The Hamilton Law Association

HLA JOURNAL

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February 2024

President's Report

Hussein Hamdani

It is always exciting when one year ends and a new year begins. It allows you an opportunity to reflect on the past and make necessary adjustments for the future. It's now 2024 and lawyers have another year of billings and making targets to look forward to. Time to climb that hill again. But as we look forward to another year of practicing law, it's worthwhile to look back at some of the accomplishments and milestones of our local community from 2023.

Part of the aim of the HLA is to promote a sense of community amongst the local lawyers. Belonging to a community holds profound significance in shaping individual well-being and societal cohesion. Human beings are inherently social creatures, and the need for connection, understanding, and shared experiences is deeply ingrained in our nature. The HLA believes that sustaining and supporting a legal community is crucial. It does so by sharing information and knowledge and providing a sense of belonging. In today's world, where many interactions are virtual or fleeting, and society seems more divided than ever, it is critical that people form communities of belonging when and where possible. By forming a legal community, it helps our members foster collaboration, tackle collective industry-wide challenges, and provide forums to discuss the evolving nature of our profession.

Of course, the HLA is only as strong as the members that make it up. The HLA relies heavily on members paying their membership fees, and for providing volunteer hours to organize seminars, present material or to participate in subcommittees.

I would like to highlight some of the HLA's accomplishments in 2023, which furthered the aim of sustaining and supporting a local and strong legal community. Some of these highlights include: (1) organizing 10 continuing professional development (CPD) seminars. Not only did these CPD seminars allow local lawyers to satisfy the requirements of the LSO, but more importantly, it educated the attendees on the latest trends in the law which allowed them to better serve their clients; (2) Five CPD Family Law Buckets; (3) Four CPD workshops; (4) Four membership-wide dinners, including the Annual Dinner and the Solicitors' Dinner; (5) Four social events, many of which were geared towards younger and newer lawyers; (6) One CPD Roundtable; (7) One Town Hall that was geared towards educating the membership on the bencher elections,

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THE HAMILTON LAW ASSOCIATION

The Hamilton Law Association exists to enable its members to become successful, respected and fulfilled in their profession.

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HLA Journal

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HLA JOURNAL ARTICLE SUBMISSION POLICY IN PART

The Hamilton Law Association Journal is primarily a volunteer written publication, including contributions by Hamilton Law Association members and staff, published bi-monthly, primarily for the benefit of lawyers within the municipal boundaries of the city of Hamilton. As a volunteer written publication, the patience and flexibility of all writers and readers is greatly appreciated.

Any opinions or views published in the HLA Journal are those of the contributor and not necessarily the opinions or views of the Association or the Managing Editor, and neither the Association nor the Managing Editor accepts responsibility for them. The Managing Editor reserves the right to publish or not. The Managing Editor may refer issues including the decision of whether to publish or not publish articles to the President of the HLA or the Board of Trustees.

The Article Submission Policy is currently under review.
Opportunity will be provided to all members for comment.

CONTRIBUTION DEADLINE FOR NEXT ISSUE: March 6, 2024

The HLA Journal, published six times a year, is distributed free to members. An annual subscription for others is $30.00 plus H.S.T.

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including inviting diverse candidates to present at the gathering; (8) our Annual General Meeting; (9) Six editions of the HLA Journal whereby volunteers write educational pieces on various legal practice areas; (10) One annual members appreciation luncheon held in the Lawyers' Lounge. This past one attracted nearly 120 members together to socialize; and (11) the HLA maintains a welcoming and comfortable lawyers' lounge on the 5th floor of the Sopinka courthouse and at the Unified Family Court. If you are lucky, you may even get free cookies at these lounges.

Additionally, the HLA volunteers held over 52 committee meetings under the auspices of 12 committees. The staff at the HLA did a marvelous job coordinating and organizing all these committee meetings.

From a CPD perspective, 2023 was an interesting year of transition. As a result of the social distancing requirements during Covid, many of the CPD programs between 2020 and 2022 were virtual or hybrid in nature. However, in 2023 there was a valiant effort to bring as many CPD programs live and in-person as possible. As part of this experiment, the HLA discovered that the back of the law library on the 5th floor of the Sopinka courthouse provided an ideal location for small to medium sized events. The HLA will dedicate further investments in the library to make this area an ideal venue for CPD programs moving forward. This saves the HLA from renting expensive hotel ballrooms and can hopefully bring down some of the costs of the CPD programs in the future.

By all measurements, 2023 was a successful year for the HLA. Our social media numbers (in terms of the number of followers on Instagram, LinkedIn, Twitter and Facebook) were on the rise. The number of unique visits to the HLA website is steadily on the increase, and the number of HLA members is larger now than it has been in recent years. My belief has always been that the stronger the HLA is, the better off its members are and the easier it will be to practice law in the Hamilton area.

Please consider renewing your membership in the HLA in 2024 so that together, we can build a stronger and more vibrant legal community. ■

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Report from the Executive Director's Office

Rebecca Bentham & Maria Morales

2024 is well underway and things have been very busy at The Hamilton Law Association. We had an incredible year in 2023 with respect to the return of in-person events. We facilitated 29 CPD events, the majority of which were hosted in the Anthony Pepe Memorial Library. Our growing membership, CPD attendance and patron count serve as evidence of the value of our many services that we provided to enable the lawyers of Hamilton and Ontario to feel appreciated and respected in their profession. We will continue our efforts working towards hosting more live events, seminars, and social events for the 2024 year.

I would like to thank our outstanding staff Shega Berisha, Maria Morales, Kubra Solmaz, Nicole Strandholm and Stephanie Zordan for all of their great work in 2023.

I would also like to extend a heartfelt thanks to all the volunteers who have given their time and expertise in support of the Association over the past year. Our volunteers are the key to the success of our Association.

For 145 years, this association has thrived and continues to grow. This is thanks to all our past, present and future members. The basic principle the HLA adopts is putting our members' needs and goals ahead to ensure they are succeeding in their practice, inter-

est, and areas of law. Our membership offers many incentives such as 24-hour access to our library and lounge, seminars and roundtables, subscription to the HLA Journal, important updates sent directly to your email, networking opportunities, committee opportunities, courtroom aids and many more. We value our members and welcome you to share any suggestions or ideas you may have to better our association. Thank you to all the members of the Hamilton Law Association for your support in 2023 and thank you to our members who have renewed their membership for 2024 thus far.

The kickoff of The Hamilton Law Association's 2024 social events will start on February 15th, 2024. The Family Law Subcommittee is proud to present the return of the Groundhog Day social for the first time since 2017. This event will be hosted at the Grotto (located at 25 John St. N) from 5:30pm – 7:30pm. Please join us for drinks, snacks, and prizes. No RSVP is required!

Later this month, we are calling all solicitors to join us for our annual Solicitors' Dinner to be held on February 29th, 2024, at The Hamilton Club. Our president, Hussein Hamdani will be hosting the evening with a reception starting at 5:30pm and dinner will be served at 6:30pm. If you are interested in attending, please contact Stephanie at szordan@hamiltonlaw.on.ca. We look forward to seeing you there!

We are excited to announce that on March 5th, 2024, the Commercial Litigation Group will be presenting the Annual Commercial Litigation Seminar in-person for the first time since 2019. The event will be hosted in the library, and will include a light breakfast, and a networking lunch. We are looking forward to hearing from the Honorable Justice Michael Bordin, Erica Lamont, Kevin Mitchell, Rosemary Fisher, Bevin Shores, Trent Howard, and Noah Aresta. We'd like to thank them all for agreeing to participate and their willingness to share their knowledge with the Hamilton bar. We hope to see you there!

More events to come in April & May. Stay in the loop by reading our Tuesday Update each week! ■

Librarian's Report

Nicole Strandholm

As we hit the ground running into 2024, the HLA has been hard at work ensuring that our members are well prepared for whatever comes their way. We have just recently purchased over twenty book titles for the start of 2024, and we will continue to listen to what our members want to see from us here in the library.

We are excited to host our first seminar of the year, once again, at the back of the HLA Library. We are so pleased with what our library has become, and its importance to our members and the legal community here in Hamilton. I am sure the 19th Annual Commercial Litigation Seminar on March 5th will be a great success and will be a continuing opportunity to showcase our lovely classroom space and features within the library.

New year, new lounge! The HLA staff has been hard at work improving the Family Court Lounge. The satellite lounge has just recently been fixed with new computers with a much faster connection, a brand-new fridge, and we are working to improve the coffee area even further. In the meantime, the Family Court Lounge will be regularly stocked with free snacks and coffee pods. A special thank you goes out to the Family Law Committee for their suggestions and new ideas to improve the space for members to return to. If you have any questions or recommendations for the lounge, please let either the HLA staff or a member of the Family Law Committee know.

Research Tips and Tricks:

As a Librarian, I am supposed to tell you that Google is not the way to start searches, but that statement is not always the be-all-end all. Google searches can be a good starting point for research questions if you know what results to look for. For me personally, Google is a starting point to acquaint myself with questions I don't immediately understand. As a library and information professional without any educational background in law, some questions I receive are challenging to breakdown. Don't get me wrong, I love breaking down a question and learning anew, otherwise, I wouldn't be a librarian, but sometimes legal inquiries require a little bit of background research. This is where Google comes in handy. Oftentimes, Ontario law firms have blogs which touch upon a research question I have received. Though an opinion piece for the most part, the blog posts usu-

ally have a legal standing on where to start. From there, I can search proper legislature on the matter, check if we have any annotated volumes, or find available texts that support the topic in question.

Another trick that may be useful to you as legal professionals is to read up on news and updates within your field in the HLA Journal. Even if you do not practice in a particular area of law, I find that many practice areas bleed into each other quite frequently, and it might be a good idea to know about the current happenings of the practice areas of your colleagues.

I enjoy reiterating how exceptional our library resources are here in the HLA Library, however I want to take this opportunity to share some tips and tricks you can try on your own, and bring your attention to a free resource that I do not normally speak about.

SEDAR Plus– Corporate Filings:

Public securities documents and information filed by issuers with various provincial securities regulatory authorities can be found online for free at SEDAR Plus (www.sedarplus.ca). You can also file, disclose, and search for issuer information in Canada's capital markets. If your practice area is corporate and/or commercial law, and SEDAR is not on your radar, take a look at what you might be missing out on.

On behalf of the HLA Library, I would like to wish everyone a happy New Year and a safe and fulfilled 2024. ■

New Books at the HLA Library!

- Bowles, Conduct of Lien, Trust and Adjudication Proceedings (formerly Conduct of a Lien Action); Thompson Reuters
- Butkus, 2023 Annotated Ontario Landlord and Tenant Statutes; Thompson Reuters
- First Peoples Law, Indigenous Peoples and the Law in Canada, Cases and Commentary, 2023; Thompson Reuters
- Kaplinsky, Lavoie, & Thompson, Principles of Property Law; Thompson Reuters
- Klar & Jefferies, Tort Law; Thompson Reuters
- MacDonald, Wilton, 2024 Annotated Ontario Family Law Act; Thompson Reuters
- MacFarlane, Frater & Michaelson, Cannabis Law: The Legislative Framework; Thompson Reuters
- Rouleau & Bar-Moshe, Ontario Municipal Law: A User's Manual; Thompson Reuters
- Segal & Libman, Annotated Ontario Rules of Criminal Practice; Thompson Reuters
- Sherman, The Practitioner's Income Tax Act; Thompson Reuters
- Sherman, The Practitioner's Goods and Services Tax, Annotated; Thompson Reuters
- Snyder, 2024 Annotated Canada Labour Code; Thompson Reuters
- Torrie & Garellek, The Annotated Bank Act with Associated Regulations; Thompson Reuters
- Wang & Keeshan, 2023 Annotated Ontario Construction Act; Thompson Reuters
- Watson & McGowan, Ontario Civil Practice; Thompson Reuters
- Watt, Watt's Manual of Criminal Jury Instructions 2023; Thompson Reuters

Corporate Commercial News

Hassan Chaudhary

TRANSPARENCY REQUIREMENTS: PUBLICIZING PRIVATE COMPANY OWNERSHIP

As of June 13, 2019, through an amendment to the Canada Business Corporations Act (the "CBCA"), most private federally incorporated companies are required to maintain a register containing personal information about individuals that hold significant control (the "ISC Register").

As of January 22, 2024, CBCA corporations subject to the ISC Register requirement will also be required to submit the information in the ISC Register to Corporations Canada. Some of that information will then be made publicly available on Corporations Canada's website.

1. Rationale

The ISC Register, and publicizing certain personal information in the ISC Register, is intended to combat illicit activities such as money laundering and tax evasion, while also producing certain ancillary benefits.

The public register will increase transparency. Increased transparency will purportedly provide authorities with assistance in criminal investigations by identifying potential suspects or witnesses faster and streamlining the process to trace and/or freeze assets. It will also assist regulated industries, such as banks and realtors, to comply with their due diligence obligations and for consumers to further understand whom they are doing business with.

Despite being well-intentioned, the amendments will result in additional administrative obligations for impacted CBCA companies and give business owners pause in knowing that some of their personal information will be made public.

2. Individuals with Significant Control

An Individual with Significant Control (an "ISC") is one who by themselves or jointly (with one or more individuals) has an interest in a "significant number of shares" of the company,

(a) as the registered security-holder;

(b) as the beneficial holder; or

(c) through direct or indirect control, influence or direction.[1]

A significant number of shares in the company means 25% or more of the voting rights in the company or 25% of the company's outstanding shares measured by fair market value.[2] [3]

The wording would ensure that, in a scenario involving several layers of holding companies, the individual(s) at the top of the corporate pyramid is identified. In doing so, however, the wording is seemingly crafted to encourage greater disclosure through terms such as "control, influence or direction".

3. ISC Register & Publicly Accessible Information

Below, is the information to be contained in the ISC Register and that which will be made public.[4] Notwithstanding the foregoing, certain law enforcement and investigative bodies will have access to all filed ISC information.[5]

The Hamilton Law Association Presents ...

19th Annual Commercial Litigation Seminar

March 5th, 2024 | 9:00 am - 12:00pm

Hosted at the John Sopikna Courthouse, Suite 500

Planning Committee & Hosts:

George Limberis, SimpsonWigle LAW LLP | Eric Nanayakkara, Regency Law Group | Michael Stanton, Scarfone Hawkins LLP

LAW SOCIETY OF ONTARIO accredited

This program contains: **2.0 Substantive Hours, 1.5 Professionalism Hours**

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

Registration includes continental breakfast from 8:15am-9:00am & lunch and networking from 12:00pm-12:30pm

Topics Include:

Dos and Don'ts from the Bench for the Modern Litigator

- How to Prepare for a Motion
- Judicial Efficiency & Client Affordability

Presented by: The Honorable Justice Michael Bordin, Superior Court of Justice & Erica Lamont, Lamont Law

Tools of the Trade

- How To Use Request to Admit & How To Respond

Presented by: Rosemary Fisher, *SimpsonWigle LAW LLP* **& Bevin Shores,** *GOWLING WLG (Canada)*

How to: Caselines

Presented by: Kevin Mitchell, *SimpsonWigle LAW LLP*

Non-Competes, Non-Solicitations

Presented by: Trent Howard, *Scarfone Hawkins LLP*

Lessons from the Court of Appeal

Presented by: Noah Aresta, *Regency Law Group*

Mediation Roundtable Discussion

Moderated by: George Limberis, *SimpsonWigle LAW LLP*

Presenters to be announced.

HLA Members	**$300.00 + HST= $339.00**
Non-Member Lawyers & Other Professionals	**$350.00 + HST= $395.50**
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Need a price break?* If so, please contact Stephanie Zordan at szordan@hamilonlaw.on.ca *only current HLA members are eligible. **Refund Policy: Registration fee less then 25% plus HST is refundable if cancellation is received at least FIVE working days before the program**

ISC Register Requirements	Information that will be made public
• Name • Date of Birth • Residential address • Address for service • Citizenship • Jurisdiction of residence • Date individual became an ISC • Date individual ceased to be an ISC • Description of how individual is an ISC	• Name • Date individual became an ISC • Date individual ceased to be an ISC • Description of how individual is an ISC • Residential address (will be made public if no address for service is provided) • Address for service (if one is provided)

4. Filing Timelines

The information in the ISC Register is to be updated and filed with Corporations Canada annually at the time of filing the company's annual return.[6] Any changes will need to be filed within 15-days of the change being recorded in the company's ISC register.[7]

Incorporations, on or after January 22, 2024, subject to the ISC Register will require a filing or confirmation of exemption.

With respect to amalgamations and continuances, the ISC information is to be filed within 30-days of the date of the Certificate of Amalgamation or Certificate of Continuance.[8]

5. Exemptions

There are certain exemptions, pursuant to which personal information of an ISC will not be made publicly available, and include,[9]

(a) an ISC who is below 18-years of age. Upon reaching the age of 18, provided the individual remains an ISC of a company, the information will be made available to the public;

(b) an ISC who applies to the Director of Corporations Canada, for their personal information not to be made public, and the Director,

i. reasonably believes making the information public would present a serious threat to the safety of the ISC;

ii. is satisfied the ISC is incapable;

iii. is satisfied the information is to be kept confidential under the Conflict of Interest Act or similar legislation; or

iv. is satisfied a prescribed exemption (as may be regulated in the future) is available.

6. Non-Compliance

Failing to comply, may result in,

a) a Certificate of Compliance not being issued, which can impact a company's ongoing business activities including financings or transactional matters;

b) the company being administratively dissolved;

c) the company being subject to an offence and liable on summary conviction to a fine not exceeding $100,000;

d) a person committing an offence under the provision being liable on summary conviction to a fine not exceeding $1,000,000 dollars or to imprisonment for a term not exceeding 5 years, or to both.

7. Ontario Business Corporations Act ("OBCA")

As of January 1, 2023, through amendments to the OBCA, most private OBCA companies are required to maintain a similar ISC Register.[10] However, at the present moment, there is no requirement to make public filings which, in the interim, may encourage entrepreneurs to incorporate or continue their corporation in Ontario.

That being said, public disclosure

requirements may eventually be introduced in Ontario. Should Ontario move in that direction, it would not be the first province to institute such a requirement, as the government of Quebec has already implemented such (which is arguably broader than that introduced under the CBCA). ■

Hassan Chaudhary is a Partner in the Business Law and Real Estate Law Groups at Ross & McBride LLP.

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Endnotes

[1] Canada Business Corporations Act (R.S.C., 1985, c. C-44), ss. 2.1(1) and 2.1(2).

[2] Ibid, s. 2.1(3).

[3] For context, during parliamentary discussion of the amendment, a lower threshold of 10% was proposed, but was unsuccessful. The transcript of the parliamentary discussion can be found at: https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-215/hansard

[4] Supra note 1, ss. 21.1(1) and 21.303(1).

[5] Ibid, s. 21.301.

[6] Ibid, s. 21.21(1)(a).

[7] Ibid, s. 21.21(1)(b).

[8] Ibid, s. 21.21(2).

[9] Ibid, s. 21.303(3).

[10] Business Corporations Act, R.S.O. 1990, c. B.16, s. 140.2.

Criminal Law News

Geoff Read

NEW HAMILTON OCJ DIRECTIVE FOR SETTING DATES

At the risk of tedium, let's have another look at another judicial fiat, this time from Justice Fiorucci for our City of Hamilton regarding "*Jordan*-Compliant Trial Scheduling" (yes, it's the same title as Chief Justice Nicklas' *diktat* for the Province of Ontario). Last edition, we took a look at that Practice Direction by Chief Justice Nicklas for the Province of Ontario. Now we have our local practice direction to implement it: see https://hamiltonlaw.on.ca/Notices-to-the-Profession/13287149##13287149. This 12-page (including appendices) Direction might seem a bit overwhelming, so it is hoped that this little exegesis will help to clarify it.

Overall, Justice Fiorucci's "Notice To The Profession" closely tracks Chief Justice Nicklas' "Ontario Court of Justice Practice Direction - *Jordan*-Compliant Trial Scheduling" that is **appended** to it. For convenience and clarity, they'll be referred to as "the **Hamilton Directive** [HD]" and "the **Ontario Directive** [OD]," respectively. This article cross-references to the OD corresponding paragraphs.

Likewise, The Hamilton Directive establishes courtroom #302 at 10 a.m. as the venue for executing the processes it mandates, and so, for convenience and clarity, it will be referred to as "***Jordan* Court,**" presided over by a judge.

The Hamilton Directive separately addresses Information laid after October 2023, Information laid before November 2023, and 11(b) Applications in Parts I, II & III, respectively.

Part I: post-October 2023 Information

6 Months to set date.

Crown and Defence must resolve or set preliminary inquiry or trial dates (for simplicity, they'll be referred to as **hearing dates**) within 6 months of (when) the Information (was laid) [OD paras. 8 & 9]. Unless the court directs otherwise, the parties must either (i) resolve the case (or identify the date and courtroom to do so) or (ii) set the hearing date as already obtained from the Trial Coordinator (TC) [OD para. 10] at the first court appearance after the 6 months from (when) the Information (was laid). The hearing date must be set pending further resolution discussions, even if resolution negotiations are incomplete [OD para. 11], specific Disclosure is outstanding, or counsel hasn't been retained [OD para 12].

Confirmation Appearance

Where resolution negotiations are incomplete, specific Disclosure is outstanding or counsel hasn't been retained, the TC will also provide an "**issue specific confirmation date**" to appear in the *Jordan* Court, and this date will be set at the same time as the hearing date(s). The parties must identify the outstanding issues on the Record when setting the date(s) and the presiding Justice will document them on the "Judicial Endorsement Form." The court expects the parties to address the outstanding issues before the "issue specific confirmation date."

The Hamilton Directive does not appear to explicitly state what is to occur if the parties are not ready to set either resolution or hearing dates, but one might suppose that the case would then be referred to the *Jordan* Court *(c.f.* Part II: pre-November 2023

Information ("Transitional Cases"), *infra)*.

Variations to the Estimated Trial Time

The parties must give written notice to the TC as soon as possible and the case might have to be brought forward to the *Jordan* Court or schedule another JPTC [OD para 13].

Pre-Set Date Tasks

Within the 6 months of (when) the Information (was laid), and by that date, the parties must address disclosure, have Crown and, if necessary, judicial, pre-trial conferences ("**CPTC**" and "**JPTC,**" respectively), and focus hearings (**FH)** if a preliminary inquiry is requested and a FC is required [OD paras. 7 & 9].

JPTC's

The April 2021 "Mandatory JPT Policy," also **appended** to the Hamilton Directive, requires JPTC's in the circumstances it specifies (*q.v.*). JPTC's must be scheduled within 4 months of (when) the Information (was laid) regardless of whether substantial Disclosure has been received [OD para. 15].

Preliminary Inquiries and Focus Hearings

Likewise, see the June 2022 "Notice to the Profession Re Preliminary Inquiries and Focus Hearings in the Hamilton OCJ," also **appended** to the Hamilton Directive, which specifies when they are required. See below for a note about the June 2022 Notice.

15-month limit for hearing dates

The court will offer dates for trials or preliminary inquiries to be completed within 15 months of (when) the Information (was laid) [OD para. 4].

Waiver Hearing

If either Crown or Defence waive the offered date(s) [OD para. 6], then the case will be addressed in *Jordan* Court for what, for convenience and clarity, will be referred to as the "waiver hearing." The waiver will be explicitly declared on the Record, but the court reserves the right to refuse the waiver and require 15-month preliminary inquiry or trial date be set [OD para. 6] (q*uaere* how to reconcile the Right to Counsel of Choice).

Part II: pre-November 2023 Information ("Transitional Cases")

15-month limit for hearing dates

The court will offer dates for trials or preliminary inquiries to be completed within 15 months, or as close as possible, of (when) the Information (was laid) [OD paras. 17 & 18].

Adjournment to next Case Management Court in order to Acquire Hearing Dates

This will occur unless a JPTC is required but not concluded [OD para. 19]. The deadlines to do this are:

- 2-3 days for counsel to get a trial date from the TC once the Trial Scheduling Form has been submitted;
- 1-2 weeks to conduct a CPTC and get a date from the TC (where no JPTC is required);
- 4-6 weeks to schedule a JPTC or FH upon e-mail request to the TC made the same day as directed by the Justice of the Peace.

See "Enhanced Judicial Case Management," next, where the parties are not ready to set either resolution or hearing dates at the next Case Management Court.

Enhanced Judicial Case Management

This will occur in the *Jordan* Court where, *inter alia*,

(a) the parties are not ready to set either resolution or hearing dates at the next Case Management Court, or

(b) there is a dispute as to whether the Disclosure necessary for Defence to elect has been made.

Part III: 11(b) Applications

The Hamilton Directive **appended** the November 1, 2023, province wide OCJ "Section11(b) *Charter* Applications" Practice Direction of Chief Justice Nicklas (for simplicity, referred to as **the 11(b) Directive**).

Defence counsel (or authorized agent) must advise the JPTC judge whether an 11(b) application is to be made [11(b) Directive para. 3(i)]. (*Quaere* how counsel would know before the trial date is provided by the TC, which must follow the JPTC). In any event, the TC will provide an 11(b) date if the trial date is anticipated to be more than 18 months after the Information (was laid), unless the Defence indicates to the TC that an 11(b) motion is not being made, in which case the Defence must renounce it on the Record when the trial date is being scheduled in the Case management Court [11(b) Directive para. 3(ii)]. The 11(b) date will be set at the same time the trial is set [11(b) Directive para. 3].

11(b) applications will be heard at least 4 months before the trial date [11(b) Directive para. 2] and the parties must comply with the 11(b) Directive service and filing requirements [11(b) Directive para. 4]. A *Criminal Code* s. 551.1 case management judge instead of the trial judge may be appointed to hear the Application [11(b) Directive para. 5].

Oral argument time limits, unless otherwise directed by the Local Administrative Judge, are 25 minutes for the Applicant, 25 minutes for the Respondent, and 10 minutes for Reply by the Applicant [11(b) Directive para.6].

The Application must identify the periods of delay attributable to the Defence or to "exceptional circumstances," and the delay periods must be set out in a chart describing the history of the proceeding up to its anticipated completion [11(b) Directive para. 7].

June 2022 "Notice ... Re Preliminary Inquiries and Focus Hearings in ... Hamilton OCJ"

Election

Before scheduling a JPTC, the Defence must elect mode of trial on any preliminary inquiry (for simplicity, referred to as **PI**)-eligible charges. Failure to elect will result in the case being referred to a case management judge. Neither a JPTC nor a FH will be scheduled until the accused elects or is deemed to elect.

Focus Hearing

Where the accused or prosecutor requests a PI, a *Criminal Code* s. 536.4 FH, instead of a JPTC, will be held before scheduling a PI requiring 2 or more days can be set, except in murder cases.

Advance Requirements for Focus Hearing

(a) a *Criminal Code* s. 536.3 "Statement of Issues and Witnesses" must be filed before the FH;

(b)(i) any *Criminal Code* s. 540(7) Notice, with a copy of the written or otherwise-recorded witness statement and a precis of the intended evidence, must be filed in advance of the FH;
(b)(ii) the party making any *Criminal Code* s. 540(9) request for the witness to appear or be cross-examined must make submissions to the FH judge who will decide the issue at the FH;

(c) the Crown must provide the Defence and the court with a summary of the anticipated PI evidence to assist the FH judge to limit the issues and witnesses per *Criminal Code* s. 537(1.01). ■

Geoffrey Read is a sole practitioner in Hamilton. He is certified by the Law Society of Ontario as a Specialist in Criminal Law.

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Estates Law News

Jennifer Vrancic

Substantial Costs Awarded Against Unsuccessful Will Challenger

A recent decision from the Ontario Superior Court of Justice should have prospective Estate litigants reconsidering Will challenges without evidentiary support of their claims.

In *Fanelli v Fanelli-Bruno*, 2023 ONSC 6501, Justice Myers awarded costs on a substantial indemnity basis against an applicant who challenged his mother's Will.

The testator had previously divided her Estate equally between her two adult children, the applicant and his sister (the respondent Estate Trustee). However, one year prior to her death, the testator revised her Will, such that the adult children each only received 25%. The remainder was divided between her two grandchildren (the applicant's niblings; he had no children himself).

Of importance, the Estate was only worth $320,000, meaning that the applicant's best-case scenario would have seen his share of the Estate increase by $85,000.

The applicant alleged the testator lacked capacity and that his sister exercised undue influence over their mother.

The case commenced with a consent order providing for production of the deceased's medical, financial and legal records (some 9,000 pages). Following receipt, the applicant abandoned his claims. With the other aspects of the litigation settled, Justice Myers was asked to decide the issue of costs.

Costs were substantial. The applicant incurred legal fees of almost $60,000. The Estate Trustee incurred costs of $90,000. She sought costs in the amount of $75,000 on a substantial indemnity basis. The applicant did not seek his costs.

Justice Myers did not mince words when it came to the applicant's conduct, describing it as "an example of scorched earth litigation."

The factors to be considered when determining whether the court should award costs to an unsuccessful party in estate litigation are as follows:

a) Did the testator cause the litigation?

b) Was the challenge reasonable?

c) Was the conduct of the parties reasonable?

d) Was there an allegation of undue influence?

e) Were there different issues or periods of time in which costs should differ?

f) Were there offers to settle?

Justice Myers held that the applicant's evidence did not surmount even the minimum evidentiary threshold prescribed by the Court of Appeal in *Neuberger v York*, 2016 ONCA 191, and further discussed in *Johnson v Johnson*, 2022 ONCA 682.

The applicant adduced no evidence that the testator did not know her assets, could not appreciate the likely recipients of her largesse, or that she could not appreciate property decisions. The only evidence that she lacked capacity at the time she signed her new Will was that she took morphine pills for pain the day before. (She battled cancer for several years before her passing). The applicant did not even provide observations of his mother being confused or lacking understanding.

There was also no evidence to support the allegations of undue influence, "a fact-heavy, serious allegation

of wrongdoing that is tantamount to fraud." The applicant lived with his mother; his sister lived in California. The testator was not in a position of vulnerability to the sister.

Justice Myers did not think it was fair for the costs of the litigation to be borne by the Estate. He observed that every dollar of legal fees paid by the Estate is borne only 25% by the applicant, meaning that he would not be the party to suffer the consequences of his actions. The applicant chose to "invest his entire inheritance to obtain a roughly equal amount. He was not acting from a place of economic rationality."

While the Estate Trustee's costs were more than the applicant's, this was understandable and to be expected given that she bore a greater burden to collect and produce the documents obtained from the various third parties under the order for directions. She also had to collect evidence to respond to the applicant's bald allegations.

Justice Myers denounced the applicant's conduct, stating "[b]ringing a case like this, making allegations of undue influence with no relevant evidence of either incapacity or undue influence, forcing a massive expenditure on an estate in an effort to scorch the earth, i.e. destroy what you cannot have yourself, is reprehensible litigation behaviour in my view."

In the result, the applicant's $75,000 inheritance will be almost entirely depleted by the $74,000 costs award. The applicant is also responsible for his own legal fees of almost $60,000. And there is still the matter of the costs of the hearing, which the parties were instructed to attempt to settle between them. The applicant's ill-considered challenge has cost him dearly.

Litigation is incredibly expensive, and Estate litigation is no exception. However, it often appears that parties are emboldened to take unreasonable positions in these matters due to the commonly held belief that costs will be paid out of the Estate. While that is often appropriate, with due consideration of the factors outlined above, it's insupportable where a party is making allegations without any evidentiary basis.

Justice Myers made the correct decision. He protected the other beneficiaries of the Estate from the reckless actions of a disgruntled beneficiary. Hopefully this discourages similar prospective litigants from taking the same approach. ■

Jennifer Vrancic is an associate at Scarfone Hawkins LLP practicing in civil and commercial litigation. She currently sits on the Hamilton Law Association Continuing Professional Development and Estates & Trusts committees.

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Family Law Update

Lacey Bazoian

As we start another new year (the Hamilton Law Association's 145th!), here are some updates, changes, and upcoming dates to keep in mind for 2024.

ID Verification Changes:

As we are all aware, the Law Society of Ontario ("LSO") recently updated the client identification and verification requirements in Part III of By-Law 7.1, which came into effect on January 1, 2024.

While many of us have shifted from in person to virtual meetings in recent years, verifying a client's identity by only viewing an individual and their identity document virtually is not sufficient under the new requirements.

Subject to limited exemptions, lawyers and paralegals must now verify the identity of their client (or any third party the client is representing) whenever you are retained to provide legal services and will engage in or give instructions regarding the receipt, payment, or transfer of funds.

Exemptions to these requirements can be found in ss. 22 (2), (3) and (4) of By-Law 7.1. Notably, there are exemptions for certain types of licensees (e.g. duty counsel), for certain types of funds (e.g. funds paid or received for billed fees, disbursements or expenses), or certain types of clients (e.g. a financial institution or public body). Please refer directly to the By-Law in determining whether you are exempt from these requirements.

While the new requirements may seem daunting, keep in mind that different activities attract different requirements. Providing certain legal services may require you to identify your client, but will not require verification unless, as part of your services, you engage in or give instructions regarding the receipt, payment or transfer of funds. Although we are likely to see more clarification as the new requirements are implemented and enforced, a strict interpretation of the requirements would obligate family law practitioners to verify a client's identity if you are providing or receiving instructions regarding the transfer of funds. Accordingly, files that involve support or property issues can trigger this requirement, regardless of whether the funds flow through your accounts.

Once you have determined whether verification is required, verification for an individual client must occur immediately after engaging in or giving instructions in respect of the receipt, payment or transfer of funds (although best practice is to verify before or when you first engage in this activity). For organizations, you must verify within 30 days (although, again, best practice is to verify before or when you first engage).

There are six main elements to the client identification and verification requirements:

1. Identification – obtaining basic identification information about the client (and any third party that the client is acting for or representing);

2. Verification – verifying the identity of the client or third party when engaging in or giving instructions regarding the receipt, payment, or transfer of funds (a "financial transaction");

3. Source of Funds – obtaining source of funds information where there is a financial transaction;

4. Monitoring – periodically monitoring the professional business relationship when retained regarding an ongoing financial transaction;

5. Record Keeping – recording and retaining all relevant information

gathered during the identification and verification process; and

6. Withdrawal – withdrawing from representation at any point if you know or ought to know that you would be assisting in fraud or other illegal conduct, or the client or third party refuses to provide the above information.

A lawyer or paralegal is retained in a "financial transaction" when, during the retainer, the lawyer or paralegal will engage in or give instructions in respect of the receipt, payment, or transfer of funds.

There are five methods that lawyers and paralegals can choose from to verify an individual client's identity, including:

1. Government-Issued Photo ID Method – meet in person and carefully examine the client's federal, provincial or territorial government-issued photo ID to confirm it is authentic, valid, and current, and matches the name and appearance of the person (e.g. passport, permanent resident or citizenship card, secure certificate of Indian status, Ontario Driver's Licence, Ontario photo card, etc.). Note that while some foreign documents that are equivalent to a Canadian-issued photo ID document, such as a United States Passport, may also be used, any photo ID document issued by a municipal government, whether Canadian or foreign, is not acceptable. Additionally, Ontario Health Cards are not acceptable, as privacy laws in Ontario prohibit lawyers from collecting, using or making a record of the individual's health card number. A complete list if acceptable government-issued photo ID documents can be found on the LSO's website.

2. Credit File Method – obtain the individual's credit file directly from a Canadian credit bureau (e.g. Equifax or TransUnion) or a third-party vendor authorized by a Canadian credit bureau, confirm the credit file has been in existence for at least three years, and ensure the identification information provided by the individual (e.g. name, date of birth, address) matches the individual's credit file. While you do not need to meet physically with the client, you do need to obtain the credit file directly from the credit bureau, and cannot rely on a copy provided by the client. If any information provided does not match the information in the credit file, and there is no reasonable explanation for the discrepancy, you cannot proceed with the credit file method and must use another method to verify the client's identity.

3. Dual Process Method – under this method, lawyers can rely on any two of the following pieces of information to verify an individual's identity:

- information from a reliable source that contains the individual's name and address;
- information from a reliable source that contains the individual's name and date of birth; and/or
- information containing the individual's name that confirms that they have a deposit account, credit card, or other loan amount with a financial institution.

Examples of a "reliable source" to verify a client's name and address, name and date of birth, and/or name and financial account are listed on the LSO's website and may include government cards or statements (such as provincial vehicle registration, municipal property assessments, or CRA documents), other Canadian sources (such as utility bills, T4 Statements, Records of Employment, or travel VISAs), birth or marriage certificates, insurance documents, or bank or credit card statements, as applicable.

4. Virtual Verification with Authentication Method – authentication by virtual verification now requires a

determination of whether an individuals' government-issued photo identification document is true and genuine by asking the individual to send a scan or picture of their government-issued photo ID and use a technology to compare the features of the ID against the ID's known characteristics, security features and markers. Once the government-issued photo ID has been authenticated, you must still confirm that it is valid and current, which can involve comparing the person's name and features with the ID during a virtual meeting or having the person send a photo and using a software application to apply biometric technology to compare features in the photos. The Digital Identification and Authentication Council of Canada ("DIACC") has developed an online directory of products that can be used to assess identification documents and verify identity.

As lawyers and paralegals will now be required to use authentication technology for virtual identity verification, if, on a case-by-case basis, you determine that this expense is a disbursement (as opposed to overhead expense), you may elect to pass the charges to your client. However, you must ensure that the disbursement is fair and reasonable per LSO rules, disclosed to the client in a timely fashion (and in writing), and billed at the actual (not estimated) cost. Costs and alternative options should be discussed with the client in advance.

5. Using an Agent Method – a lawyer or paralegal may use an agent to verify the identity of an individual client, a parent/guardian of a minor client, a third party the client is acting for or representing, or an individual authorized to instruct on behalf of an organizational client or third party. This method can be used if, prior to the agent acting, you enter into a written agreement with the agent, obtain from the agent the information collected under the agreement, and you are satisfied that the information is valid and current, and that the agent complied with the verification requirements. A sample letter agreement and attestation is available on the LSO's website. Please note that you are not permitted to use an agent to verify the identity of an organization.

If you have minor clients, note that there are different verification requirements for individuals older than 15 years of age, and for children younger than 15 years (in which case you must verify the identity of the child's parent or guardian using one of the five individual verification methods). While not specifically required under the by-law, best practice may require you to obtain information or records to confirm the existence of the child-parent/guardian relationship.

If you are acting for an organization, rather than an individual, the verification requirements depend on the type of organization:

1. Organization created or registered pursuant to legislative authority – for this type of organization (such as a corporation or society), you must obtain written confirmation from a government registry of the organization's existence, name, and address, as well as the names of the organization's directors, if applicable. This may include a certificate of corporate status or a record filed annually under provincial securities legislation.

2. Organization not registered in any government registry – for this type of organization (such as a trust or partnership), you must obtain a record confirming the organization's existence, such as a copy of the organization's constating documents or articles of association.

Subject to an exemption, you must also verify the identity of each individual authorized to instruct the organization using one of the methods of verification for individuals, comply with the source of funds and monitoring requirements, and obtain information about the directors, beneficial owners, control, and structure of the organization.

Regardless of your chosen method, keep in mind that you are obligated to maintain your records for the duration of your professional relationship with the client and for so long as necessary to provide services to the client, and at least six years following the completion of the work for which you are retained.

The LSO's website has a handy Client Identification and Verification flowchart that can be found online here: https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/identification-and-verification#overview-of-requirements-7

If you have any questions about the new identification and verification requirements, please refer to the LSO's website for further information. Specific inquiries can also be directed to the LSO's Practice Management Helpline at 416-947-3315 or 1-800-668-7380. (Tip: You can also schedule a call with the Practice Management Helpline online at https://bookpmh.timetap.com/#/).

Patricia Wallace Award:

The HLA is proud to announce that the recipient of this year's Patricia Wallace Award is Jamie Mountford, counsel at Scarfone Hawkins LLP. Jamie received the award at the HLA's Annual Family Law Seminar held on October 26, 2023.

The Patricia Wallace Award is presented to a lawyer who practices primarily family law in the Hamilton area and whose community service and professional conduct best exemplifies the qualities we all admired in Justice Wallace.

Congrats Jamie!

Bench and Bar Meetings:

The Family Law Bench and Bar and The Child Protection Bench and Bar meetings are now being combined.

Members of the bar are welcome to join this year's Bench and Bar meetings, which take place over Zoom from 1:45 p.m. to 2:30 p.m. Please email Nicole Strandholm (nstrandholm@hamiltonlaw.on.ca) to RSVP and receive the Zoom link.

Upcoming Bench and Bar Meetings are scheduled for April 3, 2024, July 10, 2024, and November 13, 2024 at 1:45 p.m.

2024 Hamilton Family Court Trial Sittings:

JANUARY 8, 2024 – 4 Weeks – Purge Court: Tues, JAN 2/24 @ 9am
FEBRUARY 12, 2024 – 4 Weeks – Purge Court: FEB 5, 2024 @ 9am
MARCH 11, 2024 – 4 Weeks – Purge Court: MAR 4, 2024 @ 9am
APRIL 8, 2024 – 4 Weeks – Purge Court: Tues, Apr 2, 2024 @ 9am
MAY 13, 2024 – 3 Weeks – Purge Court: MAY 6, 2024 @ 9am
JUNE 10, 2024 – 2 Weeks – Purge Court: JUNE 3, 2024 @ 9am
JULY 1, 2024 – 2 Weeks – Purge Court: JUNE 24, 2024 @ 9am
AUGUST 5, 2024 – 2 Weeks – Purge Court: JULY 29, 2024 @ 9am
SEPTEMBER 2, 2024 – 4 Weeks – Purge Court: AUG 26, 2024 @ 9am
SEPTEMBER 30, 2024 – 4 Weeks – Purge Court: SEPT 23, 2024 @ 9am
OCTOBER 28, 2024 – 4 Weeks – Purge Court: OCT 21, 2024 @ 9am
NOVEMBER 25, 2024 - 3 Weeks – Purge Court: NOV 18, 2024 @ 9am

Groundhog Day:

Shadow or no shadow, Groundhog Day is back! We hope you will join us on February 15, 2024 at La Grotta Blue (above The Capri at 25 John Street North in Hamilton) from 5:30 to 7:30 p.m. for some much needed comedy and comradery! ■

Lacey Bazoian is a sole family practitioner practicing at LMB Family Law. She can be reached at: lacey@lmbfamilylaw.ca or 289-389-4991.

New Lawyers' Update

Taylor P. Johnson

The Vanishing Pleadings – *Rai v Rai*

To kick start 2024, I reviewed the decisions of the Honourable Justice F.L. Meyers in *Rai v Rai*, 2023 ONSC 6680 (CanLII) and *Rai v Rai*, 2023 ONSC 7182 (CanLII) which demonstrate the importance of following procedure and bestowed the early Christmas Gift of $200,000.00 in costs against the Applicant.

The case was brought by Mr. Lalit Rai originating as a guardianship claim with respect to his parents' Mr. Bhupinder Kumar Rai and Mrs. Neera Rai. Mr. Rai had also brought numerous claims against his sister (Anu Bhalla) and mother (Neera Rai), Respondents to the proceeding. The original claim centered around the capacity of his parents and an allegation of undue influence against his sister. At the time of the hearing none of these issues were being pursued.

***November 23, 2023 Conference Hearing – Rai v Rai*, 2023 ONSC 6680 (CanLII):**

The Applicant's amended notice of Application (dated July 23, 2023) which sought twenty-three separate heads of relief that the Court summarized to include *inter alia*:

1) An order removing the sister (Anu) as attorney for her mother (Ms. Rai) under the mother's 2021 and 2023 Powers of Attorney and declaring that the mother's 2021 Last Will and Testament was invalid;

2) An order removing the mother (Ms. Rai) as Power of Attorney for the father (Mr. Rai);

3) An order appointing the Applicant and another non-party sibling as the guardian for their father;

4) An order that the sister (Anu) repay and account for all funds taken/given to her on the basis of undue influence;

5) Voluminous disclosure orders relating to various lawyers' records and medical records dealing with the father's (Mr. Rai's) care; and

6) Orders prohibiting the sister/mother from taking action against the property and preservation of the family home.

Background:

The Applicant previously managed his parents' affairs, but Mrs. Rai's evidence was her son's anger/bullying when she asked him to account to her for his management caused her to assign this task to her daughter. The Applicant's anger was not in question, it was evidenced in the complaints of the father's doctor and Mr. Rai that he had been barred from previous conferences. The Applicant takes the position that his mother is being fed lies by his sister. In particular, he claims that his sister has lied about his misappropriation of $640,000.00 of his parents' funds. There is a separate defamation claim brought by the Applicant against his mother and sister as a result wherein he is seeking $10,500,000.00 in damages.

The Applicant's position is that his mother does not have capacity, nor did she have capacity at the time of signing her 2021 Wills/Powers of Attorney. In or about May 2023, the Case Management Judge, the Honourable Justice Meyers made an order that the mother (Mrs. Rai) undergo a third capacity assessment. Consistent with the results of the first and second assessment, Mrs. Rai's third assessment verified her capacity. Thereafter she entered into an updated Power of Attorney again appointing her daughter. The Applicant raises concerns that his mother was coached through the assessment by a grandchild.

There is no dispute as to the father's capacity – the father does not have capacity and had appointed his wife, Mrs. Rai, to manage his affairs.

Case Management:

The Court spent some time reviewing the directions provided by the Case

Management Judge, the Honourable Justice Meyers on July 28, 2023, when scheduling the November 23, 2023 hearing and some of the comments therein. In particular:

The July conference was held to set a litigation timetable and to deal with outstanding matters to ensure the file was ready for a two-day hearing in October;

The Court noted that after five previous case conferences it would be futile to hold another;

On June 30, 2023, the Court had set procedural steps given the results of the capacity assessment, being that counsel for the sister (Anu) would proceed with a motion to dismiss the Application, counsel for the Applicant would bring a cross-motion for relief regarding the capacity assessment and his parents' Powers of Attorney – instead in July the Applicant had amended his Application.

Further timelines were set dealing with: the service of the Applicant's amended Application and supplementary Affidavit; the Respondent sister's motion and supporting materials; responding and reply materials; cross-examinations that were scheduled for September 20 and 21st of 2023; factum timelines were set; timelines for summons and production were set; timelines for disclosure were set.

Finally the Court noted that the Respondent sister's motion to dismiss would precede the hearing of the amended Application.
Costs were reserved.

Immediately prior to the scheduled cross-examinations, the Applicant disclosed a number of audio recordings he personally translated with the intention to demonstrate conversations where his sister was said to be instructing his mother's counsel. Given the timing of the release, the examinations did not proceed as scheduled. The hearing was adjourned from October to November 23, 2023.

The Applicant had not satisfied any of the direction or instruction provided at the Case Management stages in June and July.

Relief Sought at the Time of the Hearing:

The Applicant's reply factum again changed the scope of his approach to this litigation– the Applicant was no longer attacking the Powers of Attorney executed by his parents, and second in response to the motion for dismissal/summary judgment, the Applicant took the position that a trial was required on the financial issues. The Court noted that this was a large departure from what was contemplated by the Court and the parties at last attendance – the Application was meant to be about the validity and capacity of the parents' Powers of Attorney.

At the hearing, the Court noted concern with counsels' position to launch into a trial without any clarity as to the issues.

Time was spent narrowing the issues, at which point the Applicant confirmed that he was no longer challenging his mother's capacity or her Powers of Attorney, nor was he seeking to be appointed as guardian for either parent. The Applicant was instead seeking the following orders:

1) A declaration that the Applicant did not take $640,000.00 from his mother and that disclosure of the same was not provided by his sister;
2) Appointment of s. 3 counsel for the father and financial disclosure relating to the father's affairs;
3) Directions regarding protection of the father's health; and
4) An order that the 2023 capacity assessment of his mother was not valid.

Analysis:

His Honour found there was no availability to proceed with trial on the relief sought. Procedurally, with respect to new claims by the Applicant, there had been no affidavits of documents exchanged, no examinations for discovery, no pretrial conference, no trial management on the Application, no judge had provided an approval that a trial be held, or live evidence be called, and there were no defined causes of action or issues entitling the parties to relief identified at the time of this hearing.

The Court addressed the Applicant's freshly narrowed relief. In short:

- There was no longer a basis to seek an appointment of any guardian for his father, given that his mother was validly appointed; there was no need to appoint section 3 counsel for the father, who was represented by his litigation guardian (and previous section 3 counsel had been removed by the Case Management Judge).
- The previous basis for the alleged mistreatment of $640,000.00 was on the basis that the mother's power of attorney was executed while the mother was unduly influenced by the Respondent sister (Anu) making the issue irrelevant to the remaining live issues. The defamation claim would address this issue.
- The Court has no action before it upon which to make any directions around his father's care. He has a valid Power of Attorney, and no issue was taken with his capacity at the time of signing the Power of Attorney.
- Given there was no longer a challenge to the mother's capacity, it was no longer relevant to rule on the issue of whether her capacity assessment was tainted.

The Court noted at paragraph 49:

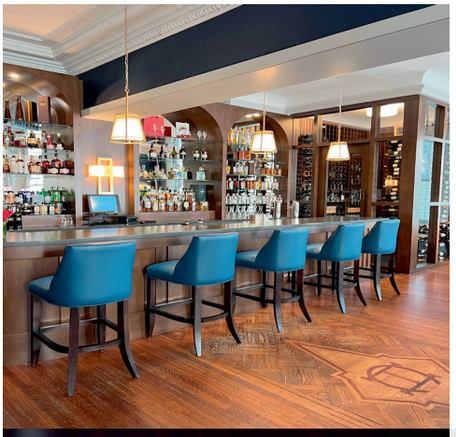
> "What seems to have happened is that the applicant recognized that he requires more evidence. He wants a trial and discovery. But there is no statement of claim. There is no live cause of action on which to build a case. One cannot just come to court to have a trial with no issues as a form of discovery to support later claims".

The Applicant changed course again pleading with the Court to assist his father. Reference is made to the *Charter of Rights and Freedoms* and more specifically to the agency that should be afforded to his parents in structuring their affairs. The Court was unwilling to subvert the parents' wishes and noted that the Applicant did not have rights under the *Substituted Decisions Act* to compel a passing of accounts from his sister (Anu).

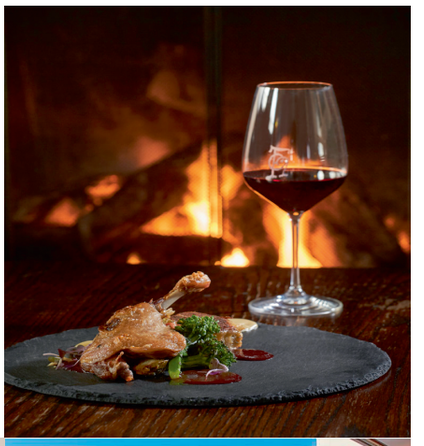
The Application was dismissed.

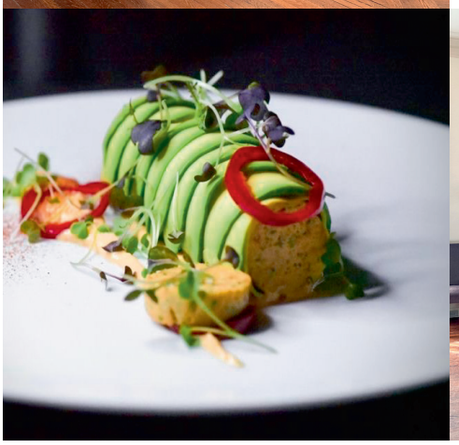
The Court set filing deadlines for cost submissions limited to three (3) pages, double-spaced, normal margins and a 12-point font. The parties would also deliver a costs outline and Offers to Settle.

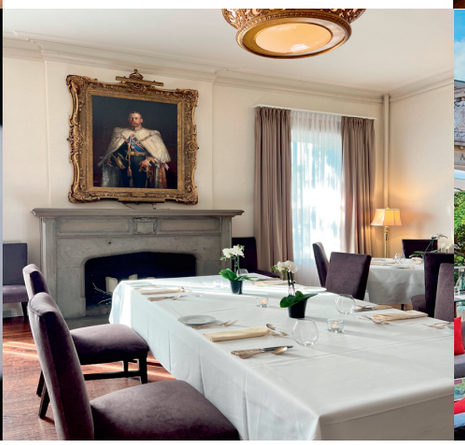
***December 19, 2023 Costs Endorsement – Rai v Rai,* 2023 ONSC 7182**

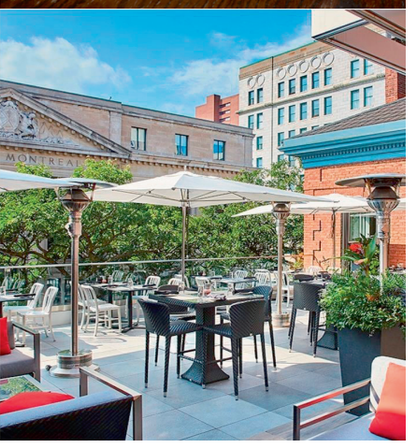


The Hamilton Club









DINING - MEDIATIONS - BUSINESS MEETINGS - RECEPTIONS - SPECIAL EVENTS

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(CanLII):

On December 19, 2023, the Honourable Justice F.L. Meyers released a costs decision from the application hearing on November 23, 2023.

Both the Respondents filed their submissions limited to three pages. The Applicant submitted ten (10) pages of costs and a fresh affidavit referring to recordings of conversations and transcripts, being thirty (30) pages long.

The parties claimed costs were nearly equal, being in the range of $144,089.42 and $148,595.00.

The Court noted the following at paragraph 7:

> "As 2023 draws to a close, I bestow the Oxymoron of the Year Award upon counsel to the applicant whose "Costs Outline" was a mere 65 pages long. I should give Honourable Mention to counsel for Anu Bhalla whose "Costs Outline" was a svelte 32 pages."

The Court considered sending the materials back for ignorance of process, but refrained from doing so on the basis that given the parties nearly equal costs the difficult issue of proportionality was streamlined.

Counsel for the Applicant's mother submitted that she was obligated to produce and review thousands of documents from the past decade only to have the Applicant waive all of his claims immediately prior to the hearing, simultaneously seeking more disclosure.

Counsel for the Applicant's sister submitted that the case was litigation abuse and focused on the Applicant's desire to profit for himself. Counsel highlighted the Applicant's constant changing of relief, late submissions of court materials, and the fact that he refused all three of his mother's capacity assessments.

The Applicant submits that his motive was always altruistic and intended to protect his parents.

The Applicant's offers to settle were made immediately before and after the hearing. The Applicant beat none of his offers.

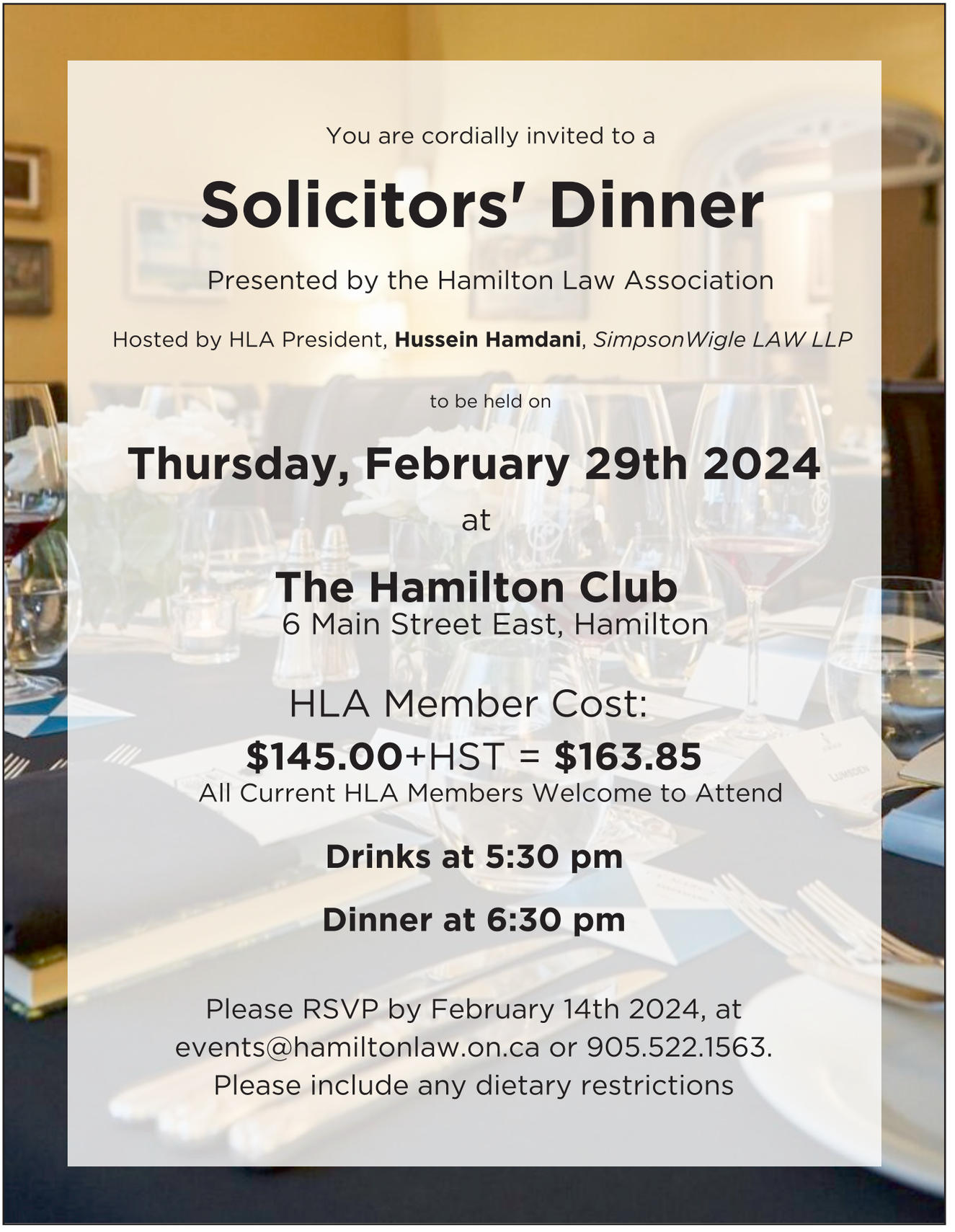
The Court ultimately awarded $100,000.00 in costs to each respondent. The Applicant had picked his forum and made allegations that he did not have the ability to prove. ■

Endnotes

Rai v. Rai, 2023 ONSC 6680 (CanLII);

Rai v. Rai, 2023 ONSC 7182 (CanLII).

Taylor P. Johnson is an Associate Lawyer at Szpiech, Ellis, Skibinski, Shipton in Hamilton Ontario. Taylor practices in the areas of family law, wills and estates, and real estate.



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Solicitors' Dinner

Presented by the Hamilton Law Association

Hosted by HLA President, **Hussein Hamdani**, *SimpsonWigle LAW LLP*

to be held on

Thursday, February 29th 2024

at

The Hamilton Club

6 Main Street East, Hamilton

HLA Member Cost:

$145.00+HST = **$163.85**

All Current HLA Members Welcome to Attend

Drinks at 5:30 pm

Dinner at 6:30 pm

Please RSVP by February 14th 2024, at events@hamiltonlaw.on.ca or 905.522.1563. Please include any dietary restrictions

Personal Injury Update

Andrew Spurgeon

There have been some important judicial decisions that are of particular interest to folks who do personal injury.

One of them, which I will only touch on briefly, is R. v. Greater Sudbury (City), 2023 SCC 28. It deals with an occupational health and safety prosecution of a municipality which had hired a contractor to do watermain construction work under a roadway. A worker employed by the contractor doing the work struck and killed a pedestrian with his road grading equipment.

The main legal issue before the Supreme Court was whether the municipality was also an entity with sufficient oversight responsibilities of the person who negligently operated the machinery which killed the pedestrian to be found culpable for the offense. Though this is an occupational health and safety case, the issues of when and how a municipality or other occupier may be found to have oversight responsibilities – and therefore duties of care sufficient to establish liability, may be informed by the case. I commend it to you for your consideration.

The case I really want to spend time talking about is Baker v. Blue Cross Life Insurance Company of Canada, 2023 ONCA 842 which was released on December 20, 2023 by the Court of Appeal.

In that case, the plaintiff, a woman named Sara Baker was a 38-year-old executive who ran various logistical services at Humber River Hospital in Toronto when she had a stroke while exercising in October 2013. She applied for short-term disability benefits from her insurer, Blue Cross. In that period she received, then was denied and had benefits resorted after an appeal.

After those benefits lapsed, she applied for and intermittently received long-term disability benefits for two years premised upon an "own occupation" test. There were disputes and appeals during that period. After two years she was denied benefits outright when the test shifted to an "any occupation" test. Sara appealed the Blue Cross decision within the company but ultimately had to sue.

After 22 days of trial Sara won. The jury awarded her:

- A declaration that she was totally disabled pursuant to the terms of her policy with Blue Cross;
- $220,604 in retroactive benefits payments;
- $40,000 in aggravated damages for mental distress;
- $1,500,000 in punitive damages; and
- $1,083,953 costs inclusive of HST and disbursements on a full indemnity scale.

Blue Cross appealed – but lost. Why?

The Court of Appeal outlined the pros and cons of serving a jury notice, noting that one of the implications is that as juries do not provide reasons, their determinations are, assuming they received proper instructions, factual and therefore, not as easily reviewable as judgments from judges. However, in the realm of determining to award the discretionary remedy of punitive damages, jury verdicts are more easily reviewable as they can be measured for their reasonableness and rationality based on the record established at trial.

Blue Cross did not challenge the instructions provided to the jury. It merely asserted that the evidence on the record demonstrated it acted in good faith and therefore the award was not rational or reasonable. The Court of Appeal, noting that Blue Cross did not call any of its claims examin-

ers to give evidence, save one, there was a dearth of evidence supporting good faith in contrast to the surfeit of evidence of bad faith which the court enumerated. Examples include:

- Termination of benefits without warning to the insured prior to seeking further evidence of disability from the insured.
- Relying on medical opinions from general practitioners which blue Cross knew or ought to have known were incorrect. Specifically because they sent inaccurate material information to their retained medical consultant and got an inaccurate report in return – which Blue Cross failed to correct.
- Blue Cross cherry-picked evidence supporting denial of benefits but ignored evidence supporting awarding benefits.
- Blue Cross delayed getting appropriate assessments such as a neuro-psychological assessment – which would be an obvious and necessary assessment tool for a stroke victim.
- Once Blue Cross had that neuro-psych report, it omitted considering and ignored material caveats, qualifications and comments in that neuro-psych report which were favourable to Sara's claim for benefits.
- Blue Cross misread a Transferrable Skills Analysis report in a way that supported denial of benefits.
- Blue Cross persisted in distorting the opinions of its own experts who did the neuro-psych and Transferrable Skills assessments, despite its distortions being pointed out to them by counsel for Sara.

Given this, the Court of Appeal said:

> [30] Overall, we see repeated instances of the Blue Cross team ignoring information, misinterpreting experts' reports, and relying on the ill-informed advice of their contracted doctors to deny benefits. In effect, they created a closed loop of information that ignored contrary information and created a counter-narrative based on their misinterpretation of the relevant data. This is a pattern of misconduct that, at best, shows reckless indifference to its duty to consider the respondent's claim in good faith and conduct a good faith investigation, and at worst, demonstrates a deliberate strategy to wrongfully deny her benefits, regardless of the evidence that demonstrated an entitlement.

With respect to the question of quantum – was $1,500,000 too much, the Court said:

> [34] Deterrence is impossible unless the punishment is meaningful. I take judicial notice of the fact that Blue Cross is a large insurance corporation. While a punitive damages award of $1.5 million might be devastating to a personal defendant or a small business, it is little more than a rounding error for Blue Cross. Indeed, it is difficult to envision how an award of anything less than $1.5 million would even garner the attention of senior executives, let alone deter future misconduct.

Blue Cross also sought leave to appeal the "full indemnity" cost award. The plaintiff beat her rule 49 offer to settle. However, the trial judge in awarding "full indemnity" costs declined to award them on the basis of the spurned offer to settle, but rather on the basis of:

> " . . . the wrongful denial of long-term disability benefits by an insurer, given the unique character of long-term disability insurance policies, constitutes special circumstances justifying [an award of full indemnity costs]."

The Court of Appeal granted Blue Cross leave to appeal on the matter of costs based on the proposition that the trial judge should not have created a new category or foundation for the finding of costs as such would impact the inherent discretion judges have with respect to costs.

The Court of Appeal agreed. However, the Court held the quantum of the award of over $1,000,000 in costs on a full indemnity scale was reasonable given two things:

- the fact that the plaintiff beat her rule 49 offer; and
- Blue Cross' marked disregard for its duty of good faith to her.

The Court of Appeal noted that Blue Cross adopted a litigation strategy of shielding its employees from appearing at trial and explaining themselves. The bad faith Blue Cross exhibited toward its insured was not just in claims handling but manifested itself in the management of the litigation and trial itself. ■

Andrew J. Spurgeon is a partner at Ross and McBride LLP. He is also an Elected Bencher of the Law Society of Ontario, and the Chairman of the Board of Directors LawPRO, which is the sole insurance company providing primary liability coverage to all

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Real Estate Law News

Li Cheng

Power of Sale and s. 116 of the ITA

The new interest rate environment has led to an uptick in the number of mortgages under enforcement.

I have recently advised on a few potential purchasers power of sale transactions who ultimately elected to not proceed with the transactions.

Among the host of risks that a purchaser takes on in a power of sale transaction, one that frequently flies under the radar is how to deal with the purchaser's obligation s. 116 of the Income Tax Act (ITA).

In general, a power of sale transaction if listed on MLS through a brokerage will tend to be based off of an OREA form agreement of purchase and sale (APS). The APS will include comprehensive schedules with provisions that override the majority of the standard OREA provisions, including but not limited to the following:

- The purchaser accepting both title and physical condition of the property "as-is";
- A limited list of closing deliverables by the parties;
- Expanded unilateral right to terminate or extend the transaction by the mortgagee seller; and
- Wholesale re-statement of mortgagee seller representation and warranties to be very minimum, if any.

The last point causes particular issue when advising potential purchasers, as the blanket removals typically will extend to the residency representation and warranty typically found in the OREA forms.

CRA circular No. : IC72-17R6 states:

> 54. If a mortgagee exercises a power of sale pursuant to the terms of the mortgage, a court order or the provisions of the relevant Mortgage Act, rather than foreclosing, title to the property passes directly from the mortgagor to a third party purchaser. Thus the provisions of subsections 116(5) or (5.3) apply if the vendor/mortgagor was a non-resident. Where title to the property has passed from a Canadian resident vendor/mortgagor to a Canadian resident purchaser, albeit through a power of sale by a non-resident mortgagee, the provisions of section 116 will not apply to any of the three parties.

In essence, in a typical power of sale transaction, the CRA considers the person disposing the property under s. 116 of the ITA to be the registered owner/mortgagor and not the mortgagee enforcing and actually signing off on the transaction. In fact, the tax residency of the mortgagee appears to be irrelevant.

Accordingly, the CRA believes s. 116 continues to obligate the purchaser to complete their duty to conduct a reasonable inquiry on the tax residency status of the registered owner of the property. Otherwise, the purchaser may be liable to remit 25% or 50% of the purchase price to the Receiver General, unless the purchaser had no reason to believe the mortgagee is not a non-resident after a reasonable inquiry.

As a refresher, residency status under the ITA is not determined by way of legal citizenship or permanent residency.

The problem is, with the limited representation and warranties, the mortgagee seller will not represent or warrant the tax residency of the mortgagor as it is information outside of their knowledge. As the mortgagor is rarely involved in a power of sale transaction, it is also difficult to track them down and get any sort of declaration from the mortgagor.

In an ordinary transaction, the purchaser satisfies its "reasonable inquiry" obligation by obtaining a statutory declaration. The details of which can be reviewed in the leading case Kau v.

The Queen, 2018 TCC 156. I also discussed this case in my previous HLA article in 2019.

In the case of a power of sale, what can a purchaser do to satisfy its "reasonable inquiry" obligation? Here are my thoughts. Disclaimer, none of this is tested in any way, but given the relative low threshold to meet the obligation described by the judge in the Kau case, they may get us partly there:

1. Requesting last known address of the mortgagor from the mortgagee, the enforcement lawyers (who may have an affidavit of service), and the real estate agents involved

2. Inquire whether the mortgagor had provided a statutory declaration regarding their residence as part of the security documentation for the initial funding transaction. I am seeing more and more of these and I require the same when representing a lender. This way, perhaps the mortgagee can provide a statutory declaration indicating that they are not aware of any change in the mortgagor's tax residency between the original funding date and the closing date

3. Comparing the registered address for service on the original transfer to the mortgagors

4. Comparing the registered address for service on the active charge instrument for the mortgagors

5. Searching public records, Teraview, Geowarehouse to see if the mortgagor owns other real property in Canada.

Failing which, my opinion is a purchaser has the right to remit the holdback amount to the Receiver General. However, the mortgagee will likely terminate the transaction.

While discussing this matter with some colleagues, this issue does not appear to be high on the list of issues. While the potential risks are significant for the purchaser, it is difficult to advise the purchaser client when there seems to be no definitive answer. ■

Li Cheng practises in association with George Street Law LLP with a focus on real estate, land development and business law. He can be reached at:

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Shareholder Benefit from Transfer of Real Property Upheld

Amit Ummat

***Greer v. HMK* 2023 TCC 110**

Summary

The two main issues to be resolved by the Tax Court of Canada (Tax Court) were a) was the Appellant Michale Greer (Appellant) required to include a shareholder benefit in 2005 following the receipt of real properties worth over $2.4mil from a corporation owned by his late father's estate and b) was the Minister even allowed to reassess 2005. The Tax Court answered both in the affirmative.

Background

The Appellant is a New Brunswick resident. His parents were Hedley and Violetta. Hedley operated H. Greer & Son Ltd. (HGSL) which was involved in property development and sales. Hedley died in 1998. Violetta became the executrix of his estate.

In October of 2005, HGSL transferred four properties to the Appellant for no consideration. The Appellant then sold some of the properties in the following two years and transferred the remaining properties to his own company H. Greer & Son (2006) Ltd. The Appellant was a shareholder of HGSL (but he disputed this at trial).

Reassessments

The Minister reassessed the Appellant's 2005 taxation year to include an additional $2,846,200 in computing his income under a combination of subsections 15(1) and 15(2) of the Income Tax Act (Act). The Minister included a shareholder benefit of $1,584,200 under subsection 15(1) of the Act and a shareholder loan of $1,262,000 under subsection 15(2) of the Act. The Minister's assessment of a shareholder benefit of $1,584,200 under subsection 15(1) reflected the difference between the price the Minister assumed the Appellant paid for the properties in question. The Minister's reassessment of a shareholder loan of $1,262,000 under subsection 15(2) reflected a loan the Minister assumed was made by HGSL to the Appellant to allow him to purchase those properties from HGSL.

Timing

The Minister initially assessed the Appellant for the 2006 taxation year but later realized that the property transfers occured in 2005, and not in 2006. The 2006 assessment was vacated by the appeals division and the Minister proceeded to reassess the 2005 tax year on an identical basis.

Law

Subsections 15(1) and 15(2) of the Act:

15(1) Where at any time in a taxation year a benefit is conferred on a shareholder ... by a corporation ... the amount or value thereof shall ... be included in computing the income of the shareholder for the year.

15(2) Where a person ... is

(a) a shareholder of a particular corporation, ...

(b) and the person ... has in a taxation year received a loan from or has become indebted to the particular corporation, ... the amount of the loan or indebtedness is included in computing the income for the year of the person or partnership.

Decision & Analysis

The Court was left with four questions to answer, namely:

Was there a shareholder loan? Was the Appellant a shareholder of HSGL? What was the fair market value of the transferred property? Was there a misrepresentation attributable to neglect or carelessness in respect of the Appellant's 2005 tax return?

The Court found that there was no loan, and that subsection 15(2) had therefore been improperly pleaded. Based on the Appellant's testimony, the Court found that the Appellant rationalized the transfers as a distribution from his late father's estate. To the Court, this meant that he did not intend to purchase the properties at the time of transfer.

The Court found that the Appellant was a shareholder of HGSL, despite the Appellant denying this at trial, on three bases. Justice Spiro found the Appellant's testimony to be unreliable. For example, he indicated to the Court that he was not at all involved with HGSL (the transferor corporation). But later in cross examination, he admitted he was president, vice-president, and director of HGSL and carried out transactions on behalf of HGSL. At this point the Court likely stopped believing him altogether. Furthermore, his name appeared in the shareholder as owning a single share as of 1996. Finally, a provision in the relevant Corporations Act included a presumption that an entry in a share register is, in the absence of evidence to the contrary, proof that the holder shown in the register is the owner of the share. The Court relied on this presumption.

Fair market value was determined by expert evidence. The Crown and the Appellant both presented real estate appraisers who gave their opinions on the fair market value of each of the four properties. The parties were able to agree on the first two properties but disagreed on the last two. The Court ultimately accepted the evidence of the Crown's expert, for several reasons. The Appellant's expert was unclear and omitted relevant evidence. The Crown's expert:

- provided detailed explanations
- performed extensive research and used aerial photographs
- considered factors Appellant expert did not, including the 2004 announcement of the Trans-Canada Highway interchange and the general growth trend in the development of the relevant area
- used an additional valuation method
- considered events not considered by his counterpart
- weighted comparables in a better way
- quantified and explained costs that would have been incurred by an owner before selling certain portions of the property

Thus, the fair market value as expressed by the Crown's expert was accepted by the Court.

According to Justice Spiro, there indeed was a misrepresentation attributable to neglect or carelessness and that determining whether one exists is a two-step process, namely, a) is there a misrepresentation and b) if so, was it attributable to neglect, carelessness or willful default.

In the Court's view, failing to report the shareholder benefit was a misrepresentation, given that the Appellant knew he did not acquire the properties from the estate because he knew the estate did not own the properties. He knew that he did not get the properties from Violetta because he knew she also did not own the properties. The Court found that the Appellant knew that HGSL owned the properties and that they were transferred to him for no consideration. Lastly, he knew or ought to have known he was a shareholder of HGSL.

The misrepresentation was attributable to neglect because he did not consult a tax professional before his 2005 filing. That failure reflected a lack of reasonable care and was therefore negligent.

The appeal was allowed only to reflect a change in the fair market value of the shareholder benefit. Otherwise, the Appellant lost this case on the basis that he received a shareholder benefit

in the amount of $2,436,900. ■

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 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.

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Approved by the Board of Trustees, December 13th, 2017.

The Hamilton Law Association • Hamilton Legal Community

2024 CALENDAR OF EVENTS

Thursday, February 15th, 2024
Groundhog Day Social
5:30pm – 7:30pm
La Grotta Blue
No RSVP Needed!

Thursday February 29th, 2024
Solicitors' Dinner
5:30pm – 9:00pm
The Hamilton Club

Tuesday, March 5, 2024
19th Annual Commercial Litigation Seminar
9:00 a.m. - 12:00 p.m.
HLA Library

Thursday. March 21st, 2024
Winter Social
5:30pm – 7:30pm
La Grotta Blue
No RSVP Needed!

Thursday April 11th, 2024
Real Estate Workshop: Title Searching 101
12:00pm – 2:00pm
HLA Library

Tuesday April 16th, 2024
The Annual Advocacy Conference
8:50am – 4:00pm (Lunch & Social included)
The Sheraton Hotel Hamilton

Thursday, April 25, 2024
The 22nd Annual Estates and Trusts Update
1:00 p.m. - 4:00 p.m.
HLA Library

Tuesday May 7th, 2024
Professionalism Session
2:30pm – 5:00pm
HLA Library

Thursday May 9th, 2024
Corporate Commercial Workshop: Startup Business Formation
12:00pm – 2:00pm
HLA Library

Thursday May 16th, 2024
Annual General Meeting & Presidents Reception
More Information to Come!

Thursday June 6th, 2024
Hamilton Law Association Annual Dinner
5:30pm – 9:00pm
The Hamilton Art Gallery

Contact Information:
Stephanie Zordan
Tel: 905-522-1563 x221
Email: events@hamiltonlaw.on.ca

For more information on upcoming events, please email: events@hamiltonlaw.on.ca. Please note that registration and additional information may not be available for some events at this time.

Save the Date!

Groundhog Day CENSORED

Thursday, February 15, 2024

Location: La Grotta Blue

(25 John St N, Hamilton, ON)

5:30pm – 7:30pm

The Family Law Subcommittee is proud to present the return of the Family Law Groundhog Day Social.

Join us for after-work drinks, snacks, prizes and games! Be ready to poke a tiny bit fun as well.

No RSVP Required

Be  Ready!

• Canadian Publications Mail Agreement #40036029