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ASSOCIATION

Snail



November Issue

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President's Report

By: Karen Hulan / Beckett Personal Injury Lawyers

It is with a heavy heart that I write this message.

In October, **Bob Ledgley** resigned from his position as President of the Middlesex Law Association. Bob served on the Board of Trustees for five years. His approach to decision making has made Board meetings engaging (as have his entertaining stories and anecdotes!). I have met few people who can inject much needed levity into serious discussions as nicely as Bob does. On behalf of the Board, I extend our sincere thanks to Bob for the work he has done for the association. He is already missed.

I am stepping into the role of President a few months earlier than I expected and in circumstances that I wish the Board was not facing. There is insufficient funding available to pay for services that we have grown accustomed to having. As I wrote in an article for the Snail in December 2020, last fall the Law Society announced a substantial reduction in funding that the **MLA's Practice Resource Centre** receives from the **Legal Information and Resource Network (LIRN)**. Our funding was reduced by approximately \$57,000. The Practice Resource Centre was already operating at a shortfall as funding decreased year after year. The MLA supports the **Practice Resource Centre (PRC)** with an annual transfer because LIRN funding is insufficient to maintain the number and types of holdings we are required to have as a regional library.

In light of the funding cuts announced

last year, the MLA needed to review the budget with a view to the long-term viability of the association. We began with identifying the core purposes of the MLA. We determined those purposes to be advocating for lawyers' interests, providing information resources, professional development and networking opportunities to members as well as a physical space for lawyers at the London Court House. An ad hoc committee was struck to review MLA finances to find ways of reducing expenses. The Board started to immediately implement changes including reducing the number of print titles and loose-leaf services.

As part of that process, last winter the Board decided to embark upon a new direction to deliver on its core purposes. It was decided that an Executive Director will be hired. An ED will be accountable for all MLA and PRC operations with oversight provided by the Board. CPD will be insourced and developed by Board members with support of the ED and PRC staff. This is a model that exists in other jurisdictions in Ontario including Ottawa and Hamilton. With CPD now being developed internally, the CPD contract with **Paula Puddy** has not been renewed. Paula has provided the MLA with 15 years of valuable CPD programming. She has been an integral part of the MLA and the services it offers members. I had the opportunity to work with Paula for a few years in preparation for the annual Straight from the Bench conference. I witnessed firsthand the amount of work that Paula devoted to that conference

alone and the ease and pleasant manner in which she approached everyone with whom she worked. On behalf of the Board, I extend our gratitude to Paula for the contribution she has made to the association. Please see page 9 of this edition of the Snail for Paula's personal message to the membership.

I am preoccupied with one word as I write this message. Change. It is something that I thrived upon decades ago but I now approach with caution. I remind myself, however, that as Bob wrote in his first message as President in April of this year, not all change is negative. The Board is comprised of hardworking trustees who have spent a considerable amount of time making difficult decisions thrust upon us by financial constraints. The upcoming year will be one of transition and one that I hope members will engage in. One way to participate is with CPD development. The CPD committee intends to recruit practice-area committee members to reflect a broad range of practice areas. Another way to engage is to become a MLA Trustee. Eight positions will be open on the Board in February 2022. Nominations are now open. [The link for "Nominations" is here.](#)

We look forward to your participation in the year ahead.

Karen Hulan
PRESIDENT

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Library News



Contributed by:

Cynthia Simpson and Shabira Tamachi
library@middlaw.on.ca

What's with the Text Collection?

If you come to the library in the new few weeks, you may be a tad disconcerted about the state of the text collection. We are finally able to work on a cleanup project in this area (known to librarians as weeding) and the first step is to pull off all the outdated or underused items and officially withdraw them from the collection. Perhaps someone still consults the Proceedings of the annual meeting of the Uniform Law Conference of Canada from 1983, but it wasn't our members! Same goes for those Bank of Canada Annual Report page-turners. However, with all cleaning, it's easiest to get rid of the clutter first before reorganizing everything, so the shelves may look a bit sparsely populated in some areas for the next few weeks before we shift everything and relabel the shelves.

Historic Legislation

Sometimes you need to dig into the old and mouldy legislation for a bit of point-in-time research that might not be as easy to do online. Our library users are familiar with those handy annotated or consolidated statutes that we have on

our shelves, but we try to only keep about three years' worth in the main collection area. Fear not as we have simply moved the older versions, still in the same call number order, to the back law reports room in the library. Just look to your right when you enter that area, and you will see them all shelved there, usually going back to the late 1990's or very early 2000's.

Donated Court Attire

A former member of the MLA has retired and donated her robe and vest to the library. We also have a set of men's court attire from another former member, and a couple of spare sets of tabs. We have enough donated court attire already for lawyers to borrow for day use so we are offering these sets to a New Call or current articling student. Please email us at library@middlaw.on.ca to arrange a time when you can come by to see if they would suit your needs.

New Books

Fazakas, Derek. **Wills and estates --5th ed.**, Emond

Glaholt, Duncan W. **Conduct of lien, trust and adjudication proceedings 2021**,

Thomson Reuters

Glaholt, Duncan W. **2021 annotated Ontario Construction Act**, Thomson Reuters

Gvelesiani, Irina. **Trusts and trust-like devices: translation and interpretation**, LexisNexis

Knight, Patricia. **Small Claims Court: procedure and practice --5th ed.**, Emond

Kurtz, JoAnn. **Family law: practice and procedure --6th ed. vol.1 & 2**, Emond

Lange, Donald. **Doctrine of res judicata in Canada --5th ed.**, LexisNexis

LSO. **4th Motor vehicle litigation summit**.

LSO. **Commercial real estate transactions 2021**.

LSO. **Practice gems: administration of estates 2021**.

MacDougall, Bruce. **Misrepresentation and (dis)honest performance in contracts - 2nd ed.**, LexisNexis Canada

MacFarlane, Q.C., Bruce A. **Cannabis law: the legislative framework 2021 ed.**, Thomson Reuters

Middlesex Family Lawyers Association. **31st annual MFLA conference**, MFLA

Siddiqui, Shahzad. **Islamic wills, trusts and estate drafting in Canada**, Thomson Reuters

Steinberg, et al. **Ontario family law practice 2022 -2 vol.**, LexisNexis



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If you scan this QR code, it will take you to the website you're already on to read about QR codes. There is a time and a place for touchless, paperless QR codes. Up to you if you think your body is one of them.

COVID, phone cameras revive QR codes



Contributed by:
David Canton / Harrison Pensa LLP

QR (quick response) codes, like the one in the graphic above, have gained a resurgence from COVID.

One reason they are becoming more popular is that most phone cameras now read them directly. You no longer need a specific app.

The bigger reason is that they provide touchless and paperless ways to interact during COVID. You may have used them to see a restaurant menu or fill out a COVID questionnaire.

Most QR codes take you to a web page — the same as typing a URL into a browser. They can also do things like create vCards with contact info, send emails or SMS with a predefined message, or post a tweet.

Malicious QR Codes

QR codes themselves are not risky. But like typing a URL into a browser, they can take you to [places that track you or are malicious](#). You shouldn't scan a QR code unless you are comfortable that the source is legitimate and trustworthy. A QR code in a restaurant that takes you to a menu is probably safe, as is one on the packaging or instructions for a product you purchase. But scanning one on a flyer taped to a post is probably not a great idea.

QR codes are easy to create. A Google search for "best QR code generators" will turn up many options.

If you want to use them, put some thought into what you are trying to accomplish, and avoid [common mistakes](#).

Give the user some idea where the code will take them to encourage their use.

It doesn't make much sense to put one on

a web page or in a blog post like this one where a link would work. Putting one on a billboard or a vehicle doesn't make much sense either, as it is hard, and perhaps even dangerous, to take a picture of it.

Another bad idea is having a [QR code tattooed on your body](#). Yes, that's actually a thing.

[David Canton](#) is a business lawyer and trade-mark agent with a practice focusing on technology issues and technology companies. Connect with David on [Twitter](#) and [LinkedIn](#).

This article was originally published on the [HPTechlaw blog](#). To get HP's Tech Law Weekly Newsletter - which includes a blog post and other top stories at the intersection of tech and law - delivered to your inbox each week, [sign up here](#).

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? Questions & Comments ?

If you have any issues or concerns regarding the Middlesex court facilities, operations, judiciary, etc., let them be known! Send all concerns to the current MLA Bench & Bar representatives:

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Jennifer Wall 519-661-6736

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Report on Past CPD Programs



Contributed by:
Paula Puddy, MLA CPD Director

The Semi-Annual Women's Networking Event

The latest Women's Networking Event was held virtually on October 6, 2021 to a small but engaged group. During this program, Larissa Mills BA, MEd, shared strategies she researched and developed on "digital wellness" for home and work. These strategies were particularly relevant to households with children. Her tips included references to health device routines, links to mental health and creating healthy habits.

Thank you to our chair, Louise Mimmagh, for inviting Larissa.

The Middlesex Law Association was pleased to make a donation to London Lawyers Feed the Hungry on behalf of our guest speaker.

Real Estate Update

We welcomed Jeffrey Lem, the Director of Titles, on October 7, 2021 via Zoom. As always, he shared practical tips and updates for Land Registry in his enthusiastic manner to over fifty lawyers and clerks from the real estate bar. Matthew Wilson outlined remedies to pursue when a transaction falls apart. Casey Hayward shared his tips on correcting common conversion errors.

Thank you to our co-chairs, Matthew Wilson and Casey Hayward, for their dedication to the real estate bar and preparing presentations twice a year!

As always, we made a donation to London Lawyers Feed the Hungry on behalf of the speakers and program chairs.

A big thank you to our sponsors! Here is some information from our sponsors to check out:

- Legal Professionals - Residential & Commercial Title Insurance | FCT
- Home | Stewart Title Canada
- TitlePLUS title insurance Home

Upcoming Programs!

Thursday, November 18, 2021, 2:00pm to 3:30pm, The 5th Annual EDI seminar:

Keep Calm and Check your Privilege!
A Positive Look at Becoming an Ally,
Advocate and Accomplice

Speaker: Deirdre Pike of Queer
Transformative Power

[Middlesex Law Association - The 5th Annual EDI seminar: Keep Calm and Check your Privilege! A Positive Look at Becoming an Ally, Advocate and Accomplice \(wildapricot.org\)](#)

Thursday, December 2, 2021, 1:00pm to 3:00pm, The 16th Annual Personal Injury Conference

The Impact of the Pandemic on Personal Injury Litigation

Guest Speaker: The Honourable Mr. Justice Grace

Speakers: Sarah Kirshin-Neilans, Lindsay Campbell, and more!

Chairs: Alysia Christiaen, Kerry Figliomeni, Lucy Lee

[Middlesex Law Association - The Quick & Dirty Personal Injury Update: The Impact of the Pandemic on Personal Injury Litigation \(wildapricot.org\)](#)

Wednesday, December 8, 2021, 9:00am to 12:00pm, The 17th Annual Wills, Estates & Trusts Conference

Solicitors and estate litigators – pencil in this annual program! Our annual wills conference features relevant topics for your practice. Registration forms, and a draft agenda will be available soon.

Chairs: Lou-Anne Farrell, Justin Newman and Ian Wright

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1. Go to <https://www.cpdonline.ca/purchase-options>
2. Get Started... Individual Subscription or Pay as you Go
3. Mention your Middlesex Law Association on the registration page as well as check the box that says "were you referred by your association"!



Reflections as the CPD Director

Fifteen years ago, I took over the MLA's CPD programming which consisted of a handful of small, ad hoc programs running at a net loss. Over the years, I added annual programs, program chairs, sponsors and diverse speakers developing important relationships with numerous stakeholders including members of the bench.

I truly believe we created a CPD program consisting of over 15 seminars per year that the MLA and its members could be proud of – high quality, relevant and professional local programming at a reasonable price.

I am extremely proud of my achievements as the CPD Director which include:

- being recognized by the Law Society as an accredited provider of professionalism content;
- sourcing and adding EDI programming to our line-up;
- generating a positive net income from CPD programming for the last 9 years;
- entering into a partnership with CPDOnline.ca in 2017 contributing over \$35,000 to the MLA's bottom line;
- donating over \$35,000 to London Lawyers the Hungry on behalf of speakers and chairs since 2009; and
- pivoting all CPD programming online in 2020, and earning a positive net income.

Of course, I could not have accomplished all of this without the help and support of many people, a village.

I extend my sincerest thanks to the wonderful judges in our region who did not hesitate to participate in our programs despite their busy schedules. Thank you to all my program chairs many of whom have been helping for years, particularly those involved in Straight from the Bench (especially 2011 when our daughter Zoe was born 3 months prematurely!) Thank you to all the speakers who shared their knowledge with the Southwestern Ontario bar. Thanks to the chairs of the CPD committee for liaising with the Board. Thank you to all of our generous sponsors.

A big thank you to my wonderful hostess of 10 years, **Kaye Powell**, who did an excellent job "herding cats". **Cynthia, Shabira, and formerly Gail**, were part of my "behind the scenes" team. It was a pleasure to work with the 3 of you over the years. Thank you for all your support and effort.

Finally, thanks to you, the members, for regularly attending one or more of our CPD conferences and seminars every year.

I have truly enjoyed being the CPD Director for the MLA, especially since it never felt like work.

Paula

Continuing Professional Development Programs & Events 2021 held by Zoom

The 5th Annual EDI seminar

Thursday, November 18, 2021, 2:00pm to 3:30pm

Keep Calm and Check your Privilege!
A Positive Look at Becoming an Ally,
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Speaker: Deirdre Pike of Queer
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[Register Here](#)

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Chairs: Lou-Anne Farrell, Justin Newman and Ian Wright

Supreme Court Provides Clarity and Framework for Retroactive Child Support Cases



Contributed by:
Carolyn Lloyd / Anita Osmani / Lerner LLP

In a system where child support is tied to a payor's income (the parent who is obligated to pay), fair support is dependent on disclosure of necessary information.

July 9th, 2021

The Court's decision in *Colucci* demonstrates that a failure to provide adequate evidence of one's financial circumstances can be fatal in an application to eliminate arrears.

A recent decision by the Supreme Court of Canada, *Colucci v Colucci*, [2021 SCC 24](#)^[1] ("Colucci"), establishes a useful framework for retroactive decreases in child support based on material changes in circumstance. This decision reinforces the importance of proactive disclosure and informational asymmetry in retroactive variation cases.

Background

In *Colucci*, the parties married in 1983 and later divorced in 1996. The mother had custody of the two children, and the father was required to pay \$230 per week in child support, with the obligation ending in 2012. In 1998, the father requested a decrease in his child support obligations but provided no financial disclosure to support his request. Accordingly, no agreement was reached by the parties. Following this impasse, the father made no voluntary child support payments from 1998 to 2016 during which arrears accrued.^[2]

In 2016, the father applied to

retroactively reduce his child support payments and rescind his arrears of \$170,000 due to his income reduction over the sixteen year period. The motion judge retroactively decreased the child support, reducing the father's arrears owing to \$41,642. The Ontario Court of Appeal overturned the motion judge's decision and ordered the full amount of arrears to be paid.

In a unanimous decision, the Supreme Court of Canada upheld the Ontario Court of Appeal's decision in finding that the father was obliged to pay the retroactive child support payments and full amount of arrears.

The Ruling

In a decision authored by Martin J, the Court dealt with two framework related issues. First, the appropriate framework for deciding applications to retroactively reduce child support under s. 17 of the Divorce Act, and second, the appropriate framework for when a payor parent seeks to rescind child support arrears under s. 17 based on their current and ongoing inability to pay.^[3]

The Court emphasized that all rules and principles must yield to the "child's interest in a fair standard of support commensurate with income,"^[4] with three interests that ought to be balanced to achieve a fair result: the child's interest in receiving the appropriate amount of support to which they are entitled; the interest of the parties and the child in certainty and predictability; and the need for flexibility to ensure a just result in light of fluctuations in the payor's income.^[5]

The framework that governs applications for rescission of child support arrears

based on a current and ongoing inability to pay is dependent on the full and frank disclosure of a material change in income or circumstance. The payor, who knows and has control of the necessary information, is expected to provide adequate, accurate and timely financial disclosure.^[6] The Court cited a payor's duty to disclose income information with sufficient and reliable evidence as a "corollary of the legal obligation to pay support commensurate with income."^[7] Clear communication of the change in circumstance is required, along with the disclosure of any necessary documentation to substantiate the change to allow the recipient parent to meaningfully consider the situation. Simply put, effective notice must be accompanied with sufficient and reasonable proof.

Upon establishing a material change in the payor's financial circumstances, a presumption arises in favour of retroactively decreasing child support to the date that the payor gave the recipient effective notice, extending no further than three years before the date of formal notice. In the absence of effective notice the Courts will prioritize the certainty and predictability interests of the child over the payor's interest in flexibility.

Courts retain discretion in departing from this presumptive date of retroactivity where the result would otherwise be unfair in a particular case. This is to be done keeping in mind the four *D.B.S. v S.R.G.*, [2006 SCC 37](#) factors at play: (1) whether the payor has an understandable reason for the delay in giving effective notice or seeking relief; (2) the payor's efforts to disclose and communicate;

(3) the circumstances of the child; and (4), whether the retroactive decrease would result in an order requiring the recipient to repay support to remedy an overpayment.^[8]

Application

Given that child support obligations are commensurate with any changes in payor income, the Courts will take into account any fluctuations in the income, but they will not allow the payor to be “better off from a legal standpoint if they do not pay the child support the law says they owe. Nor should payors receive any sort of benefit or advantage from failing to disclose their real financial situation or providing disclosure on the eve of the hearing.”^[9]

In *Colucci*, the Court found that the father’s request fell short of effective notice and that he was not proactive in disclosing his income information. Specifically, he did not provide any reasonable proof or adequate evidence regarding his financial circumstances that would have allowed the mother to meaningfully assess the situation, nor did he give effective notice before arrears stopped accumulating in 2012. As such the father failed to discharge his onus of showing that he would be unable to pay the arrears, now or in the future, and was not entitled to any retroactive decrease in his child support obligations.

The Court held that the three year rule precludes any retroactive decrease in this case given that the children were no longer eligible for support in 2012, and the father gave formal notice in 2016. The application of the *D.B.S.* factors also did not support a longer period of retroactivity given that the father was absent from the children’s lives and made no voluntary child support payments.

The Court stressed that “a payor who has established a past decrease in income is not automatically entitled to a retroactive decrease of support back to the date of the [income] decrease... [as

the] overall decision is a discretionary one.”^[10] Accordingly, the onus is on the payor parent to give notice and disclose the information relating to their material circumstances. Given that the father failed to provide evidence of his change in income, he could not have been found to have given effective notice of such.

The applicant’s “deficient communication, inadequate evidence and insufficient disclosure” were fatal factors to his application to rescind arrears and as such, his application for a retroactive decrease in support payments and a recession of arrears owing was effectively denied.^[11]

Conclusion

This case is a prime example of the kind of adequate, accurate and timely disclosure necessary to justify retroactive variation back to the date of formal notice. The Supreme Court’s decision in *Colucci* will offer guidance to the courts on future family law issues as it pertains to child support obligations.

Not only does proactive disclosure promote conflict resolution, but it encourages settlements between parties.

This decision is significant as it relates to ensuring that child support is provided and paid, something which is a problematic and ongoing issue within the family law system.

^[1] *Colucci v Colucci*, [2021 SCC 24](#).

^[2] *Ibid* at paras 11-13.

^[3] *Ibid* at para 27.

^[4] *Ibid* at para 46.

^[5] *Ibid* citing *D.B.S. v S.R.G.*, [2006 SCC 37](#) at paras 2, 74, 96.

^[6] *Ibid* at para 49.

^[7] *Ibid* at para 52.

^[8] *Ibid* at para 96 citing *D.B.S.* at para 99.

^[9] *Ibid* at para 55.

^[10] *Ibid* at para 5.

^[11] *Ibid* at para 118.



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Nelson (City) v. Marchi - The New Leading Case on Municipal Liability



Contributed by:

John Nicholson / Cohen Highley LLP

The Supreme Court Revisits Distinction between Policy and Operational Decisions

Historically at common law the Crown was immune from tort liability, including vicarious liability for the tortious acts of its servants and employees. However, complete Crown immunity became untenable in the mid-twentieth century as government functions expanded with increasing involvement in activities that would lead to tortious liability if engaged in by private persons. Legislation was therefore enacted by Parliament and all the provincial legislatures allowing the Crown to be held liable for the torts of officials in a manner akin to private persons.

Nonetheless, a significant and important measure of Crown immunity remained. As held by the Court in the seminal case of *Just v. British Columbia*, [1989] 2 SCR 1228, the Crown retained immunity for core policy making decisions, and could only be found liable for operational decisions. Where a decision involves core policy decisions, no private law duty of care exists under the *Anns/Cooper* test, and liability cannot be imposed. Over the years, a body of law developed concerning the distinction between core policy decisions, for which the Crown was immune from liability, and operational decisions for which the Crown could be successfully sued in negligence.

Governmental decisions at the extremes of these categories are easy to identify. On the one hand, the decision of a government not to fund the construction of a new hospital in a community in preference to increasing social welfare

payments is clearly a core policy decision, although it might have a tremendous impact on an individual in need of surgery. At the other end of the spectrum, the failure of a government employee to inspect and maintain an existing building, leading to injury when a ceiling tile crashes down on someone, falls into the operational category where Crown liability arises. Between the extremes the distinction is more difficult to make.

In *Nelson (City) v. Marchi*, 2021 SCC 41, released on October 21, 2021, the Court took the opportunity to provide guidance on how to determine whether a government decision is a “core policy decision” or an operational decision.

The case arose after a heavy snowstorm in the City of Nelson, B.C. The city plowed the snow on roads in the downtown area, clearing the angled parking spaces on the street, but left a high snowbank at the side of the road. The city did not clear walking paths through the snowbank, and when the plaintiff parked she was forced to climb over the bank in order to reach the sidewalk and the shops on the other side. She seriously injured her leg when she tried to climb over the bank, with damages of \$1 million agreed upon, and the trial proceeding on liability only.

The city defended the case on the basis that its snow clearing practices involved balancing budgetary constraints and engaged policy considerations, such that no duty of care was owed to the plaintiff. The trial judge agreed with the city, and dismissed the action. The B.C. Court of Appeal disagreed holding that the city did owe a duty of care in these circumstances. A further appeal to the Supreme Court

was dismissed, with a unanimous court holding that the city’s decisions regarding snow clearing were operational. A new trial on the issue of whether the standard of care had in fact been breached by the city, and concerning the issue of causation, was ordered.

The Court held that the guiding principle for making a distinction between operational and policy decisions is the rationale for Crown immunity for policy decisions: the separation of powers between the legislative, executive and judicial functions of government. The Court held that “Core policy decisions of the legislative and executive branches involve weighing competing economic, social and political factors and conducting contextualized analyses of information. These decisions are not based only on objective considerations but require value judgments – reasonable people can and do legitimately disagree.”

The courts are not institutionally equipped to make these kinds of value judgments, and it is not their function to do. “If the courts were to weigh in, they would be second guessing the decisions of democratically elected government officials and simply substituting their own opinions.” Rather, the role of the courts is to decide disputes under the laws that have been enacted. This rationale – the proper role of the courts in Canadian democracy – is therefore the touchstone for determining when the Crown’s immunity for core policy decisions is engaged.

In reviewing its past jurisprudence, the Court discerned four factors that assist in assessing the nature of a governmental decision:

1. **The level and responsibility of the decision-maker.** The higher the level at which decision is made, the more closely related the decision-maker will be to the democratically elected official who bears responsibility to the public for policy making decisions. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with only implementational decision-making, are less more likely to attract liability.
2. **The process by which the decision was made.** Decisions which require debate, perhaps publicly, involving input from different levels of government and intended to have broad application and which are prospective in nature, the more the separation of powers concern is engaged and the more likely immunity will arise. In contrast, the more the decision is the reaction of an employee or group of employees to a particular event reflecting their discretion and with no period of deliberation, the more likely that it will be reviewable by the courts in a

negligence action.

3. **The nature and extent of budgetary considerations.** Government decisions concerning allotments between government departments or agencies will be classified as policy decisions. On the other hand, day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.
4. **The extent to which the decision was based on objective criteria.** The more a government decision weighs competing interests and requires value judgments, the more likely separation of powers will be engaged, as the court would otherwise be substituting its own value judgments for that of democratically accountable officials. Conversely, if the decision is based on technical standards or general standards of reasonableness, the more likely it can be reviewed by the court for negligence.

None of these factors are determinative – all must be weighed in the balance with the separation of powers between the legislative and executive on the

one hand, and the courts on the other, kept in the forefront of the analysis. In the case of *Nelson (City) v. Marchi*, the court held that consideration of all four factors weighed in favour of imposing a private law duty of care. The decision to pile snow into banks at the side of the road was made by lower management under a general municipal snow clearing policy only engaged budgetary concerns at an operational level. Reviewing that decision for reasonableness under the law of negligence would not therefore require the courts to intrude on the core policy making functions of democratically accountable officials.

Unlike a number of recent and notable tort decisions from the Supreme Court in recent years where the court has been sharply divided with strongly expressed dissents, *Nelson (City) v. Marchi* was a unanimous decision. It is likely to remain the leading case on municipal liability in Canada for many years to come. It is therefore a decision with which all lawyers who deal with municipal liability cases should be familiar.

Will Notices

Jeffory Scott Steip

Anyone having knowledge of a Last Will and Testament for Jeffory Scott Steip, born February 17, 1965, who died on August 24, 2021, please contact Frederick A. Mueller at 519-673-1300 or fred_mueller@rogers.com.

Gayle Christine Johnson

We are searching for the original last will of Gayle Christine Johnson, dated May 30th, 1990. It was prepared by David Wayne Lewis. Gayle's date of birth is February 8, 1942 and date of death in London was October 17, 1998. Notarial copies of the will were prepared by Sylvia Anne Loyens on October 27, 1998 and

Colin M. Cockburn on November 7, 2012. If you have the original will dated May 30th, 1990, please contact Alison Jutzi, Estates clerk at Wilson Law in Guelph: 519.831.3838; alison@martiwilsonlaw.ca.

Marion Jeanette Barr

Anyone knowing of a Last Will and Testament for Marion Jeanette Barr, died September 16, 2021 of Lucan, ON, Ontario. The original Will was drawn up by J. Robert Benner of Lucan, ON. Please contact Caroline Larmer at 519-284-3640, email: caroline.larmer@waglaw.net.



Meekis v Ontario: The Court of Appeal Offers Guidance on Striking Misfeasance in Public Office and Charter Claims



Contributed by:
Debbie Boswell / Lerner LLP

In a recent decision (*Meekis v Ontario*, [2021 ONCA 534](#)), the Ontario Court of Appeal offered guidance on striking claims for failing to disclose a reasonable cause of action in the context of the tort of misfeasance in public office and *Charter* damages claims involving discrimination.

Brody Meekis was a four year-old boy from Sandy Lake First Nation who died of complications from strep throat. The coroner considered whether to conduct an inquest into Brody's death and ultimately decided against doing so. Brody's family members then brought an action for damages, including claims in tort law against the investigating and supervising coroners and the province of Ontario under the *Canadian Charter of Rights and Freedoms*.

The defendants brought a motion to strike the claim under Rule 21.01(1)(b) as disclosing no reasonable cause of action. The motion judge struck all the claims, including the misfeasance in public office and *Charter* claims, without leave to amend.

Brody's family members appealed to the Court of Appeal for Ontario. Justice Sossin, on behalf of the court, concluded that the motion judge erred in striking the misfeasance in public office and *Charter* claims and held that these claims should be allowed to proceed. The other claims were either not appealed to the Court of

Appeal or properly struck.

With respect to the tort of misfeasance in public office, the Court of Appeal reviewed the Supreme Court's recent decision in *Ontario (Attorney General) v Clark*, 2021 SCC 18. One of the requirements for the tort of misfeasance in public office, as affirmed in *Clark*, is that the public official deliberately engaged in an unlawful act in their public capacity.

The motion judge concluded that because the *Coroners Act* gave discretion to coroners, the misfeasance in public office claim could not succeed. The Court of Appeal, however, disagreed. According to Justice Sossin, the alleged wrongful act for the misfeasance claim was that the coroners exercised their discretion to knowingly discriminate against a class of persons, including Brody and his family members. This was a viable claim for misfeasance in public office and Brody's family members pleaded facts in support of this claim.

With respect to the *Charter* claim, Justice Sossin noted that Brody's family members were alleging adverse impact discrimination. A claim of adverse impact discrimination looks behind facially neutral rules to look at how those rules are actually applied in practice. Brody's family members did not allege they were entitled to a particular outcome from the coroner's investigation, but rather, "that the way coronial services are provided in Ontario arbitrarily and disproportionately exclude on-reserve Indigenous communities, thereby undercutting the purpose of the *Coroners Act*" (para. 153).

Justice Sossin held that it was not plain and obvious the claim for *Charter* damages could not succeed. He accepted that Brody's family members' core allegation ("that the investigating coroner deliberately adhered to a known discriminatory pattern of neglect in death investigations in on-reserve Indigenous communities") was sufficient to particularize the threshold misconduct that could engage *Charter* damages (para. 178).

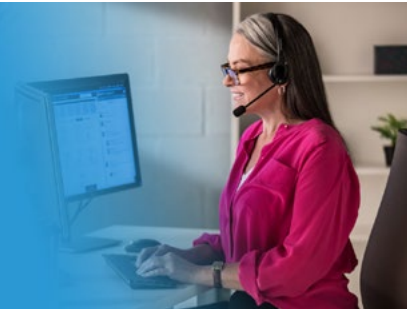
Although *Charter* damages will not be awarded where the Crown can establish countervailing factors that would make *Charter* damages inappropriate, Justice Sossin did not accept that any countervailing factors were established here that would make it appropriate to strike the *Charter* damages claim. Judicial review is available under the *Coroners Act*, but Brody's family members' claim focused on their distress, humiliation, and anxiety, which judicial review is not intended to address. Justice Sossin also did not accept that there were good governance concerns which would justify striking the *Charter* damages claim.

Ultimately, the Court of Appeal's decision in *Meekis* offers helpful guidance regarding the test for striking a claim for failing to disclose a cause of action and particularly in the context of misfeasance in public office and *Charter* claims. As the Court of Appeal emphasized, claims will only be struck when it is clear that the claim has no reasonable prospect of success and courts must err on the side of allowing novel but arguable claims to proceed.

Continued on page 15

The court's decision in *Meekis* allows Brody's family members to continue their misfeasance and *Charter* claims against the coroners and province of Ontario. The court did not address the merits of Brody's family members' claims. That determination will have to await another day. Brody's family members are advancing some novel claims and it will be interesting to see how this case progresses and whether they will ultimately be successful.

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MLA BOARD OF TRUSTEES NOMINATION FORM 2022

TAKE NOTICE that candidates for the office of Trustee shall be nominated in writing by a qualified member of the Association and said nominated candidates shall signify in writing their willingness to serve if elected; such written nomination and undertaking to serve shall be filed with the MLA Practice Resource Centre on the Ground Floor of the Courthouse, 80 Dundas St., London, Ontario on or before the hour of **4 p.m. on Friday, January 28, 2022**. Nomination forms may be delivered to the Practice Resource Centre in person or by email (library@middlaw.on.ca). If **8** candidates have not been nominated by the foregoing procedure, the Chair of the Annual Meeting shall open the meeting to nominations from the floor. The **8** candidates having the highest number of votes shall be declared duly elected Trustees for the current year; in case of a tie, the presiding officer shall have a casting vote.

The undersigned, being a duly qualified member of The Middlesex Law Association does hereby nominate:

PLEASE PRINT NAME OF CANDIDATE

to stand as a candidate for the office of Trustee of the Middlesex Law Association commencing March 1, 2022 for a period of two years.

DATED at _____, Ontario this _____ day of _____, _____.

Name of Nominator (please print)

Signature of Nominator

UNDERTAKING OF CANDIDATE

The undersigned, being the candidate herein before nominated to stand for the office of Trustee of the Middlesex Law Association commencing March 1, 2022 for a period of two years hereby confirm that I have had the opportunity to review the job descriptions for those elected as Trustees, that I agree to allocate time as necessary to fulfil the duties of a Trustee and signify my consent and willingness to serve as a Trustee to the Middlesex Law Association for such period, if elected.

Signature of Candidate

NOTE: The nomination form and undertaking must be filed with the MLA Practice Resource Centre on the Ground Floor of the Courthouse, 80 Dundas St., London, ON, on or before the hour of **4 p.m. on Friday, January 28, 2022**. Forms may also be delivered by email at library@middlaw.on.ca.

Member Updates

By the time the next newsletter is published, we should have our print 2021-2022 Members' Directory available for pickup, so stay tuned for an email announcing its availability. In the meantime, here are the updates to the current print 2020-2021 directory.

You can search the [MLA's online Members' Directory](#) for updated information.

Beth Leaper Law Office – the suite number for the office (and also Leapfrog Mediation) has changed to 110-220 Queens Ave.

Julie Lee – is not currently practicing but can be reached at phone number 519-870-6582 or by email at julielee3455@outlook.com

Linda Smits – is now at GoodLife Fitness and her email is linda.smits@goodlifefitness.com

Ian Wright – has opened Ian S. Wright Law, 207-478 Waterloo St., London N6B 2P6, ph: 548-488-2228, email: ian@ianswrightlaw.com

Luigi E. Circelli – his firm name should be listed as such and the phone number is now 519-673-1834

Vanetia R – new member practicing at the Corporation of the City of London, City Solicitor's Office, email: vanetiar@london.ca

Nusaiba Al-Azem – is now with the National Council of Canadian Muslims, PO Box 13219, Ottawa, ON K2K 1X1, ph: 866-524-0004, fax: 613-254-9810, email: nalazem@nccm.ca

David Spence – is now at Diamond Aircraft, 1560 Crumlin Rd., London N5V 1S2, ph: 519-457-4000, email: d.spence@diamondaircraft.com

Layla Hassan – has re-joined the MLA practicing at Layla Hassan Law, 82 Ridout St, London N6C 5H6, ph: 519-701-1567, email: lhassan1000@gmail.com

Elizabeth Harding – is now practicing at Intact Insurance, Legal Department and email is elizabeth.harding@intact.net

Mary Doran – new member at McKenzie Lake LLP, 519-679-5666 ext. 7407, email: mary.doran@mckenzielake.com

Robert Carrier – email as changed to robert@robertcarrierlaw.com

Luke Kilroy – new call practicing at Legate Injury Lawyers, 226-777-8817 ext. 104, email: lkilroy@legatelaw.ca

Want to contribute to the next issue?

Deadline is November 25, 2021

The Snail welcomes articles from MLA members. in Word format, along with photos, headshot and headline. For clarity and readability, we encourage submissions in the range of 200-500 words, with a maximum limit of 1000 words for news and opinions, and a limit of 2000 words for articles on law and legal issues. At the request of the contributor, any submissions shortened in this way can also be published with a link to the full article to be obtained directly from the author.

Potential topics for submissions include:

News, the promotion of an upcoming event, a review of a past event, recognition of someone in the legal community, opinion and letters to the editor, discussion of a legal issue & case reviews, or practice tips

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An established law firm in Tillsonburg has an immediate need for a junior Corporate lawyer on a full-time basis. The successful candidate will have experience with corporate reorganizations, document preparation and support for corporate transactions, have strong organizational skills and attention to detail, strong verbal and written communication skills, ability to work independently within a small team environment and ability to exercise discretion when dealing with sensitive information.

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- Legal Administrative Assistant Certificate or Diploma preferred.
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- Ability to work independently within a small team environment.
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November 2021

Middlesex Law Association Newsletter

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