



HCLA NEWS

Newsletter of the Halton County Law Association

Volume 12 Issue 1

Winter 2021

Please join us for the
The Halton County Law Association
Annual General Meeting
Thursday, March 4, 2021



Annual General Meeting



Register today through the HCLA Website!

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PRESIDENT'S REPORT

by Ken Kelertas



Happy New Year to one and all! I hope that you and your loved ones are keeping well and that you continue to stay safe and healthy.

2020 did end on a relatively positive note for the Association. On November 27th, we held the annual EDI CPD seminar offered free of charge to our members. Deirdre Pike spoke enthusiastically on the theme of fostering a 2SLBGTQ+ positive workspace. If you missed it, the Zoom recording of this seminar is available on the HCLA website. On December 17th, we held our virtual Holiday Party, with a wine tasting curated by the Two Sisters Winery in Niagara-on-the-Lake that was well attended and, by all accounts, well-received.

Otherwise, looking back on 2020, all I can say is: good riddance! I sincerely hope that there are better days ahead for all of us.

At the beginning of last year, my prediction was that 2020 was going to be a challenging one for the legal profession in Ontario. In hindsight, this was a profound understatement. The COVID-19 pandemic wreaked havoc on our practices and for a short time brought our justice system to a near standstill. Work to find solutions to many of the problems that have plagued the legal system in Ontario- the inadequate funding of legal aid, the growing numbers of self-represented family law litigants, the disturbingly high percentage of criminal charges stayed or withdrawn, and the significant numbers of accused persons on remand- was forced to the backburner. In Halton, the pandemic and the resulting financial stresses put on the provincial government led to the decision to cancel the consolidated courthouse project. However, the pandemic did provide an opportunity for the justice sector to examine not just how we do things but why we do them. Action was taken by the provincial government to modernize legal practice in general. The

wider availability of virtual hearings, electronic filing, the introduction of CaseLines, virtual commissioning of affidavits, and the acceptance of electronic signatures for real estate transactions were all initiatives that were fast-tracked during the pandemic. On January 1, 2021, significant changes to the Rules of Civil Procedure took effect, making permanent many of the temporary measures which the Courts and the province put in place to accommodate the issues and challenges associated with the pandemic. The intent of the amendments is to modernize the court system in Ontario and allow for a more convenient and accessible justice system. Essentially, these changes signal the Court's willingness to embrace the virtual world and advance e-litigation by leaps and bounds. So... all is not doom and gloom.

Nevertheless, we continue to encounter significant challenges in Halton. The Milton courthouse remains closed to the public due to mould. Plans are in place to implement remediation measures. The likely impact is that the Milton courthouse will remain closed for much of 2021. As for the future (after the pandem-



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Thank you!

ic has abated and in-person hearings resume), there has been no definitive plan put forward by the government for the Milton and Burlington courthouses. In his last communication with the Association on December 9th, the Attorney General Doug Downey indicated that his ministry will undertake a number of initiatives, both facilities-based and operational, at the Milton courthouse to address immediate infrastructure needs. This will include the implementation of security upgrades, a new front entrance, and video technology upgrades in courtrooms. In addition, the Attorney General advised that his ministry will seek approval to undertake due diligence and planning for a possible expansion/addition to the Milton courthouse. However, no timelines have been provided for the start of these projects and, disappointingly, there has been no meaningful consultation with the local bench and bar since the consolidated courthouse project was cancelled last May.

Looking forward, the Annual General Meeting of the Association will be held by Zoom this year on March 4th (details to follow). I invite all interested members who wish to become more involved in the business of the Association to join the Board of Directors. Any members interested in running for a Director's posi-

tion must submit their name and a short bio to Karen Cooper (info@haltoncountylaw.ca) on or before 12:00 noon on January 31st, 2021. You are reminded that, beginning this year, Directors will be elected to two (2) year terms.

In closing, this will be my last President's Report. My past 10 years on the Board of Directors have been fulfilling, and I look forward to continuing to serve the Association in any way I can as Past President. While I not yet achieved my personal goal of seeing a new courthouse built in Halton, I have full confidence that the Board of Directors and our membership will continue the fight and that the torch will eventually be carried to the finish line.

Thank you for your continued support of the Association and I hope to see you at the AGM on March 4th.

Cheers!



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BENCHER REPORT

by M. Claire Wilkinson



LLD awarded to Max Eisen

Convocation on November 27, 2020 started on an inspiring and emotional note, as the LSO presented the degree of Doctor of Laws, honoris causa (LLD) to author, speaker, Holocaust survivor and passionate educator, Tibor “Max” Eisen, in recognition of his outstanding achievements with respect to the cause of justice. Max was born into an Orthodox Jewish family in Czechoslovakia. When he was 10 years old, Hungary occupied Slovakia. In 1944, his family (including his parents, two younger brothers and baby sister) was deported to Auschwitz-Birkenau, where his entire family was eventually executed in gas chambers. Max survived overwhelming odds against him, including enduring concentration camps and the 13 day “death march” in January 1945 to Mauthausen, and a further 3 day march to Ebensee. He was liberated on May 6, 1945, and eventually emigrated to Canada in 1949. Max testified in Germany in 2015 and 2016 at the trial of two former guards at Auschwitz, who were convicted at their trials. He has dedicated his life to Holocaust education around the world, and his book “*By Chance Alone*” details his courage, resilience and determination to survive in the face of immeasurable darkness. His presentation can be seen on the LSO website at the link below. I highly recommend you find the time to view it. You won’t regret it.

<https://www.lso.ca/news-events/news/latest-news-2020/law-society-presents-honorary-lld-to-holocaust-sur>

LSO BUDGET 2021

The LSO was already in the process of making efforts to reduce spending when COVID 19 hit. The LSO was forced to eliminate some positions, and further reduce its expenses, and as a result Convocation passed a budget intended to maintain Law Society stability. The LSO continues to focus on the core obligation of protecting the public, to ensure a continuation of effective, competent and reliable legal services. Projected total expenses of approximately \$129 million exceed the total revenue of about \$119 million, but the \$10 million shortfall is not considered to be a deficit as long as the Lawyer General Fund balance is used to mitigate any 2021 fee increases for Lawyers, and the Paralegal General Fund balance is similarly

used. The focus on reducing expenses has happily resulted in savings for lawyers of about 9%, with the annual fee being reduced to \$1873, and a 4% savings for paralegals, with fees being reduced to \$964. Your LSO fees allow for governing regulatory oversight, plus access to the Practice Management Helpline, the Member Assistance Program and library facilities.

LIBRARY BUDGET 2021

LiRN the successor to LibraryCo, receives grants made to the County Libraries. Its overall budget has been reduced by about 10%, with the big libraries facing larger cuts than the smaller ones. Numerous organizations have been writing to the LSO expressing concern about the reduction in funding, but it is hoped that technological advances will allow for continuation of services to members. It is acknowledged that in smaller centres such as Halton, the law library is the life blood of our Association, and the centre of our social connections to one another. The Library Budget has now been passed, but the concern regarding reduction in funding for libraries is certainly acknowledged and will be monitored. Longer term, we are cognizant that libraries are essential, and the LSO is looking at ways to enhance service while avoiding cost increases.

COVID RESPONSE RELIEF FOR 2021

In an effort to assist our Members who are struggling with cash flow issues as a result of COVID 19, those in practice since 2018 or earlier, in firms of five or less having gross income reductions of more than 50% will be able to defer their 2021 annual fees to March 31, 2022. Those licensed from 2019 to 2021 must have gross income from all sources in 2020 of less than \$50,000 in order to defer fees. Please note that this program is a fee deferral program, so your 2021 fees will still eventually need to be paid. But the program does allow some temporary financial assistance in delaying payment of the 2021 fees for one year.

LIBRARY NEWS

by Karen Cooper



Happy New Year!!

I cannot believe that the last time I saw many of you in person was at the last AGM, when we gathered together at the Burlington Convention Centre to celebrate the careers and wonderful achievements of Robert S. Martin and Jarvis G. Sheridan and here I am already sitting down to plan the next AGM!! It's been a very interesting year and quite difficult for so many ... certainly not one that you would think to fly by so quickly ... isn't that supposed to happen when you're actually having fun??

I have been working from home since the start of the pandemic in March and really miss the personal day to day interactions with everyone. Between the pandemic and the mould issue at the Milton Court, well let's just say I have recently moved my "temporary" home office from the dining room table to a spare bedroom. Tickled pink with the current working arrangement is my new office assistant, Chloe, who rarely listens to me or follows any orders:)

I believe she thinks that she is the boss! This has certainly been one of my bright lights as she ensures that we get out for a walk every day and soaking up a little sunshine sure goes a long way in helping to ward off COVID fatigue!!



While Zoom has allowed us the opportunity to move on and get things accomplished, it will never replace the in person interaction that we are all so desperately missing as we struggle through this second wave.

I would like to extend my gratitude and appreciation to outgoing President, Ken Kelertas, who has been a pleasure to work with since my return to the Halton County Law Association in August 2019. Ken has been a steady calm in this COVID-19 storm and I am grateful for his knowledge and guidance. I would also like to acknowledge Sam Misheal who has now served two years as past president and whose enthusiastic participation will be sorely missed at our monthly board meetings. He has and continues to work tirelessly on your behalf and we offer a big thank you for his generosity and commitment! I am very much looking forward to working with incoming President, Melissa Fedsin, as we continue to support our members through these challenging times. I would also like to extend my thanks to the entire board of directors who have volunteered and worked extremely hard to be able to offer you various continuing professional development programs and social events during their term.

LIRN Grant Cuts

Finally and sadly, our 2021 LIRN grant has been reduced in excess of \$12,000. Our grant has not typically kept pace with the increase in publishing costs for many years now, however, this cut will result in further collection cuts.

CIVIL LITIGATION LAW NEWS

by James Page



UPDATE ON CIVIL MOTIONS PROCEDURES IN MILTON

Since March 2020, all of my articles have been about updating my fellow civil litigation lawyers on the evolving procedural directions due to COVID-19. For me, it has been hard to keep track of the changes (or to remember the new way of doing things) and I imagine the same may be true for many of my colleagues.

We all know the pandemic has put a massive strain on our judicial system, including our Judges and our court staff, who are working hard to modernize the way we practice law and updating us along the way.

The goal of this article is to provide an update on some of the important procedural aspects for urgent, regular and consent motions in our virtual “Milton” courthouse and to give a proverbial heads up when it comes to filing documents electronically. Plan for some delay.

Dress Code for Hearings

You do not have to gown. But fellow counsel, please, please, please wear proper business attire. That means a suit and tie for male lawyers to be safe. If you are not properly dressed, you may not be granted leave to address the court.

Booking Regular Motion Dates (Less Than 1 Hour)

In the “old” system, we could simply bring a motion any Tuesday or Wednesday (or was it Monday and Wednesday, it seems so long ago?). Of course, out of civility and professional courtesy, we typically would canvass dates with all counsel ahead of time. But theoretically every week was available to you, especially if something had to be dealt with urgently. Some dates were busier than others, but you would sit in the body of

the court until your matter was called.

If you are thinking about bringing a motion now, you really must think ahead – months ahead. You must write to the trial coordinator at scjhaltontrialoffice@ontario.ca. You have to ask for the available motion dates within a given time period. The trial coordinator, in my experience, is very, very prompt at writing back. You then should canvass those dates with other counsel. You then must write back to the trial coordinator to book or secure that date.

The dates “go” incredibly fast. By the time you write back to secure your date, the date may be gone. You will then have to start the whole process over again. Ah!

Once a motion date is secured, you can serve your notice of motion and motion record. You then file it on the portal. You then must confirm your motion three days beforehand. Send the standard form (37B) to scjhaltontrialoffice@ontario.ca and copy the relevant parties/counsel to the email.

A zoom invitation will then follow, typically in the afternoon on the day before the motion. If you are the moving party, make sure all parties/counsel are copied to the invite and if not, forward the email to them with the Zoom link.

Right now, it will take approximately 2 months to get a regular motion hearing. That gap may widen as time marches on. I believe the reason for the delay is that each matter on the docket is given a 60-minute block of time. As a result, there are only a certain number of matters that will be booked on any given day.

Again, I cannot stress enough, think ahead and give yourself lots of time when contemplating motions.

Urgent Motions

You may not be able to wait up to two months for a motion. If that's the case, you may qualify for an urgent motion.

As a reminder, urgent motions in civil matters are those where there may be **immediate** and **significant financial repercussions** if there is no judicial hearing, or those that concern outstanding warrants issued in relation to small claims court or superior court proceedings.

To be heard quickly for an urgent motion, you must send the materials to the right virtual place. If you don't there will likely be delay. That's because it is taking the court approximately two weeks to officially file the materials submitted on-line. It therefore may take two weeks for the court to inform you that you submitted your materials incorrectly.

As of this article, you must send your urgent motion ma-

terials to miltonscjcourt@ontario.ca. Copy the interested parties to the email. The registrar will do its best to get those materials before a Judge who will then review them. If the materials are determined to be urgent, the Judge will either issue an endorsement which will be sent to the parties via email, or arrangements will be made to book an urgent hearing over Zoom, perhaps with timelines imposed for filing materials. Judges have been addressing these matters very quickly – within one or two days.

But the moral of the story is this: send your urgent motion materials to miltonscjcourt@ontario.ca. DO NOT send them to scjhaltontrialoffice@ontario.ca and DO NOT submit them on the portal.

We've Come to an Agreement! How Do We Inform the Court?

It is not uncommon for counsel to come to an agreement in the days before a motion, after the confirmation form had been submitted. Before the pandemic, I would just fax or email the trial coordinator

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a letter advising the presiding Judge of the agreement. I do that because it may save the Justice time if he or she has not yet had an opportunity to review the materials, and you are required to update your confirmations under the Rules anyway.

If you find yourself in that situation (or a similar situation) and you want to send a letter, send an email to scjhaltontrialoffice@ontario.ca. That's the same email address for obtaining motion dates. I did that for a recent motion and my letter definitely came to the Judge's attention.

Filing Materials? Don't Forget the Email Addresses!

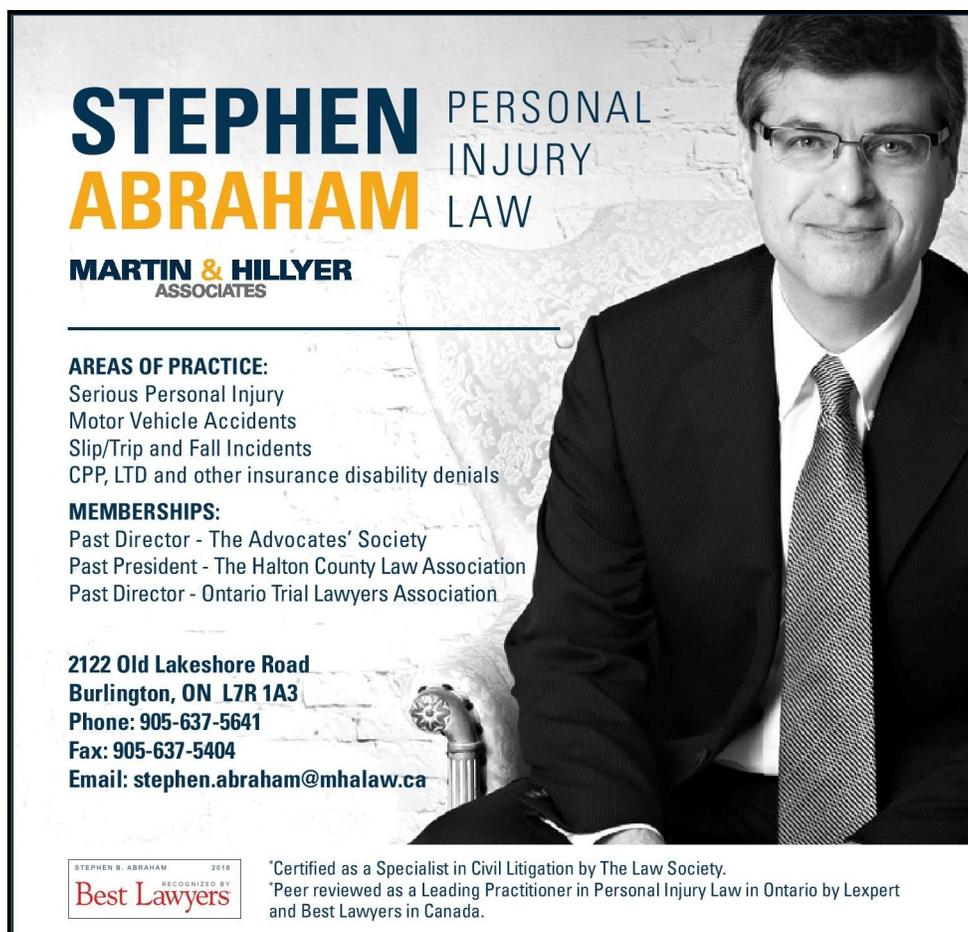
Please ensure the email addresses of all counsel and representatives are on the cover pages of your materials. Court staff are communicating by email and need to know where to send correspondence and documents.

Submitting vs. Filing – Factor Some Delay into the Equation

Motion records and pre-trial briefs are submitted online through the portal. However, that does not mean they are filed. I understand that they will not be filed for another 5-14 days, as there is a backlog in terms of officially entering the documents. You will receive an email from the court once the documents have been filed. On average, I understand the delay to be about two weeks. Please keep this mind and submit your materials well in advance.

When it comes to pre-trials, if you do not give yourself at least two-week grace period, the presiding Judge may not receive the materials and the pre-trial may have to be adjourned.

As for motions, if you do not factor in the delay, your motion materials may be officially "filed" too late though submitted on time. You may not be heard as a result and you may have to start the whole process all over again.



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If you have filed documents less than five days before the hearing, you can email them to miltonscjcourt@ontario.ca, which is the same email address for urgent motions.

I understand that originating processes, like Statements of Claim, tend to be filed within few minutes of being submitted. It seems that they are given top priority, which makes sense. The court will send you an email confirming the originating process has been issued.

Key Websites

I've only provided a summary of what I thought were some important concepts. To be sure about what the court expects, I direct you to the following websites:

https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-cw-september-25-2020/#Regular_Motions_less_than_1_hour

<https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-cw-september-25-2020/cw-filing/>

Halton County Law Association Board of Directors

Call for Nominations

Any members interested in running for a director position on the HCLA Board of Directors must submit their name to Karen Cooper at info@haltoncountylaw.ca in writing by **12:00 noon on January 31, 2021.**

Director terms are two years.

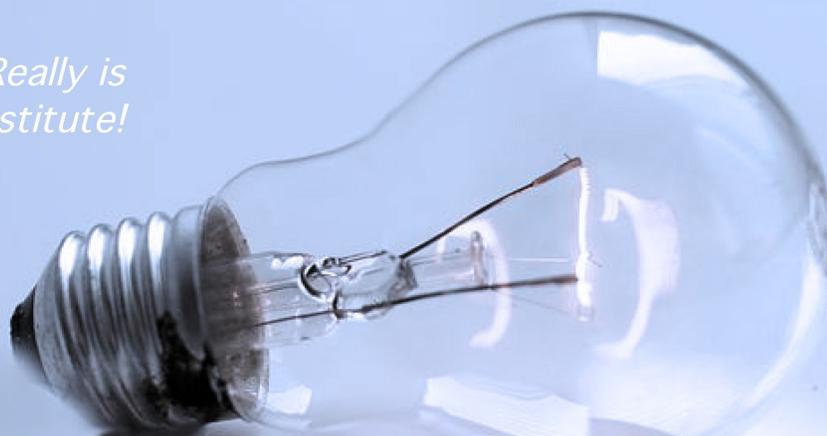
Kindly forward a brief note (50 words or less), outlining your biography and any concerns.

The Halton County Law Association Board of Directors holds 10 (virtual) meetings per year, usually on the second Thursday of the month. Aside from attendance at each meeting, Board members are required to complete committee work.

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ESTATES NEWS

by Suzana Popovic-Montag and Nick Esterbauer



Medical Assistance in Dying: An Overview for Estate Lawyers

A major turning point with respect to the legality of physician-assisted death (also known as medical assistance in dying, or "**MAID**" for short) came in 2015 with the Supreme Court of Canada's decision in *Carter v Canada (Attorney General)*¹. Since that time, federal legislation has been updated and the option of physician assistance in dying has introduced several important considerations in respect of incapacity and estate planning.

Historically, MAID was prohibited under the Canadian *Criminal Code*². The Supreme Court, however, found that the provisions prohibiting MAID infringed upon the right of Canadians to life, liberty and security of the person, in violation of the Canadian *Charter of Rights and Freedoms*³. The Court suspended the invalidity of the prohibition against MAID to allow the federal government the opportunity to update legislation to reflect this landmark decision⁴. In 2016, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*⁵ received Royal Assent. The resulting amendments decriminalized MAID and provided criteria for its authorized access by Canadians.

We take this opportunity to briefly review the continually-evolving state of the law involving MAID and its eligibility requirements, and review a few possible implications for estate lawyers and related professionals.

Who Can (Currently) Access MAID?

Currently, MAID is available only to individuals able to satisfy the following test:

- a) *they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded*

by a government in Canada;

- b) *they are at least 18 years of age and capable of making decisions with respect to their health;*
- c) *they have a grievous and irremediable medical condition;*
- d) *they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and*
- e) *they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care*⁶.

As it currently stands, an individual who qualifies for MAID must provide express consent to receive it immediately prior to the procedure and their natural death must be "reasonably foreseeable" as a result of their condition, among other requirements outlined by the *Criminal Code*⁷.

How are Eligibility Rules for MAID Changing?

A number of individuals and groups have advocated for

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the amendment of MAID eligibility requirements to provide for the option of providing advanced requests for MAID.

In *Truchon c Procureur général du Canada*⁸, the Quebec Superior Court of Justice considered the constitutional validity of the requirement that the natural death of individuals accessing MAID be reasonably foreseeable. Ultimately, the Court found that this requirement infringed the applicants' fundamental rights under Sections 7 and 15 of the *Charter* and declared these provisions of Quebec and Canadian MAID laws unconstitutional. Rather than appealing the *Truchon* decision, the federal government announced that it would propose legislative amendments to enhance access to MAID. Since then, legislators have been tasked with finding a better balance between the rights of those with grievous and irremediable medical conditions to die with dignity on one hand, and the protection of individuals who are vulnerable and whose capable wishes can no longer be confirmed on the other.

Proposed legislative amendments to enhance access to MAID further to the *Truchon* decision and in response to complaints regarding inaccessibility were ultimately introduced by way of Bill C-7⁹. Most notably, Bill C-7 seeks to repeal the provision requiring a person's natural death to be reasonably

foreseeable, and permits access to MAID by individuals who have previously consented to receive it but are no longer capable, on the basis of their prior consent and agreement with the medical practitioner to receive MAID.

As of the date of publication, Bill C-7 was recently approved by the House of Commons. Whether it receives Royal Assent (in its current form or as amended) remains to be confirmed, but it is expected that eligibility rules for MAID will be updated in the near future.

Can an Attorney or Guardian of Personal Care Consent to MAID?

As it currently stands, although the scope of authority of an attorney or guardian of personal care are broad, in order to access MAID, it is currently the patient him or herself who must consent to its administration. What is currently being contemplated by the federal government is a change to the time at which consent must be provided, not the extension of such rights to substitute decision-makers.

What Impact Does MAID Have on Life Insurance?

The terms of life insurance policies typically

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address the issue of whether a beneficiary will be entitled to the insurance proceeds if the insured commits suicide. Policy terms often include a restriction as to the payout of the policy if the insured dies by his or her own hands within a certain number of years from the date on which the policy is taken out (generally two years).

The change in the law regarding MAID raised concerns in terms of whether it would be distinguished from suicide for life insurance purposes and should, accordingly, attract different treatment under the terms of a life insurance policy. Depending on the terms of the policy, the definition of suicide as it relates to voiding a life insurance policy may or may not encompass MAID. Accordingly, early on, there was some concern that MAID could have a significant impact on the implementation of the estate plans of those who choose to access it. Since then, the Ontario government has implemented legislation that provides protection and clarity for patients who have accessed MAID and their families¹⁰. The legislation specifies that MAID does not impact a person's rights that otherwise exist under a contract or statute, including life insurance policies or other survivor benefits, unless an express contrary intention appears in the statute¹¹.

Conclusion

Some clients may ask us during the incapacity and estate planning process about MAID and under what circumstances it may be available.

As with other end-of-life preferences, clients should be encouraged to communicate their wishes with their loved ones. A recent decision of the Nova Scotia Court of Appeal saw a scenario in which a wife of nearly fifty years petitioned to prevent her husband from receiving MAID after he had told her of his plan to access assisted death, highlighting the importance of having open discussions with family regarding this aspect of end-of-life care¹².

As MAID becomes more accessible and we continue to see it more and more in our practices, it will become increasingly important to stay up-to-date regarding its developments. We will continue to share any notable updates relating to MAID through our blog at hullandhull.com/blog.

4 *Supra* note 1; *Carter v Canada (Attorney General)*, [2016] 1 SCR 13.

5 SC 2016, c 3.

6 *Criminal Code*, *supra* note 2, s 241.2(1).

7 *Ibid*, ss 241.2(2)(d), 241.2(3)(h).

8 2019 QCCS 3792.

9 Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*, 1st Sess, 43rd Parl, 2020.

10 *Medical Assistance in Dying Statute Law Amendment Act, 2017*, SO 2017, c 7.

11 *Excellent Care for All Act, 2010*, SO 2010, c 14, s 13.9.

12 *Sorenson v Swinemar*, 2020 NSCA 62. The wife's application and appeal were unsuccessful, and the husband accessed MAID the day after the Court of Appeal's decision was released.

1 [2015] 1 SCR 331.

2 RSC 1985, c C-46.

3 Enacted as Schedule B to the *Canada Act 1982*, 1982, c 11 (UK), which came into force on April 17, 1982.



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FAMILY LAW NEWS

by Katherine Batycky



Happy New Year to all. Now that 2021 has arrived, the family law bar have some new directions and news that directly affect our practice. Below are the two most recent:

1. February Case Conference Blitz in Milton

In order to address the current backlog of new family case conferences in Milton, the Central West Region Bench has announced that, in Milton, there will be a February Conference Blitz. This means that 1 1/2 additional judges (in addition to an already scheduled case conference judge) have been assigned to Milton for the weeks of **February 8 and 15, 2021** to hear family case conferences currently scheduled after April 1, 2021.

This is a great opportunity to have a conference scheduled far in the future to be brought forward and heard soon. Below is what we need to do to bring a conference forward:

- a) If you have a family case conference scheduled for after April 1, 2021, contact the Trial Coordinator's Office to re-schedule a new case conference date during the weeks of February 8 and 15, 2021. The old case conference date will be vacated;
- b) Ensure that the Case Conference Briefs are filed no later than January 31, 2021. If the Case Conference Briefs are filed after this date, the conference judge will decide whether to hear the matter or simply adjourn it to the next available conference date; and
- c) Remember the restrictions on size of documents: Case Conference Briefs are limited to 4 pages, plus Financial Statements, plus excerpts from critical documents needed for the case conference. Failure to comply with this requirement will result in the Case Conference being cancelled administratively and not proceeding on the scheduled date.

2. New procedure for Long Motions

Effective January 1, 2021 Central West Region has new procedural rules pertaining to Long Motions that are scheduled on or after January 1, 2021, in an effort to reduce wasted judicial time when such motions do not proceed at the last minute. Below are the details:

a) Scheduling Long Motions

To schedule and secure a Long Motion hearing date from the Trial Coordinator's Office in the Central West Region, counsel and litigants must: (1) Unless *ex parte*, confer with the opposing party to identify possible dates and to discuss the estimated time required for the Long Motion; (2) Then, moving party contact the Trial Coordinator's office in the courthouse where the Motion is to be heard, to tell the TC estimated time for the motion and with that information obtain a motion date (3) Serve the Notice of Motion and motion materials forthwith on all parties with an interest in the Long Motion with the date assigned; (4) File proof of service (of Notice of Motion and Motion Record) within 10 days from the date you obtained the Motion date from the Trial Coordinator's Office. (NOTE: Subject to an order from a judge, failure to do so will result in the Long Motion hearing date being vacated.)

b) Agreement upon a Timetabling Schedule of the Necessary Steps

After the motion materials have been served, all counsel and the litigants must agree in writing upon a timetabling schedule for completion of all steps necessary for the Long Motion to proceed on the scheduled date. This written timetable must be filed with the Confirmation sheet.

If agreement cannot be reached, the party who

obtained the long motion date may request from the Trial Coordinator's Office, a telephone conference hearing date, before a judge to set a timetabling schedule by court order for the Long Motion and/or other directions the judge considers appropriate.

NOTE: If the Long Motion does not proceed on the scheduled hearing date and there is no written timetabling agreement or order, the court will consider this a significant factor in determining whether to grant an adjournment and/or to award costs and the quantum of costs of the aborted Long Motion hearing date.

c) Confirming the Long Motion

Unless otherwise directed by a judge, the following applies:

(1) Long Motions must be confirmed by all interested parties by filing Confirmations no later than 14 days prior to the hearing date. Failure to file Confirmations will result in the Long Motion hearing date being vacated and made available to other parties on a short notice basis; and

(2) All materials for Long Motions (including factums maximum 20 pages) must be filed no later than as set out in the agreed upon timetable scheduling agreement but in no case less than 14 days prior to the Long Motion hearing date. If all motion materials are not filed within 14 days prior to the Long Motion hearing date, the Long Motion, subject to the discretion of the motions judge, may or may not be heard, may be adjourned, dismissed or directions issued.

d) Adjournments of Long Motions

Adjournment of Long Motions are discouraged.

Expect that, subject to exceptional circumstances where an adjournment is warranted, unnecessary adjournments will attract cost awards.

Below are the rules regarding adjournments:

i) *Consent Adjournments more than 14 days prior to the Long Motion Hearing date.*

If all counsel and the parties agree, at least 14 days prior to the Long Motion hearing date, that the Long



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Motion is to be adjourned, one of the parties may write to the court (copied to all other parties) stating:

- (1) the request for an adjournment;
- (2) that it is on consent of all interested parties; and
- (3) stating the reasons why the adjournment is appropriate or necessary.

Counsel and the parties will be given the next available Long Motion date. Counsel and litigants should not expect to be given an earlier date as a result of the consent adjournments.

Only one adjournment will be granted on consent.

li) Opposed Adjournments more than 14 days prior to the Long Motion Hearing date

If counsel or a party seeks an opposed adjournment, at least 14 days prior to the Long Motion hearing date, the party seeking the adjournment shall obtain from the Trial Coordinator's Office a telephone conference hearing date before a judge who will determine whether to grant the opposed adjournment of the Long Motion date or make an order for directions regarding

the Long Motion.

(iii) Consent or Opposed Adjournments within 14 days of the Long Motion Hearing date

Unless otherwise dealt with by a judge in advance of the Long Motion hearing date, any adjournments sought within 14 days of the Long Motion hearing date, whether opposed or on consent, shall be made to the motions judge on the scheduled hearing date. A copy of the timetabling scheduling agreement must be provided to the motions judge.

Counsel and parties should be prepared to proceed with the Long Motion in the event the adjournment is NOT granted.

If an adjournment is granted, all counsel and parties must bring and have available their Costs Outlines to permit the motions judge to deal with the issue of costs of the adjournment and to make any other order for directions.

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IMMIGRATION LAW NEWS

by *Melissa Babel*



Canadian and U.S. Immigration Law Updates

Canada Immigration Update:

Travel restrictions and quarantine requirements continue to be the norm for travel to Canada as we end 2020 and move into 2021. There are several key updates that impact all travelers to Canada as well as applicants for work and study permits; permanent residence and citizenship which are reviewed in more detail below.

Pre-Departure COVID Test: Effective January 7, 2021, all passengers aged five (5) years of older are required to provide a negative COVID test prior to being able to travel to Canada by air. The test must be a PCR test from an accredited lab and be taken within 72 hours prior to boarding a flight to Canada. Travelers who can prove that they were unable to get a test abroad will have to quarantine for 14 days at a federally approved facility upon their return. All other non-exempt travelers continue to be required to meet the 14-day quarantine on entry to Canada and to provide a written quarantine plan.

ArriveCan App: is now mandatory for all travelers arriving by air to Canada, including Canadian Permanent Residents and Citizens. If you are flying to Canada, be ready. Download the app before you travel and complete the mandatory travel and contact information, quarantine plan (unless you are exempt) and the COVID-19 symptom self-assessments. Usage of the app is not mandatory for travel by land and sea, but it is strongly encouraged.

Extension of Travel Restrictions: Travel restrictions and Mandatory Isolation Orders continue to be in place for all travelers seeking entry into Canada. There are exemptions from the restrictions Canadian Citizens and Permanent Residents, temporary foreign workers, some international students, and any person whose

presence is, in the opinion of one of the three designated Ministers, in the 'national interest.' There are also exemptions from the travel restriction for immediate family and some extended family members of Canadian citizens and Permanent Residents, as well as foreign nationals who authorized by the Public Health Agency of Canada ("PHAC") to travel to Canada for compassionate reasons, such as providing support to a critically ill person or attending a funeral or end-of-life ceremony.

Scheduling Biometrics appointments: In March 2020, in response to the COVID-19 pandemic, Service Canada paused in-person biometric collection, which is a critical step in finalizing permanent and temporary residence applications. It was reintroduced by appointment only, with Service Canada calling individual applicants to schedule appointments. As of November 30, applicants who have not been contacted can use the online scheduling tool to schedule their own appointment, once they have been issued a biometrics instructions letter.

Online Citizenship Tests: IRCC is launching a new platform for online citizenship tests. The platform is being tested over the next few months, and IRCC will begin to invite applicants to use the platform once it is ready for a full rollout. Once invited, applicants will have 21 days to complete the test.

Permanent Residence Confirmation Portal: IRCC is moving to an online portal solution to confirm permanent residence. This innovative change allows for confirmation of PR status without in-person interviews and has the potential to decrease the time required for confirmation of PR at the end of application process.

Express Entry Fall Update: In the Fall 2020, IRCC announced an increase to the number of points allocated to **French language abilities** for the Principal Applicant under Express Entry's Comprehensive Ranking System ("CRS"). The CRS system is the application intake system that sets out who is invited to apply for Permanent Residence based on their individual points allocation and their ranking in the pool of eligible candidates.

Melissa M. Babel, Certified Specialist in Immigration Law (Ontario), Foreign Legal Consultant (U.S. Immigration).



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TAX NEWS

by Amit Ummat



Federal Court of Appeal Rules Crown Must Honour Settlement Agreement with Taxpayer - *Canada v. CBS Canada Holdings Co.* 2020 FCA 4

Summary

A corporate taxpayer entered into a settlement with the Crown to reallocate its non-capital losses in the 2007 tax year. After signing the agreement but before the reassessments were issued, the Crown tried to resile from the settlement agreement. The taxpayer brought a motion before the Tax Court of Canada (“TCC”) for an order enforcing the settlement agreement. The TCC ruled in favour of the taxpayer. The Crown appealed to the Federal Court of Appeal (“FCA”) and the taxpayer prevailed again.

Background

In 2002, Viacom Canada was formed following the amalgamation of several companies. In 2006, Viacom Canada’s name was changed to CBS Canada Holdings Co. (“CBS”). On March 8, 2007, CBS was involved in an amalgamation with several other related corporations, resulting in two taxation year-ends of March 7, 2007 and December 31, 2007. In its income tax returns for each of those years, CBS deducted a non-capital loss in computing its income. CBS claimed these were incurred by its predecessors in prior years and available for carry-forward in the amounts of \$25,751,078 and \$7,557,852, respectively. The Minister reassessed the 2007 taxation years and reduced the non-capital losses available to carry-forward as \$893,260 for March 2007 and \$382,594 for December 2007. The Minister denied the remaining non-capital loss amounts claimed on the basis that such amounts were less than reported by CBS’ predecessors. In 2013, CBS appealed the

reassessments.

During the litigation, CBS offered to settle the appeal, by carrying forward approximately \$24 million of other non-capital losses (not the amounts in dispute) from prior years to the March 2007 taxation year. The Crown eventually agreed to accept the offer (with a minor change not relevant to this case). Minutes of Settlement were circulated, revised, and eventually signed by both CBS and the Crown.

Several weeks later, the Crown advised CBS that contrary to its prior understanding, no non-capital losses were available for carry forward to the taxation years under appeal. After many procedural steps ensued, CBS filed a motion at the TCC to enforce the settlement.

The only issue was whether the Minutes entered into and signed by both parties constituted a valid and binding settlement agreement.

TCC Decision

Position of Parties

CBS’ position was that the Crown’s acceptance of the Minutes created a valid and legally-binding contract with CBS and was enforceable against the Minister.

CBS submitted it had approximately \$24 million of non-capital losses available for carry-forward that flowed from an existing pool of almost \$300 million of non-capital losses from years prior to 2007, which had been reassessed by the Minister based on CBS’ filings.

The Crown's position was that the Minister erred in agreeing to the non-capital loss figures contained in the Minutes and therefore could not reassess as the agreement would be factually and legally indefensible.

Analysis

The TCC used the framework established by the FCA in *Apotex Inc. v Allergan Inc.* (2016 FCA 155) to determine whether a settlement agreement existed. The conditions required to have such an agreement are:

- i. Parties must have a mutual intention to create legal relations
- ii. Consideration must flow between the parties
- iii. Terms of the agreement must be sufficiently certain
- iv. There must be a matching offer and acceptance on all essential terms

The TCC found that the Minutes were a binding and enforceable agreement as it satisfied all of these conditions. In reaching this conclusion, the TCC found the Crown's affidavit was incomplete and therefore was not convinced that the Minutes contained inaccurate non-capital loss amounts. As a result, CBS's motion to enforce the settlement was granted. The Crown appealed to the FCA.

FCA Decision

The main issue was whether the TCC erred in concluding that CBS' appeal should be allowed in accordance with the Minutes.

Position of Parties

The Crown argued that the TCC failed to consider the Crown's evidence from the CRA appeals officer regarding the available loss carry forwards and that the TCC also made two legal errors:

First, the Tax Court failed to consider that, pursuant to subsection 111(3) of the ITA, if non-capital losses are used in a taxation year they may no longer be claimed in a later year. Second, the Tax Court failed to consider that "[t]he Minister is not permitted to change a

taxpayer's taxable income [for an earlier year] without reassessing [...]."¹

The Crown further argued that the settlement agreement was factually and legally indefensible, and as such the Minister was precluded from issuing the reassessments. The Crown relied on the following principle from *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 at 602, 1974 D.T.C. 6355 (C.A.):

the Minister has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it. It follows that he cannot assess for some amount designed to implement a compromise settlement and that, when the Trial Division, or this Court on appeal, refers an assessment back to the Minister for re-assessment, it must be for re-assessment on the facts in accordance with the law and not to implement a compromise settlement.

CBS argued that the TCC was entitled to rely on the explicit terms of the Minutes to conclude that the additional \$24 million of loss carry forwards were "grounded in objective reality". CBS also argued that the Crown should not be able to allege errors of law at this late stage and in any event there were no such errors because the *Income Tax Act* (Canada) does not prohibit the reallocation of loss carry forwards.

Analysis

The FCA unanimously concluded that the TCC committed no error in allowing CBS' motion.

Woods J., writing for the Court, found that the Crown's reliance on the *Galway v. Minister of National Revenue*,² decision was misplaced. In *Galway*, the parties were trying to uphold a settlement agreement that was not in accordance with the law. In contrast to *Galway*, this case involved the Crown trying to unilaterally withdraw from a settlement agreement it freely made. The Minutes were also not a 'compromise' settlement of

the type considered in *Galway*. The parties in this case intended to enter an agreement that applied the law to the facts. In other words, it was not a horse-trading settlement. It was legally sound.

in Canada and was recently certified by the Law Society of Ontario as a specialist in taxation law. For detailed practice information please visit www.ummat.ca.

The FCA found that in general parties should be bound by the agreements that they make and that there was no reason to depart from that principle in this case:

As suggested by the Tax Court in *1390758 Ontario Corp. v. R.*, 2010 TCC 572, 2010 D.T.C. 1385, this would be very unfair to CBS: “[b]oth sides of a dispute are entitled to know that if they invest the time and effort required to negotiate a settlement, then their agreement will bind both parties” (at para. 37)

The Crown entered into the settlement agreement believing that it was in its best interest to do so. It should be required to live up to its bargain. In my view, it would not be appropriate for the Court to wade into the merits of the agreement.³

Takeaway

This decision should be kept in mind in any situation where a party attempts to resile from a duly executed settlement, whether it be the Crown (as it was in this case) or the taxpayer. The FCA is crystal clear that parties should be bound by the agreements they make. From a practical perspective, this, of course, requires all parties to pay close attention to the terms of any settlement prior to executing it.

¹ *Canada v. CBS Canada Holdings Co.* 2020 FCA 4, at para. 22.

² *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 at 602, 1974 D.T.C. 6355 (C.A.)

³ *Canada v. CBS Canada Holdings Co.* 2020 FCA 4, at paras. 35-36.

Amit Ummat LL.B LL.M (taxation) is the founder and principal lawyer of Ummat Tax Law. He has over 15 years of experience resolving individual and corporate income tax and GST/HST disputes.

Amit has argued over 100 appeals at various Courts

OJEN NEWS

by Inga B. Andriessen



As we close out 2020, the first two “quadrimesters” of high school have been a bit quieter for Lawyer participation than in past years. This has been in large part due to Teachers becoming used to working both remotely and, in the classroom, and determining exactly how best to engage students. We know that 2021 will be much busier for Lawyer “classroom” virtual visits as well as other activities. The Halton Mock Trial Tournaments have taken on a different format this year. In past years there has been the Catholic Tournament and the Public Tournament at the high school level, which results in a Halton Championship held at the Court House in May of 2020. Due to the Pandemic, the Mock Trials this year will be virtual and there will be no playdowns. This is in part because the high schools have been restructured due to both virtual and in person learning. As a result, we are having an all Halton High School Tournament on May 7, 2020. This will be over the Zoom platform. We will require Lawyers to volunteer to be Judges and to coach Mock Trial Teams. At this point we do not know the level of participation. It is possible we may need more Lawyers than in previous years for the one day event. Additionally, we may have more schools than before par-

ticipating due to the virtual school component. Please watch the HCLA newsletters in early 2021, as we will send out requests for help for Lawyer coaching at that time. We may also be seeking out additional donations to help with the Virtual Mock Trial Tournament. While we do not have the in person requirements to feed the students, we are considering providing them with swag bags so that they do have some of the traditional benefits from the Tournament.



CLASSIFIED ADS

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Anyone with information regarding a Will for **Peter Alan Titcombe** of Burlington (DOB March 16, 1948), who passed away on January 1, 2021 is asked to contact his son, Dennis Titcombe at dennistitcombe@gmail.com or by telephone at 902-452-3107.

Looking for a Will

Anyone with information regarding a Will for Michael Joseph Broderick of Oakville, DOB October 8, 1950, is asked to contact Andy Snelius at snelius@familylawassociates.ca. Thanks

Looking for a Will

Anyone with information regarding a Will for **Czeslaw Lotkowski**, (DOB May 19, 1953), who died November 11, 2020, is asked to contact John Jedlinski at Shibley Righton LLP john.jedlinski@shibletyrighton.com or by telephone at 519-969-9844



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Monday, February 1

Virtual Trial: Are you Ready?

4:00-6:00 pm via Zoom

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<https://haltoncountylaw.wildapricot.org/event-4094952>

Thursday, February 11

**Child Protection Law Series:
Effective Advocacy in Child
Protection Law**

4:30-6:30 pm via Zoom

Register today!

<https://haltoncountylaw.wildapricot.org/event-4086997>

Thursday, March 4

Annual General Meeting & Social

5:00-8:00 pm

Join the Halton County Law Association for our AGM and an evening with Daniel Lewis as our guest speaker. He is sure to inspire!!

Monday, March 22

**Child Protection Series:
Structure of a CAS File**

4:30-6:30 pm

Register today!

<https://haltoncountylaw.wildapricot.org/event-4087001>

Thursday, March 25

Virtual Paint Night

Join the Halton County Law Association in a virtual paint night, exclusively for HCLA members. Spouses and family members welcome! Order your supplies and have them delivered directly to your door, or opt to pick them up. Register and further event details at the following link:

<https://www.thestudiopaintbar.ca/events/halton-county-laws-event>

Monday, April 19

**Child Protection Law Series:
Temporary Care and Custody
Motions**

4:30-6:30 pm via Zoom

Watch for further details!

Friday, May 7

Annual Estates Webinar

via Zoom

Watch for further details!

Friday, June 25

Family Law Webinar

9:00 am—1:00 pm

via Zoom

Watch for further details!