



HCLA NEWS

Newsletter of the Halton County Law Association

Volume 14 Issue 1

Winter 2023



YOU ARE INVITED TO

THE HALTON COUNTY LAW ASSOCIATION
**ANNUAL GENERAL MEETING
& JUDGES' NIGHT**

**THURSDAY
MARCH 2ND, 2023**

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Dinner: 7:00 PM

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PRESIDENT'S REPORT

by *Melissa Fedsin*



As challenging as the last few years have been, they have still flown by. I can scarcely believe how quickly they have come and gone with this being the last president's message of my two year term.

I cannot say enough what an honour it has been to serve you over these last two years and through the unexpected challenges facing the world and our community.

I know our Association is in good hands as Kathy Batycky begins her term in March and takes up the reigns on the work we continue to do.

By way of courthouse update, the functional planning consultations for the proposed Milton courthouse expansion have concluded and the resultant report has been provided. The Association is in the process of reviewing the report and noting any concerns. However, at this point it is unclear whether the province will be moving forward with any of the recommendations to expand and renovate the existing building.

Additionally, the Association continues to participate in the ongoing stakeholder meetings regarding the "CUE" (courthouse user experience) hub entrance addition to the west side of the existing courthouse, which project has already been approved and is now moving through the planning and design stages.

We will continue to update the membership regarding any further developments to the Milton courthouse.

We had the absolute pleasure of spending the evening with many members at our holiday party in November and look forward to seeing some of you again at our upcoming Mentorship Social on February 23,

2023. We thank member mentors for all their commitment and hope that you are able to join so we can show our appreciation.

Our biggest event of the year, the Annual General Meeting and Judges' Night on Thursday March 2, 2023, is also around the corner. We have an exciting evening in store for guests, including the highly anticipated illusionist, Chris Bruce, as well as the presentation of several awards, including the inaugural Justice Douglas K. Gray Award.

The Halton County Law Association is pleased to announce the creation of the Justice Douglas K. Gray Award for Excellence in Civil Litigation in recognition of His Honour's contributions and achievements in civil litigation and service to the Halton community, including his efforts to educate and mentor the bar and promote excellence in civil litigation, whether in court or assisting in pretrial resolution.

Future recipients of this award must be members of the HCLA who have a demonstrated commitment to advancing the interests of civil litigation within local practice through their work and/or in their volunteer efforts, as well as a commitment to enriching the bar through continuing legal education. The award will be presented to His Honour as the inaugural recipient at our annual Judges' Night.

We are pleased to announce our other esteemed award recipients for this year as follows:

Nigel Gunding is the 2023 recipient of the Alan B. Sprague Award for Excellence.

The Alan B. Sprague Award for Excellence was es-

established in 1989 in recognition of the life and achievements of Alan B. Sprague. After being called to the Bar in 1938, he served in the Canadian Army during the second world war and was sworn in as Halton's County Court Judge on April 9, 1965. He retired from the bench in October 1985 and died on March 9, 1993 at his home in Oakville at the age of 82. Recipients of this award have demonstrated a lifetime of outstanding service.

Stephen MacDonald is the 2023 recipient of the Eric M. Swan Award for Civility.

The Eric Swan Award was created in 2013 in remembrance of his great kindness and civility after he passed away on April 28, 2013 at the age of 47, following his brave battle with cancer. He has continued to be missed by members of the Halton County Law Association. Recipients of this award have demonstrated outstanding ethical standards and dedication to the profession.

Cathryn Paul is the 2023 recipient of the Justice Victoria Starr Award for Excellence in Advocacy for Families and Children, created in recognition of Her Honour's outstanding contribution to the families and children of Halton and her tireless efforts to educate and mentor the bar and promote excellence in advocacy for families and children, whether in the family court process or in other dispute resolution processes.

Recipients of this award have demonstrated a commitment to advancing the interests of children and families of Halton through their work and/or in their volunteer efforts, as well as a commitment to enriching the bar through continuing legal education.

We are so proud of the impact these exceptional individuals have made on our profession and thank them for their contributions to our Halton legal community.

The awards will be presented at our upcoming Judges' Night on Thursday March 2, 2023 at the Burlington Golf and Country Club. We sincerely hope that all members are able to join us in celebrating them!

The Association also bids congratulations to Debbie Gibbins (Trial Coordinator), who will be retiring at the end of February after 30 years of service with the

Ministry of the Attorney General.

Members should also take note of two complimentary CPD programs coming up:

- 1) CaseLines: Your Questions Answered! on February 23, 2023 ; and
- 2) Navigating Governance Challenges in Closely Held Companies on February 22, 2023.

As always, more information about all of the events noted above can be found on our website: www.haltoncountylaw.ca

Otherwise, looking forward to seeing you all on March 2, 2023 for our Annual General Meeting and Judges' Night, our first time back in-person in two years!



*We are very pleased to
announce that the following student
received the
Bob Lush Memorial Bursary
for 2022*

Rachel Weitz

CONGRATULATIONS!!

BENCHER NEWS

by M. Claire Wilkinson



Family Legal Service Provider licence approved by Convocation:

Many of you will be aware that the issue of paralegal representation of family law clients has been under consideration by the Law Society for many years. It is well known that there is an access to justice crisis in family law, with too many litigants unable to access legal services. The hope had been that paralegals with specific training in family law could help meet this need, and reduce the number of self-represented litigants in the courts. The original proposal by the Access to Justice Committee set out a fairly broad scope of practice for paralegals in family law, including attending court for divorces, child support and spousal support in certain circumstances, and custody and access orders. As well, the initial proposal included the FLSPs being able to draft separation agreements in certain circumstances, provided that the client could obtain independent legal advice from a lawyer.

The response from lawyers and judges was not favourable to this proposal, and accordingly, a new, narrower scope of practice for the FLSP was then proposed, which is supported by the judiciary, and has now been accepted by Convocation. In order to be designated a Family Law Service Provider, paralegals will have to complete specific training that will include 98 competencies, and will take about 3 months to complete. Once certified, paralegals will be able to assist clients with process navigation, and they will also be able to complete applications for joint and uncontested divorce, and motions to change child support, based on the payor's "line 150/T4 slip" income, and excluding special and ex-

traordinary expenses. The new scope will also include responding to support proceedings and court appearances on motions to change, subject to the limitations described above.

The Access to Justice Committee will review the FLSP licence within three years of its implementation to determine its impact on access to justice. A further report will be made to Convocation at that time.

Although this new program may not resolve the access to justice problem in family law, it is a start...and that's a good thing.

First participant in the Access to Innovation Project:

The program "Willful", an online estates planning platform, has been approved for a two year operating phase by the Access to Innovation Advisory Counsel. The program assists people with creating a will and power of attorney documents through an online platform. By participating in the Access to Innovation (A2I) project, Willful is required to follow operating and reporting requirements established by the Law Society, as it works towards a permit to offer legal services on an ongoing basis. The reality is that if external companies are going to offer electronic legal services, it is in the public interest that they be regulated by the Law Society. Accordingly, it is positive news that Willful is participating in the A2I project.

Potential Tree Removal from Osgoode Hall:

Metrolinx has expropriated a portion of Osgoode Hall's property to establish a new subway stop. Convocation has voted in favour of a motion to oppose this expropriation, and to explore other alternative proposals for Osgoode Station as part of the Ontario Line Development. Osgoode Hall has historic significance for our profession and for the province as a whole. Osgoode Hall is the home of the Court of Appeal for Ontario, as well as the Law Society of Ontario. Community leaders and activists are beginning to take notice of this issue, and are voicing concerns about the potential loss of trees and green space at Osgoode Hall.

Metrolinx has now agreed that it is not necessary to remove the trees at Osgoode Hall to facilitate an archaeological assessment for the Ontario Line station that Metrolinx is proposing for the site.

The next steps will involve continuing with work with concerned community members and citizens and Me-

trolinx to develop other options and alternatives that can still achieve the goal of improving transportation for the region, without destroying Osgoode's historic trees and greenspace.

Human Rights award nominations open until December 31, 2022:

The Human Rights Award recognizes outstanding contributions to the advancement of human rights and/or the promotion of the rule of law provincially, nationally, or internationally. This award is granted for devotion to the advancement of human rights and the rule of law over a long term, or for a single outstanding act of service. Learn more about the award here: <https://lso.ca/about-lso/medals,-awards-and-honours/law-society-awards/human-rights-award>. I hope you all had an enjoyable, relaxing and joyous holiday season!

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LIBRARY NEWS

by Arielle Vaca



Have you recently taken over a law practice?

We ask our members to please let us know if you have recently taken over a law practice by emailing the librarian at info@haltoncountylaw.ca as we get frequent requests for information regarding the transfer of Wills & POAs. Although we are aware that the Law Society of Ontario has a department to

achieve this, we find it valuable as a law library to support our Halton community by having this information readily available when contacted.

e-LiRN: Electronic Resources

This is a friendly reminder that the HCLA library has access to electronic legal databases for FREE on

each lawyer computer, including but not limited to: LexisNexis Advance Quicklaw, LexisNexis Practical Guidance, Westlaw and vLex.

Visit the law library in the Milton Courthouse for more information about access to these resources and training opportunities.

Westlaw has provided a virtual training schedule for Criminal, Family and Estates & Trusts Source resources from February through April of 2023.

Please click [here](#) for a list of dates.

Each training session contains 1.0 hour(s) of Professionalism content.

STEPHEN ABRAHAM PERSONAL INJURY LAW

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2018
LEXPERT RANKED
 LAWYER

LIBRARY NEWS con't

New books list

- Aboriginal Law Handbook, Olthuis et al. 5th ed., 2018.
- Accident Benefits: A Practical Desk Reference, Singer et al. 2016.
- Agency and Partnership Law Primer, Harvey & McPherson. 5th ed., 2016.
- Annotated Aboriginal Law: The Constitution, Legislation, Treaties and Supreme Court of Canada Case Summaries, Imai. Annual.
- The Annotated Bank Act with Associated Regulations, David & Dooley. Annual.
- Annotated Divorce Act, MacDonald & Wilton. Annual.
- Annotated Ontario Construction (Lien) Act, Glaholt & Keeshan. Annual.
- Annotated Ontario Employment Standards Act, Lavender. Annual.
- Annotated Ontario Family Law Act, MacDonald & Wilton. Annual.
- Annotated Ontario Landlord and Tenant Statutes, Butkus. Annual.
- The Annotated Practitioner's Goods and Services Tax, Sherman. Annual.
- Assessment of Personal Injury Damages, Bruce. 6th ed., 2019.
- Behind and Beyond Boilerplate: Drafting Commercial Agreements, Elderkin & Shin Doi. 4th ed., 2018.
- Black's Law Dictionary, Garner. 11th ed., 2019.
- Bullen & Leake & Jacob's Canadian Precedents of Pleadings, Bullen et al. 3rd ed., 2017.

***Moved offices?
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New books list cont'd...

- Canada's Cannabis Act: Annotation & Commentary, Bennett. Annual.
- Canadian Agency Law, Fridman. 3rd ed., 2017.
- Canadian Charter of Rights and Freedoms, Beaudoin & Mendes. 5th ed., 2013.
- Canadian Civil Procedure Law, Abrams. 2nd ed., 2010.
- Canadian Guide to Uniform Legal Citation, McGill University. 9th ed., 2018.
- Canadian Immigration & Refugee Law Practice, Waldman. Annual.
- Canadian Law of Mortgages, Roach. 3rd ed., 2018.
- Cannabis law: The Legislative Framework, MacFarlane. Annual.
- Charter Remedies in Criminal Cases: A Practitioner's Handbook, Asma & Gourlay. 2019.
- Children's Law Handbook, Zuker. 4th ed., 2019.
- Condominium Act: A User's Manual, Loeb. 5th ed., 2018.
- Conduct of Lien, Trust and Adjudication Proceedings, Glaholt. Annual.
- Discovery in Canadian Common Law: Practice, Techniques & Strategy, Archibald. 3rd ed., 2017.
- Drafting Trusts and Will Trusts in Canada, Kessler. 5th ed., 2020.
- E-Discovery in Canada, Wortzman. 3rd ed., 2017.
- Education Law, Brown & Zuker. 5th ed., 2019.
- Environmental Class Actions in Canada, Durocher. 2nd ed., 2021.
- Environmental Law: Cases and Materials, Doelle & Tollefson. 3rd ed., 2019.
- Estate Planning Handbook, Allen. 5th ed., 2019.
- Examination of Witnesses in Criminal Cases, Levy. 7th ed., 2016.
- The Executor's Handbook, Greenan. 6th ed., 2019.
- Family Law Litigation Handbook (Ontario), Joseph. 2nd ed., 2017.
- A Guide to Practice and Procedure in Small Claims Court, Martel. 2018.
- Impaired Driving in Canada: The Charter Cases, Kenkel. 4th ed., 2019.
- Impaired Driving and Other Criminal Code Driving Offences: A Practitioner's Handbook, Jokinen & Keen. 2019.

New books list cont'd...

- Title Searching and Conveyancing in Ontario, Moore. 7th ed., 2017.
- Tort Law, Klar. 6th ed., 2017.
- Understanding Lawyers' Ethics in Canada, Woolley. 2nd ed., 2016.
- Waters' Law of Trusts in Canada, Waters. 5th ed., 2021.
- Witness Preparation: A Practical Guide, Finlay & Cromwell. 4th ed., 2018.
- Wrongful Dismissal Handbook, Sproat. 8th ed., 2018.

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CIVIL LITIGATION NEWS

by James Page



THE TORT OF PUBLIC DISCLOSURE OF PRIVATE FACTS

In 2018, the Ontario Superior Court of Justice (Justice Gomery) created the tort of “public disclosure of private facts”. The case is [Jane Doe 72511 v. N.M., 2018 ONSC 6607 \(CanLII\)](#).

In that case, the plaintiff, Jane Doe, and the defendant, N.M., met in high school and began dating in December 2012. The plaintiff became pregnant 6 months later and their relationship deteriorated thereafter. Over the course of almost two years, the defendant physically and verbally abused the plaintiff and threatened her. The defendant was later charged and convicted of assault and the CAS became involved as well to protect the child. The plaintiff had reported him to the police.

Then in or around June 2016, the plaintiff learned that a sexually explicit video of her was on a pornography website. The defendant posted the video without her consent. The video had a derogatory and racist title and the plaintiff’s face could be seen in the footage. She was able to get the video taken down but not before it had been viewed over 60,000 times. It was connected to at least 10 different websites and downloaded an unknown number of times. The defendant posted the video out of revenge for his criminal conviction.

The plaintiff sued the defendant in assault and battery, negligence, and for public disclosure of private facts – the last of which was not yet recognized as a tort in Ontario. N.M did not defend the action and was noted in default. All the allegations against him in the statement of claim were deemed to be true. The plaintiff, however, still had to prove her damages. Justice Gomery officially recognized the new tort of public disclosure of

private fact as it represented a constructive, incremental, and needed modification to existing law. The court found the defendant liable for the new tort and awarded the plaintiff \$50,000 in general damages, \$25,000 for aggravated damages and ¹\$25,000 for punitive damages.

When assessing the plaintiff’s general damages, the court noted that “the posting of the video has had a serious, long-term impact on Jane’s psychological well-being, her ability to form relationships and her trust in those around her. She fears that it has also compromised her future job prospects and her ability to be a good parent.” It does not seem, based on my reading of the decision that the plaintiff presented evidence of a formal psychological diagnosis or evidence of psychological treatment. She attended counselling before and after the birth of her child but before she learned of the internet posting. No medical or counselling records were produced at the hearing.

In establishing the new tort, the Ontario Superior Court held that to establish liability for the new cause of action the plaintiff must prove the following:

1. The defendant publicized an aspect of the plaintiff’s private life;
2. The plaintiff did not consent to the publication;
3. The matter publicized or its publication would be highly offensive to a reasonable person; and
4. The publication was not of legitimate concern to the public.

Since then, the Queen’s Bench of Alberta² and the King’s Bench of Saskatchewan have also recog-

nized the tort and the damages awarded in those two cases are even more significant than what was awarded in [Jane Doe 72511 case](#).

In [ES v. Shillington, 2021 ABQB 739](#) the plaintiff and defendant were in a romantic relationship between 2005 and 2016 and had two children together. The defendant committed multiple acts of physical and sexual assault against the plaintiff during their time together. As part of their relationship, the plaintiff shared intimate photographs of herself with the defendant. She was engaging in sexual activity in the photos. They were shared as a private gift to the defendant, and it was understood that they would not be distributed in any way. Near the end of their relationship, the plaintiff learned that the defendant posted her intimate images on pornography sites. He posted them as early as 2006. The plaintiff still found them online as late as 2021. The plaintiff was recognizable in some of the images.

The plaintiff sued the defendant. One of the causes of action was public disclosure of private facts. The Alberta Queen's Bench³ recognized the existence of the tort and defined it in the same way as Justice Gomery in Ontario with one point of clarity: with respect to the third element of the tort, the content publicized or its publication must be offensive to the reasonable person who stands in the position of the plaintiff.

When assessing damages, the court noted that plaintiff was suffering from depression, anxiety, sleep disturbance and humiliation. Unlike in [Jane Doe 72511](#), there was evidence from a psychologist about the impact of the public disclosure on the plaintiff's mental health. She was attending therapy and taking medications. She continued to suffer emotionally despite treatment, and it was she was unable to engage in romantic relationships. Pain and suffering damages were assessed a \$80,000. Aggravated and punitive damages were assessed at \$25,000 and \$50,000 respectively. The general and punitive damages claims were higher than they were in [Jane Doe 72511](#).

Most recently, the Saskatchewan Court of King's Bench (Justice Zerr) has also recognized the tort in [S.B. v. D.H., 2022 SKKB 216](#). The damages assessments in that summary judgment hearing were even more significant than in either [Jane Doe 72511](#) or [ES v. Shillington](#).

In the Saskatchewan case, the defendant uploaded nude pictures of the plaintiff, his ex-wife, on a pornogra-

phy website. He shared her name and personal details and encouraged users to repost the videos. Some of the videos were posted when they were married. One of the videos was viewed over 1.5 million times. She was on at least 10 different websites. The plaintiff never consented to any publication. The plaintiff sued him for, among other things, public disclosure of private facts, which was not yet recognized as a cause of action in Saskatchewan.

As a result of the publication, the plaintiff experienced anxiety, distress and shame which affected her sleep. She understandably had issues with trust. She was worried that she could never completely delete the images from the internet and that her son would one day be shown the videos. At times she was so upset about what happened that she would not be able to get out of bed. She attended 6 counselling sessions with a social worker over a 6-month period. She would have benefited from additional treatment, but her insurer would not cover any more counselling. Her social worker gave evidence at the hearing. It did not appear that she had been given a formal diagnosis, though the court found her symptoms were serious and prolonged.

Justice Zerr established the new tort. The elements were the same as in [ES v. Shillington](#). Her Honour awarded \$85,000 in general damages and \$75,000 aggravated damages (\$160,000 combined). Punitive damages were not awarded because of the defendant had already been convicted criminally of the non-consensual distribution of intimate images and served significant jail time.⁴ General and aggravated damages in [S.B. v. D.H.](#) were notably higher than what was awarded in [ES v. Shillington](#).

While general damages assessments are always going to depend on the individual circumstances of each case, it is clear that assessments in [Jane Doe 72511](#), [Shillington](#) and [S.B. v. D.H.](#) are not insignificant by any stretch, even when there isn't a formal psychological or psychiatric diagnosis. In fact, it seems whether there is a formal diagnosis is only one factor of many to consider – which is consistent with the Supreme Court of Canada's decision in [Saadati v. Moorhead](#).

Since 2012 Canadian courts have been establishing causes of action to better protect peoples' privacy and mental health in the modern age where online harassment and bullying can go unchecked but for criminal and civil remedies to protect victims. Currently, plaintiffs in Ontario can potentially seek remedies through the torts of breach of privacy (intrusion upon seclusion), internet harassment, and public disclosure of private facts – in addition to seeking remedies through the more traditional, long-standing torts such as negligence, breach of confidence, and intentional / negligent infliction of emotional suffering.

Undoubtedly, additional changes to the law will be needed, likely in the near future, because technology changes and advances so very rapidly – and sadly, it is hard to keep up with the ways in which new technology is used by people to seriously hurt others.

1. By general damages I mean pain and suffering and loss of enjoyment of life, but not aggravated damages – though aggravated damages are technically part of the general damages umbrella.

2. Now the King's Bench.

3. Now the King's Bench.

4. The defendant had been charged and convicted for the non-consensual distribution of intimate images of six different women, including the plaintiff.

ESTATES NEWS

by Suzana Popovic-Montag



The Challenge of Removing an Estate Trustee

A word of caution to anyone engaged in estate planning – take care when choosing the person who will administer your estate. Since estate trustees are not required to have any relevant experience or expertise,¹ it can be quite difficult to remove a trustee after probate is granted, even if complications arise during an estate administration. Ontario courts have consistently reiterated that they “will not lightly interfere with the testator’s choice of estate trustee”.²

Removing a trustee may be a difficult task, but

luckily, it is not impossible. This article addresses the procedure for applying to remove a trustee, the grounds for removal, and also explores potential alternatives.

Procedural considerations

An application to remove an estate trustee is largely governed by the *Trustee Act*³ and the *Rules of Civil Procedure*.⁴ While the *Trustee Act* codifies the court’s power to remove a trustee,⁵ the actual removal application is brought under the *Rules* – either rule 14.05(3)(c) or rule 75.04(c).⁶ The application must be made by an individual who has an interest in the estate,⁷ such as a beneficiary, a fellow estate trustee, an alternate executor, or

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a spouse who has applied for equalization under the *Family Law Act*.⁸

There are no prerequisites to seeking this relief. Unlike a will challenge, it is not necessary to satisfy a minimal evidentiary threshold before the application can be heard, and it is also unnecessary to first seek leave or to bring a motion for directions.⁹

Since a removal application will only be granted if there is “the clearest of evidence that there is no other course to follow,”¹⁰ it is advisable to present a full evidentiary record to the court, including transcripts of cross-examinations.¹¹ The application may not be granted if, for example, only conflicting affidavit evidence is before the court.¹² Depending on the grounds for removal, it may also be prudent to apply for removal after the trustee has passed his or her accounts.¹³ The applicable standard of proof for the application is the balance of probabilities.¹⁴

Grounds for removal

When faced with a removal application, the court’s main considerations include the welfare of the benefi-

ciaries, whether the estate trustee’s acts and omissions are of such a nature as to endanger the administration of the estate, and whether non-removal will prevent the proper execution of the trust.¹⁵

While the outcome of any application will ultimately turn on the facts before the court, a number of bases for removal are relatively non-contentious, such as when the estate trustee:

lacks capacity due to illness and/or old age;¹⁶

resides outside Ontario;¹⁷

is bankrupt,¹⁸ or

is a convicted felon.¹⁹

In comparison, the outcome of a removal application argued on other grounds may be difficult to predict. Consider the following examples:

Delay in administering an estate: While delay certainly can result in removal,²⁰ the success of the application will depend on whether the delay can be

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

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reasonably explained, whether it compromised the estate, and whether such behaviour will be repeated.²¹

Misconduct: Benign errors, mistakes and breaches of trust may not warrant the removal of an estate trustee,²² particularly if past misconduct is not likely to continue.²³ However, if an estate trustee has defied the testator's will and his or her conduct demonstrates lack of intention to carry out the terms of the trust, removal will be justified.²⁴

Conflicts of interest: If an individual's duty as the administrator of the estate is at odds with his or her personal interests, removal may be ordered.²⁵ Examples of such conflicts include the estate trustee owing unpaid debts to the estate,²⁶ or challenging the will after probate is granted.²⁷ However, not all conflicts will merit removal – for example, many beneficiaries are executors of the estate they administer, creating an inherent conflict of interest. A testator may also expressly authorize a trustee to administer the estate notwithstanding a conflict.²⁸

Hostility and friction: Regardless of whether there is hostility amongst an estate trustee and the beneficiaries

of the estate, or among multiple estate trustees, friction on its own may not merit removal.²⁹ It is only if friction will prevent the proper administration of the trust, or make it difficult for the trustee to act impartially, that removal may be ordered.³⁰ If there are additional grounds to remove an estate trustee, hostility may also tip the scales in favour of removal.³¹

While there are many more grounds available for seeking removal of an estate trustee, these examples demonstrate how difficult it can be to successfully predict the circumstances under which a trustee will actually be removed.

Alternatives to removal

Another point to ponder before applying for removal is whether another, less-costly solution may be available. The removal of an estate trustee can be “bitter, expensive and time-consuming, and is rarely productive of any real positive result,” making litigation something of a last resort.³² Moreover, if the applicant is a fellow estate trustee, there is a real

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possibility that the court will require the parties to meet to address their issues and explore solutions, rather than grant a removal application.³³

Even if an applicant is not an estate trustee, it would be prudent to consider whether alternative relief can be sought from the court in addition to removal. For example, an applicant may ask the court to utilize its inherent jurisdiction to limit the scope of the estate trustee's authority if removal is not granted.³⁴ Another potential solution may be simply asking the estate trustee to retire.

Conclusion

While it has been noted that a court should not act "too readily" to remove an estate trustee,³⁵ as a general rule, a removal application will be warranted if there is clear evidence that the estate trustee is not acting in the interests of the beneficiaries, and there is no other recourse readily available that will respect the testator's choice of trustee. Like anything in life though, success cannot be guaranteed. Given the possibility that a removal application may not be granted and that the applicant will have to continue to work with the trustee, such an application should be approached with sensitivity.

1. *Meuse v. Taylor*, 2022 ONSC 1436 at para. 43 [*Meuse*].
2. This principle has been reiterated in a number of cases, including *Re Weil*, 1961 CanLII 157 (Ont. C.A.); *Virk v. Brar Estate*, 2014 ONSC 4611 at para. 48 [*Virk*]; *Radford v. Wilkins*, 2008 CanLII 45548 (Ont. S.C.J.) at para. 100 [*Radford*]; and *Meuse*, *ibid.* at para. 12.
3. R.S.O. 1990, c. T.23.
4. R.R.O. 1990, Reg. 194.
5. *Trustee Act*, *supra* note 3, s. 37. The court also has inherent jurisdiction to remove an estate trustee: see *St. Joseph's Health Centre v. Dzwiekowski*, 2007 CanLII 51347 (Ont. S.C.J.) at para. 25 [*St. Joseph's*].
6. See *Kasandra v. Satarelli*, 2022 ONSC 185 at para. 33 [*Kasandra*].
7. *Trustee Act*, *supra* note 3, s. 37(3).
8. R.S.O. 1990, c. F.3, s. 5. See also Ian M. Hull and Suzana Popovic-Montag, *Probate Practice*, 5th ed (Toronto: Thomson Reuters, 2016) at 250 [*Probate Practice*].
9. *Kasandra*, *supra* note 6 at paras. 32-34.
10. *Virk*, *supra* note 2 at para. 48.
11. See *Kasandra*, *supra* note 6 at para. 39.
12. *Koglin Estate (Re)*, 2021 BCSC 2525 at para. 56.
13. See *Byle v. Byle Estate*, 2006 BCSC 1695 at paras. 22-23; *Bull-Noel v. Kebe*, 2010 ONSC 1056 at para. 13.
14. *St. Joseph's*, *supra* note 5 at para. 37; see also *Schaeffer Estate (Re)*, 2016 ABQB 180 at para. 175 [*Schaeffer*].
15. See *Virk*, *supra* note 2 at para. 48; *Meuse*, *supra* note 1 at para. 12.
16. See *Kullman Estate (Re)*, 2022 NLSC 159.
17. *Probate Practice*, *supra* note 8 at 255.
18. *Ibid.* at 254, but see *Chambers v. Chambers*, 2013 ONCA 511 at para. 96 [*Chambers*].
19. *Probate Practice*, *ibid.* at 255.
20. See, for example, *Kinnear v. White*, 2022 ONSC 2576; *Knight Estate (Re)*, 2014 ABQB 8.
21. *Radford*, *supra* note 2 at paras. 108-109.
22. See *Probate Practice*, *supra* note 8 at 259.
23. *Virk*, *supra* note 2 at para. 48; *St. Joseph's*, *supra* note 5 at paras. 28-29.
24. See, for example, *Scott v. Scott*, 2022 NLCA 61 at para. 22; *Wood's Homes Society v. Selock*, 2021 ABCA 431.
25. See *Chambers*, *supra* note 18 at para. 96; *Bereskin Estate, Re*, 2014 MBCA 15; *Greeley Estate v. Greeley*, 2016 NLCA 26.
26. See *Re Estate of Rose May Hazlitt*, 2017 MBQB 184.
27. See *Jones (Estate)*, 2017 SKQB 388.
28. See *Stern v. Stern*, 2010 MBQB 68 at para. 14.
29. *Radford*, *supra* note 2 at paras. 111-113; *Chambers*, *supra* note 18 at para. 96.
30. See *Oldfield v. Hewson*, 2005 CanLII 2808 (Ont. S.C.J.) at para 27; *Schaeffer*, *supra* note 14 at paras. 176-177. See also *Meuse*, *supra* note 1 at para. 15.
31. *Cordeiro v. Kulikovsky*, 2003 CanLII 37094 (Ont S.C.J.) at para. 49.
32. *Probate Practice*, *supra* note 8 at 263-264.
33. See *Re Brodylo Estate*, 2022 ABQB 358; *Hill v. McLoughlin*, 2007 CanLII 1334 (Ont. S.C.J.) at para. 23.
34. *Dempster v. Dempster Estate*, 2008 CanLII 59558 (Ont. S.C.J.); *Assaf Estate (Re)*, 2008 CanLII 23489 (Ont. S.C.J.) at paras. 32-33
35. *Schaeffer*, *supra* note 14 at para. 175.

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FAMILY LAW NEWS

by Kathy Batycky



Recently you should have received a new Local Practice Memorandum from OCJ -Family. It takes effect on February 1, 2023. Make sure you adhere to the new policies now that In-Person appearances are back. In case you missed it, the Memorandum is posted on the HCLA website here: [https://haltoncountylaw.ca/resources/Documents/LOCAL%20PRACTICE%20Memorandum%20February%201%20%202023 .pdf](https://haltoncountylaw.ca/resources/Documents/LOCAL%20PRACTICE%20Memorandum%20February%201%20%202023.pdf)

This memorandum covers all the things we need to know: Page limits, proper document naming protocols, information on how to file documents, rules about seeking adjournments and what needs to be included in the Form 17F Confirmation, how to request a Priority Case Conference, how to schedule a Motion, how to request an Urgent Motion, proper process for Motions without Notice, and information on FRO Refraining Order process.

One very important policy note from this Memorandum is about CaseLines and that is because for those lawyers who practice in both OCJ and SCJ, you need to know the different practice about CaseLines. This is what the Memorandum says:

9. Sharepoint And Caselines

All documents shall first be filed with the court which means, the documents are then available to the presiding judge through SharePoint. Should counsel choose to upload to CaseLines they may do so.

It is important to note that if documents are uploaded to CaseLines only, this means the documents have not been filed with the court and the presiding judge will not review them prior to the court date.

If case law, DivorceMate calculations or other aids to the court are uploaded to CaseLines, this must be set out in the 17F form, failing which, the presiding judge will not review the documents prior to the court date. Documents uploaded to CaseLines

without service on, or consent of, the opposing party will not be reviewed by the presiding judge.

News From Legal Aid and the Mediation Center

Remember that FLIC office is now on the 3rd floor of the courthouse in the OCJ wing. It is located across from Courtrooms 2 and 3, and is open on Tuesdays for in person appointments for qualified parties. Other days you can reach someone from FLIC by telephone, using the 1-800 number: Clients can call the Legal Aid service line at 1-800-668-8285, or the main Duty Counsel line at 905-693-6539.

Mandatory Information Program (MIP) still does exist: the MIPs are now available only by zoom technology and are no longer held in person.

Make sure you tell your clients to contact the IRC at 905-849-0417 or at miltonontariomip@gmail.com for more information or to schedule a MIP

Parties in a court file need to attend their MIP. Lawyers, please make sure you encourage the parties



Adam Rumball
Consultant

Book an
Appointment



to attend their Mandatory Information presentation.

In Court mediations are being conducted – In person on Mondays and Thursdays and virtually on the other days.

Important Case Update:

I understand that the appeal of the case Ahluwalia v Ahluwalia, 2022 ONSC 1303 trial decision: <https://canlii.ca/t/jmpnf>) is set to be argued in the Court of Appeal on Thursday, March 23, 2023. Keep a watch after that for the reported decision in that appeal of this very interesting case.



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- ANNA FITZSIMMONS

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by Hull & Hull LLP

IMMIGRATION LAW NEWS

by Melissa Babel



Canadian Immigration Updates

Work and Travel for International Youth in Canada and IEC 2023 Pools

Last year on December 1, 2022, The Honorable Sean Fraser, Minister of Immigration, Refugees and Citizenship, launched the 2023 International Canada IEC program, which opened this week on January 9, 2023.

This new program will allow international youth to work and travel, exploring new cultures and developing life-long skills that can help propel them in developing life-long skills. This program will substantially increase the number of applicants able to apply and allow more international youth to work and travel in Canada.

With efforts to help build and support Canada's economy, the government is looking for ways to optimize the country's prosperity by providing approved applicants with an opportunity to work and travel, thus improving the damage various sectors have endured and continue to face since the start of the Covid-19 Pandemic in 2019.

The IEC program is designed for partnered nations with Youth Mobility Agreements with Canada. Thirty-six partner countries are included, and applicants within the eligible age range can qualify for an IEC Work permit. Candidates interested in applying must submit an **Expression of Interest** by creating a candidacy profile that satisfies the stream requirements. Those chosen based on their profile and meeting the program's eligibility will then be allowed to apply for a Work Permit.

The government is optimistic that launching this program will help employers fill gaps and provide industries with the workers they need.

To Read more: <https://www.canada.ca/en/immigration-refugees-citizenship/news/2022/12/government-of-canada-allowing-more-international-youth-to-work-and-travel-in-canada.html>

National Occupation Classification 2021: Changes and Updates.

The National Occupational Classification system is integral to Canada's immigration processes and procedures. Categorizing employment activities in Canada helps answer questions surrounding Canada's labour market trends, helping Canada manage immigration programs for workers and employers.

Last year, we were introduced to the new NOC 2021, which included restructuring across broad occupational categories and the Training, Education, Experience and Responsibility categories. In addition to the structural changes, there have been additions, merging, splitting and complete removal of certain groups across the occupational categories and TEER Categories. Most noticeably, the previous four-category skill level structure has been revamped by a six-category system that integrates the TEER model of Training, Education, Experience, and Responsibilities to each occupation. Furthermore, occupations now have a five-digit code instead of the four-digit codification system.

Changes to the Global Talent Stream

As of December 22, 2022, the Government of Canada introduced an updated list of occupations eligible under the Global Talent Stream program, which now includes applicants qualified in civil, electrical and electronics, mining, aerospace engineering,

and electrical/ electronics engineering technologists and technicians.

As Canada continues to work towards an economic future, this news has been received with open arms by highly-skilled foreign workers looking for a pathway into Canada.

For more information: <https://www.canada.ca/en/employment-social-development/services/foreign-workers/global-talent/requirements.html>

For more information: <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/find-national-occupation-code.html>

U.S. Immigration Update

USCIS Automatically extends green cards for Naturalization Applicants

On December 12, 2022, U.S. Citizenship and Immigration Services updated its policy to allow automatic extensions on Green Cards for permanent residents who have applied for naturalization.

Ultimately this extension will apply to any lawful permanent resident who filed from N-400 on or After December 12, 2022. Lawful permanent residents who filed for naturalization before December 12, 2022, when the policy was enacted, will not receive a Form N-400 receipt notice with the extension. Those with expired Green Cards must maintain valid evidence of their lawful permanent residence status and must still file Form I-190.

These changes were implemented in response to the heightened processing times and recognizing that USCIS strives to improve efficiency by reducing the number of ADIT stamp appointments.

To read more: <https://www.uscis.gov/newsroom/alerts/uscis-updates-policy-to-automatically-extend-green-cards-for-naturalization-applicants>

Express Entry Update December 2022-January 2023

The number of invitations issued in each draw is steadily climbing, with a variation in the number of CRS points required to qualify. The points are still high but remain in a range where many qualified

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candidates with Canadian experience could expect invitations.

On December 9, 2022, 4750 invitations to apply were issued to candidates in the Express Entry pool with a minimum CRS score of 494 or higher in all categories. Most recently, another all-programs draw took place on January 11, 2023, with 5,500 invitations to apply issued and a minimum CRS score of 507.

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

As an alternative strategy to Express Entry, a number of Provincial Nominee Programs are actively issuing invitations and processing applications. Last year, on December 22, 2022, the Ontario Nominee Program ("OINP") reached its 2022 nomination allocation. The program issued a total of 9,750 nominations to applicants across all streams.

To read more: <https://www.ontario.ca/page/2022-ontario-immigrant-nominee-program-updates#section-10>

The BC Provincial Nominee Program

This month the B.C. Provincial Nominee Program has issued numerous Skills Immigration Immigrations across all streams. On January 10, 2023, 123 invitations were issued in a targeted tech draw for the Skilled Worker International Graduate stream, with a minimum score of 90.

To read more: <https://www.welcomebc.ca/Immigrate-to-B-C/Invitations-To-Apply>

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TAX LAW NEWS

by Amit Ummat



Taxpayer's Management Services Not a Personal Endeavour

Brown v. Canada 2022 FCA 200

Summary

The Appellant Mr. Darrell Brown (“**Mr. Brown**”) appealed his reassessments to the Tax Court of Canada (“**TCC**”) and lost. He appealed that decision to the Federal Court of Appeal (“**FCA**”) and was successful in having the matter sent back for loss calculation purposes.

Issue

Mr. Brown was providing management services to a numbered company owned by himself and his spouse. The numbered company operated an art gallery. The TCC Judge found that, since Mr. Brown commenced the management services activity because his spouse was no longer able to manage the gallery as a result of her illness and pregnancy, it was a personal endeavor. The main issue in his appeal was whether the TCC Judge erred in finding that there was a personal element to Mr. Brown's management services activity.

Background

Mr. Brown is a lawyer and his spouse is an artist. They opened an art gallery in Toronto. They operated the gallery through a numbered company with shares split 51/49 for Mr. Brown and his spouse, respectively.

The gallery opened in 2010 and seemed to be doing well. Mr. Brown was only minimally involved in the operation of the gallery at that point.

Later that year Mrs. Brown fell ill and also became

pregnant, which limited her ability to perform her gallery functions. In January of 2011, Mr. Brown became far more involved in the gallery operations. The numbered company resolved to retain Mr. Brown to provide management services to the numbered company. The compensation to be paid to him was a management fee equal to 20% of the amount by which the gallery's annual revenue exceeded \$100,000. This agreement to provide services was eventually extended the following year for a five-year term.

Since the gallery did not earn over \$100k in the years at issue (and posted losses some years), Mr. Brown was not paid for his services.

Mr. Brown claimed non-capital losses in 2011, 2012 and 2013. Mr. Brown was reassessed to deny the non-capital losses on the basis that his management services activity was not a source of income and that the amounts claimed as expenses were not reasonable. He appealed to the TCC.

The TCC relied on the Stewart¹ test to determine if Mr. Brown had a source of income. It is a two-part test:

- i) Is the activity of the taxpayer undertaken in pursuit of profit, or is it a personal endeavor?
- (ii) If it is not a personal endeavor, is the source of the income a business or property?

The TCC found there was a personal element, and that therefore there was no source of income from which Mr. Brown was able to deduct non-capital losses. The TCC found that the personal element arose when Mr. Brown took over for his ill spouse.

The TCC also found that the activity was not carried on in a sufficiently commercial manner to constitute a source of business. Mr. Brown did not show that his predominant intention was to make a profit from the activity.

FCA Decision

The FCA was tasked with determining whether the TCC had erred in finding a personal element in Mr. Brown's activity. Justice Webb answered this in the affirmative. He ruled that the TCC misinterpreted the Stewart decision.

Justice Webb reframed the test as follows²:

- Is there a personal or hobby element to the activity in question?
- If there is a personal or hobby element to the activity in question, the next enquiry is whether "the activity is being carried out in a commercially sufficient manner to constitute a source of income" (Stewart, at para. 60).
- If there is no personal or hobby element to the activity in question, the next enquiry is whether the activity is being undertaken in pursuit of profit.

In the Court's view, the question became whether there was any personal or hobby element to the management services Mr. Brown provided. The answer was no, there was not. Mr. Brown's decision to provide management services due to his spouse's illness did not mean that there was a personal or hobby element to his services. The activity in question in this appeal was providing management services to the corporation that was carrying on the gallery business. These management services allowed the gallery to continue to operate. There is no indication that there was any personal or hobby element to these management services. The only personal element identified by the TCC was Mr. Brown's motivation to provide these services because his spouse was unable to continue managing the gallery.

The next question was whether Mr. Brown pursued profit. The Court found that he was in fact pursuing profit. By providing the management services that allowed the gallery to continue to operate until it could generate sufficient revenue to cover all of its expenses, Mr. Brown's intent was to allow the gallery

to generate revenue which, in turn, would generate the management fees payable to him, and hence, profit for his management services activity³.

The FCA found that the determination of the expenses Mr. Brown claimed was still an open issue and sent the matter back to the TCC to determine the amount of the non-capital losses.

Key Takeaway

It is important to note that conducting business activities with a personal intention does not convert the activity itself to a personal endeavour. Justice Webb makes interesting comments on this issue⁴:

Many businesses are passed from one generation to the next. As noted above, the Tax Court Judge found a personal element to Mr. Brown's management services activity when he commenced that activity as a result of his spouse's inability to continue managing the gallery. Applying this logic to an intergenerational transfer of a business, whenever the next generation takes over an endeavour from their parents as a result of their parents' inability to continue the endeavor, the analysis to determine if the next generation is carrying on the activity in a sufficiently commercial manner to qualify as a source of income would be triggered. However, simply because a child takes over an endeavor from his or her parent because that parent is not able to continue conducting that endeavor should not result in a finding that there is a personal element to the endeavor that the child is now undertaking.

A person's personal motivation or reason for conducting an activity cannot, in and of itself, result in there being a personal or hobby element to the activity. It is possible to find a personal reason why any person is carrying on a particular activity. For example, a person may be motivated to conduct a particular activity to generate money to fund his or her personal

lifestyle or because they are personally motivated to provide better services or products than are currently available in the marketplace.

1. *Stewart v. Canada* 2002 SCC 46

2. Decision, at paragraph 25.

3. Decision, at paragraph 43.

4. Decision, paragraphs 28-29.

OJEN NEWS

by Inga B. Andriessen



The Ontario Justice Education Network Halton Committee's main focus this next quarter is on the Mock Trials that are coming up. By the time you are reading this Newsletter, you will all have seen the "cries for help" asking for Judges and coaches to help with the high school Mock Trials.

If you missed the email, please feel free to reach out to me and at the very least, we can put you on the waiting list to be a Judge if that is something you are interested in. Every year we end up using at least one backup Judge because things come up at the last moment for people who volunteered to help judge.

The tournaments are returning to in person format this year, which means that there will be additional pressures placed on the tournaments for people to appear in person rather than by Zoom.

I encourage everybody who is interested to volunteer. You don't need to be a criminal lawyer to volunteer, we provide a lot of support for those who do volunteer to help.

The tournaments are running as follows:

Halton Catholic Senior – April 11, 2023
 Halton Catholic Junior – April 14, 2023
 Halton Public/Private Junior – April 21, 2023

Halton Public/Private Senior - April 28, 2023
 Championship – May 5, 2023

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

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

The Championship will be at the Milton Court House.

We also continue to need speakers for the classrooms, and if you're interested in volunteering for that we invite you to do so.

Finally, we will likely be looking for some monetary support for the upcoming Mock Trials as we will be back to the point of providing lunches for the students at the Championships as well as lunches for the Judges at the public tournaments.

If you're interested in providing monetary support, please let me know.

Thanks, as always, for being such a great community and supporting our students within Halton Education District.

Inga B. Andriessen, JD
 Chair, OJEN Halton Committee

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CALENDAR OF EVENTS

Wednesday, February 22

12 noon—1:00 pm

Navigating Governance Challenges in Closely Held Companies

Free for HCLA members! Register online through the HCLA website [here!](#)

Thursday, February 23

12 noon—1:00 pm

CaseLines: Your Questions Answered!

Register online through the HCLA website [here!](#)

Thursday, February 23

5:30—7:00 pm

Social & Mentor Appreciation Night

Beertown, Oakville

More event information can be found on pages 19/20. Register through the HCLA website [here!](#)

Thursday, March 2

AGM & Judges' Night

Burlington Golf and Country Club

AGM 5:00 pm, cocktails 6:00 pm

Dinner 7:00 pm

Tickets: \$110

Register [here!](#) Colleagues, guests, spouses, significant others all welcome!

Tuesday, March 7, 2023

FOLA Lobby Day via Zoom

Friday, May 12, 2023

9:00 am—1:00 pm (tentative)

Annual Estates Seminar

Program co-chairs: Ian Hull and

Suzana Popovic Montag

Oakville Golf Club

Watch for further details!