wrote the other three cheques, two of which specifically referred to “mediation”, and the cheques were cashed; in addition, in an exchange of emails concerning the children, the parties alluded to the terms of an arrangement they had made during mediation). No actual contract was signed, and the summary was not signed.

Sometime later, one party commenced a court action for additional payments from the other party, different than what had been discussed in the mediation, and took the position that there was no contract entered into, also objecting to having the summary prepared by the mediator entered into evidence, on the basis that it

was protected by the confidentiality of the mediation process.

The trial judge dismissed the objection, relying in part on the settlement exception to confidentiality found in *Union Carbide Canada Inc. v. Bombardier Inc.*, [2014 SCC 35 \(CanLII\)](#), [\[2014\] 1 SCR 800](#) (a commercial mediation case) and found that there was a contract between the parties. The settlement exception allows parties to file communications that are necessary to establish the existence or terms of their agreement. The Court of Appeal unanimously dismissed the appeal. The *Association de médiation familiale du Québec* sought, and got, permission to proceed with the appeal to the Supreme Court of Canada, although the parties did not seek leave.

In dismissing the appeal, Justice Nicholas Kasirer, writing for the majority, said that the settlement exception outlined in the *Union Carbide* case may also apply to family mediation cases. The Association argued that discussions during family mediation and the summary of mediated agreements prepared by a mediator are protected by a rule of absolute confidentiality that is necessary for such a process to function fairly and effectively and that, without such confidentiality, mediation would entail risks for vulnerable spouses. Justice Kasirer disagreed. His Honour held that, while it is true that confidentiality is necessary in any mediation to allow for frank discussions between the parties in order to encourage settlements, a rule of absolute confidentiality might not only deflect family mediation from its participatory and consensual foundations, but also undermine the parties’ adherence to this process for resolving their dispute, or even to the settlement itself. Justice Kasirer found that to reject the settlement exception recognized in *Union Carbide* in favour of absolute confidentiality would interfere with the primary objective of family mediation, which is to reach an agreement resolving an existing or anticipated dispute ([see para 8](#)).

Justice Kasirer then stated that “the summary of mediated agreements provided to the parties by the mediator at the end of the family mediation process is not a contract that can serve to prove such an agreement, but simply a working tool for the spouses. ... [N]othing prevents the parties from entering into a contract whose terms are identical to those recorded by the mediator in the summary of mediated agreements. They can do so by signing the summary or by consenting expressly or tacitly after it has been given to them. Because the parties are

encouraged to obtain independent legal advice after receiving that document, they may also decide to bind themselves contractually on different terms, or not to bind themselves at all.” (see para. 9).

Justice Kasirer found that, on the facts in this case, the trial judge was correct in finding that the parties, through their communications following the mediation sessions, had expressed their intention to be bound contractually. Even without the summary, their testimony regarding their communications during mediation and the evidence concerning their communications thereafter were admissible and could serve to prove the existence and terms of a settlement, in accordance with the principles set out in *Union Carbide* and in the absence of any objection based on the applicable rules of evidence. The court commented that the parties exchanged consents after being given the summary and ultimately entered into a binding agreement, which, in the circumstances of this specific case, reflected the terms recorded in the summary (see para 10).

Although the parties had confirmed that privilege applied throughout their mediation contract, the terms of

the contract did not displace the settlement exception, although it could have. The court found that because the purpose of family mediation is the same as that of civil mediation — to prevent or resolve a dispute by entering into a freely negotiated agreement — the principles established in *Union Carbide* are equally valid in this context (see para 30).

Justice Kasirer also commented that, *during* the mediation sessions, the spouses know that they are working on a *proposed agreement* only. At the end of the mediation sessions, any consensus reached will be recorded in a summary of mediated agreements, which “will not constitute a legal document nor an enforceable agreement”, and the parties will have an opportunity to obtain “independent legal advice” on its appropriateness at a later date. They therefore negotiate knowing that the proposals they make do not bind them firmly and that they will have an opportunity to think about them and to consult a legal adviser before entering into a binding agreement. Where there is no settlement, preserving the absolute confidentiality of communications is an es-

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sential aspect of mediation and is necessary to encourage frank discussions. But confidentiality is above all a means to an end: where spouses resolve their dispute, this concern must yield, as far as necessary, to that of giving them the proper tools to implement their agreement (see para. 104)).

Excluding the settlement exception in favour of absolute confidentiality once a dispute has been resolved could prevent a spouse from asserting their rights against a spouse acting in bad faith. Absolute confidentiality could impede a spouse's ability to raise the bad faith of the other spouse where the latter, capitalizing on this airtight confidentiality, is dishonest about their own position taken during mediation. It must be kept in mind that the settlement exception may be essential for a vulnerable spouse who has been able to negotiate a fair agreement and would like to prove it, and that absolute confidentiality could undermine the protection of that spouse if the other took advantage of the power imbalance and denied the agreement (see para 105).

Justice Kasirer concluded that “absolute confidentiality would be inconsistent with the parties’ intention as expressed in the contract they signed and as inferred from the circumstances. This clause simply confirms the general rule of confidentiality, without excluding the exception to settlement privilege. In my view, the following explanation given by Wagner J. in *Union Carbide* is just as applicable to family mediation: Absent an express provision to the contrary, I find it unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement. Such a result would be illogical (para. 65). Indeed, interpreting a confidentiality clause as displacing the settlement exception may undermine the objective of reaching a settlement (*Union Carbide*, at para. 50).” ([at para 112](#)).

In this case, because the *Union Carbide* exception to settlement privilege applied, the parties could prove the existence and terms of their agreement, subject to the rules of the law of evidence. Together, the emails, the cheques written and cashed and the parties’ testimony allowed the court to conclude that the subsequent agreement, unlike the proposed one recorded in the summary, met the conditions of contract formation and was therefore binding on the parties ([at para 119](#)).

There was a dissenting opinion written by Justice Karakatsanis. The dissent would have dismissed the appeal, but on different grounds, and disagreed that

the *Union Carbide* exception should apply to communications that occur during family mediation in Quebec because the family mediation regime in Quebec requires that mediation sessions be completely confidential, except where the parties expressly state otherwise.

This summary only touches some of the comments by the SCC on family mediations and is certainly deserving of a thorough read. How this case is interpreted in the common law provinces, particularly in situations where lawyers attend mediation with the parties, remains to be seen. For now, it would be wise for all parties entering into mediations to put their mind to this exception to the confidentiality of the mediation, and if they wish to exclude the *Union Carbide* exception, to specifically state that in the contract. As Justice Kasirer pointed out, even though the exception generally applies in family matters, freedom of contract does allow the parties to displace it, provided that they do so clearly.

IMMIGRATION LAW NEWS

by *Melissa Babel*



Unvaccinated foreign nationals in Canada - Travel Restrictions (arrival and departure)

Since November 30, 2021, travelers to Canada have been required to be fully vaccinated, with only a few exceptions for essential workers and a few other categories. Starting on January 15, 2022, previously exempt travelers will be required to be vaccinated as most exemptions are ending. The groups previously exempt from the requirement to be vaccinated to travel to Canada, who are now required to be vaccinated include those seeking to reunite with family, international students, professional athletes, foreign workers (other than agricultural or food processing), and most essential service providers.

There continue to be exemptions to the requirement to be vaccinated to travel to Canada. These exemptions include agricultural and food processing workers, foreign marine crew members, those entering on compassionate grounds, new permanent residents and newly resettled refugees, children under 18 who are currently exempt, and national interest exemptions. There are also specific rules for children under 12 traveling with adults. The Government will enact testing and quarantine requirements for eligible unvaccinated individuals arriving in Canada.

On February 28, 2022, unvaccinated or partially vaccinated foreign nationals will no longer be permitted to depart Canada by plane or train. It is important to note that for foreign nationals wishing to leave Canada, the U.S. has vaccination requirements for most non-essential travelers to that country who are not U.S. citizens or Permanent Residents. We encourage anyone in this group to plan for their employees and families. It is also essential to be aware of the requirements of individual airlines concerning boarding passengers with various vaccination statuses.

To read more: <https://www.canada.ca/en/public-health/news/2021/11/adjustments-to-canadas-border-and-travel-measures.html>

<https://travel.gc.ca/travel-covid/travel-restrictions/flying-canada-checklist/covid-19-testing-travellers-coming-into-canada> Canada pauses, and then re-imposes vaccination requirement for Canadian truck drivers

It was originally planned that truck drivers would be included in the travel restrictions for the unvaccinated that come into effect on January 15, 2022. After consultation with industry stakeholders, the government announced that the requirement would be paused with respect to truck drivers. This decision has now been reversed and truck drivers in the requirements come into effect on January 15, 2022 along with other previously-exempt groups of travelers.

To read more: <https://www.cbc.ca/news/politics/canada-truckers-vaccine-reversal-1.6313200>

US Immigration Update

Waiver of Interviews through 2022 for certain visa categories

On December 23, 2021, the Secretary of State and the Department of Homeland Security, announced that consular officers are authorized to waive the in-person interview requirement for certain temporary employment non-immigrant visa applicants who have a petition approved by the U.S. Citizenship and Immigration Services (USCIS).

This new authorization applies to temporary workers applying for H-1, H-3, H-4, L, O, P and Q visas who meet certain conditions, including that they are applying for a visa in their country of nationality or resi-

dence. Consular officers have discretion to waive visa interview requirements for individual petition-based applicant in these categories who were previously issued any type of visa, and who have not been refused a visa (unless the refusal was overcome or a waiver issued), and who have no apparent or potential ineligibility. Also eligible for a visa waiver are individual petition-based applicants for the same visa categories who are citizens or nationals of a country that participates in the Visa Waiver Program (VWP) provided they have no apparent or potential ineligibility and have previously traveled to the U.S. using an ESTA.

In addition, the Secretary extended previously approved policies to waive the visa interview for certain students, professors, research scholars, short-term scholars, or specialists (F, M, and academic J visa applicants) through the end of 2022. Those eligible for the visa waiver because of their citizenship from a Visa Waiver Program country must have previously traveled to the U.S. using an ESTA.

The previous authority allowing for waiver of interview

of certain H-2 (temporary agricultural and non-agricultural workers) applicants has also been extended through the end of 2022. Applicants renewing any visa within 48 months of expiration are also eligible for interview waiver.

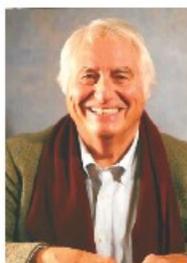
To read more: <https://www.state.gov/expanded-interview-waivers-for-certain-nonimmigrant-visa-applicants/>

Express Entry Update January 2022

There has been one draw from the Express Entry pool in 2022. This continues the drought of invitations since Fall 2021. The one draw was for the Provincial Nominee Streams, with 392 invitations issued to candidates with CRS Points of 808 or higher.

The pool of Express Entry candidates has continued to grow throughout the Fall and we are waiting to

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☎ 905-616-0216
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hear from IRCC when the next draw will occur. Employers and individuals in Canada waiting for an invitation should strongly consider independent applications to extend temporary resident status in Canada while waiting for an invitation to apply.

Ontario Immigrant Nominee Program Update

On **January 12, 2022**, the Ontario Immigration Nominee Program issued Notifications of Interest to targeted occupations for Ontario's Express Entry Human Capital Priorities stream. The OINP targeted candidates with a comprehensive ranking system score between 464-467 and work experience in a number of targeted occupations including Engineering Managers, Restaurant and Food Service Managers, Construction Managers, Mathematicians, Registered nurses, Medical Laboratory Technologists, Opticians and Licensed Practical Nurses.

To read more: <https://www.ontario.ca/page/2022-ontario-immigrant-nominee-program-updates>

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OJEN NEWS

by Inga B. Andriessen



As we open the school year with yet another virtual learning session in play, the OJEN Halton Committee is relieved to have chosen a hybrid virtual and in person mix for our mock trial tournaments coming up in the spring.

All of the tournaments can be easily converted to 100% virtual, but at this point the expectation is that the judges will be virtual, and the students will compete as a team in each of their respective schools with one camera on all of them so that they are together as a team, yet separate from the other schools and the judges.

We will be requiring many judges this year, and if you are interested in judging one or more than one of the tournaments, please reach out to me to let me know. My email address is at the end of this article.

The dates are as follows:

1. April 28, 2022 – Halton Catholic Senior Tournament;
2. May 6, 2022 – Halton Public and Private School Senior Tournament;
3. May 13, 2022 – Halton Public Catholic and Private School Junior Tournament;
4. May 20, 2022 – Halton Championship

If you are interested in participating and have the ability to participate by Zoom, please reach out to me as soon as possible so that I am able to schedule you as a judge.

We will also require coaches for the mock trial teams.

If you prefer to volunteer a few hours each week until the tournaments to help, please let me know that as well.

Looking forward to another successful mock trial tournament year!

Inga B. Andriessen, Chair - OJEN Halton Committee
iandriessen@andriessen.ca

CLASSIFIED ADS

LOOKING FOR A WILL

Estate of Lois Gloria Da Silva

Anyone having knowledge of a Will of the late Lois Gloria Da Silva of the City of London in the County of Middlesex, Province of Ontario, who died on July 31, 2020, is requested to contact:

Jennifer Butkus
McKenzie Lake Lawyers LLP
140 Fullarton Street, Suite 1800
London, ON N6A 5P2

jennifer.butkus@mckenzielake.com

t. 519-672-5666 x 7356

f. 519-672-2674

VOLUNTEER LAWYERS NEEDED AT THE HALTON WOMEN'S CENTRE IN THE AREAS OF FAMILY LAW IMMIGRATION AND EMPLOYMENT LAW

The Women's Centre of Halton is desperately in need of volunteer lawyers to support our legal clinic (due to covid-19 this is currently being offered virtually)

We are looking for Family, Immigration, and Employment lawyers. We are asking for a commitment of one day per month for 2 hours for 4 appointments for 30 minutes each.

For further information, or to volunteer, please contact Alicia Gordon-Smith, Program Development Coordinator, The Women's Centre of Halton, telephone 905-847-9104 or email alicia@womenscentrehalton.com

Thank you.



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.
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Contact: Karen Cooper
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Milton, ON L9Y 1Y7

CALENDAR OF EVENTS

Thursday February 10

4:00 pm

Swearing-in ceremony for Justices Jennifer Marie Campitelli and Brian Gregory Puddington as Judges of the Ontario Court of Justice in Milton. View the invitation [here](#) to join the virtual ceremony.

Monday February 21

Family Day

Court House Closed

Friday February 25

12:00 noon—12:45 pm

HCLA Mentoring Program—Free Virtual CPD to learn more!

See the flyer on page 4 and click [here](#) for more details and to register.

Thursday March 3

Annual General Meeting

Click [here](#) to register.

AGM: 5:00 pm

Social: 6:00 pm

Join us for the AGM, followed by a social segment that will include updates from the judiciary, an award presentation to Justice Victoria Starr and a 30-minute show by illusionist, Aaron Paterson

Tuesday April 5 2022

12:30-2:00 pm

Lexis Advance Quicklaw and Practical Guidance Training Demo

FREE and 1.5 Professionalism CPD hours! See the flyer on page 6 and click [here](#) to register!

Friday May 20

9:00 am—12:00 pm

Annual Estates Webinar

Watch for further details!

Friday May 20

OJEN Mock Trials

Halton Championships

See page 22 for details!

Monday May 23

Victoria Day

Court House Closed.