Strategic Legal Writing:
50 Do's & Don'ts

by

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To test your reading/proof-reading ability, added herein is a common student/lawyer writing error – first person to spot and email me gets a $50 Starbucks/Bridgehead/Tim Hortons gift card (you pick). *emeehan@supremeadvocacy.ca*

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No. 1: Don't be merely an information-provider – not your job

1. Many lawyers believe they fulfill their role by simply delivering information to their clients or to the court in a written form. All one has to do is write it down. Right? (Write?) They write as if their sole function is to act as a conduit for the raw data their research has unearthed. But lawyers must be more than walking photocopiers and note-takers. They should be accomplished writers – meaning strategic writers, tactical writers.

No. 2: Be strategic & tactical – on the page

2. It's important to be strategic and be a tactician on your feet in the courtroom — it's just as important to be strategic and be a tactician on the page. It takes hard work, but the finished product is worth the effort — we all know a long dictated letter is a lot easier to do than a short one (and we can all recognize a far-too-long dictated letter too).

No. 3: Sometimes "positioning" helps – or, choosing the right box to have the fight in

3. An advertising "correspondent" (Mike Tennant) on CBC Radio's *Definitely Not The Opera* says the following about his profession. Does any of this apply to us as law students/lawyers in how we write? How we write a term paper, an opinion letter, a motion record, a factum?

- "Does positioning work? The short answer is yes.
- But no amount of positioning/marketing will change your mind about:
    - An issue
    - A candidate
    - A headache remedy
    - A salad dressing.
- What positioning can do is:
    - Soften an image
    - Sharpen it
    - Create a favourable first impression
    - Boost momentum
    - Help slow it
    - Trip up a forceful argument with a well-placed "yes but", or a well-placed practical proverb or analogy that a 'normal' (i.e., non-lawyer/non-judge) person can connect with
    - Distract attention from a weakness

- Draw attention to a strength.

- The key is that the ad must have some basis in perception, and perception changes quickly.
- An effective ad is one that doesn't change simply because the public is privy to the strategy/intent behind it.
- In fact, the more you know about the nuts and bolts – the more you understand what it's getting at — the thinking behind it, the more likely are you to be affected and persuaded by it."

No. 4: Be simple, without being simplistic – find the balance

4. Keep your message simple. Ideas still need to be big, but to be effective they must be clear and focused. Try to be simple enough that a stranger, preferably even a non-lawyer, can read and understand it.

No. 5: Best argument – an explanation

5. The best argument is that which seems merely an explanation. Essentially, you know you have created a strong marketing argument when your prospects respond by saying, "That makes sense".

No. 6: Who are you writing for – not you

6. For example, when you become a lawyer & you're applying for leave in the S.C.C. (but the same goes for other courts and tribunals too) time permitting, scan applications over the last several years; what got accepted and what got rejected in the area of your appeal. It's possible to get a clear read on the kind of cases the Court is interested in. If there is a pattern, make sure you draft your application such that it relates to one of these "hot" issues. A related consideration is whether leave has already been granted to a similar case whose coattails you can ride in on. If you're going fishing for trout, don't bait your hook with pike food. If you know who the judge(s)/members of tribunal are going to be, do an electronic search of their name; that may give you an idea of how the wind's blowing.

No. 7: Make the reader part of your team

7. At a basic level (and this can be played out directly or indirectly in a careful way) the story has to make sense to the judges in terms of their personal perceptions and attitudes about life. It has to be consistent with what they think is right and what they think is wrong.

8. Understand that strategically you have to make the judge part of your thinking processes – part of your team. The "deal" you propose to him/her must work for both parties, you and the judge.

No. 8: Many people write to show how smart they are – so don't

9. Legal writing differs from other sorts of writing in that it is singularly directed toward persuading the reader (a trail judge, tribunal member, arbitrator or other decision-maker) to accept a certain position. Everything that counsel submits should put into the reader's mind the information and motivation necessary for a favourable decision. Appeal books, factums and everything else are devoted to that goal and nothing less. You're not writing to entertain, show how smart you are, how many authorities you can cite for one proposition, or even writing to inform. You're writing to **persuade**.

No. 9: People are visual – so look @ how things look

10. Law students and lawyers spend much of their time thinking about what to say and how they should say it. Relatively little time is spent considering how best to organize the material on the page. A good-looking document will help the reader get the point quicker and retain it longer. A well-organized easily-accessible reader-friendly document is simply more persuasive. Cornflakes in grey boxes don't sell well.

No. 10: Reader-friendly writing

11. Legibility (easy reading) is fundamental to readability (easy understanding). Good legibility is determined by font choice and the relationships between type size, line length and spacing (between letters, words, lines and paragraphs). An effective document is one that conveys your message well and quickly. Some simple, but important, rules of thumb include:

- don't rely entirely on standard prosey block paragraphs. Look for alternative methods of formatting (e.g., bullets) that make it visually easier for the reader;
- use sensible paragraphing and numbering. Don't go further than a third level of breakdown (e.g., 1(a)(i)). If you need to go beyond that then chances are you've overused headings (you aren't drafting legislation after all). Avoid roman numerals — they look too much like a foreign language;
- if the items listed have no rank ordering, then bullets are preferable to numbered lists;

- never use a font smaller than 10 or larger than 12 for the main body of the text;
- avoid lines that are entirely capitalized — their uniform size makes them difficult to read;
- avoid underlining — it's a throwback to the days of typewriters. Use italics or boldface to add emphasis;
- there is evidence that justified right margins make text harder to read, so it may be best to use ragged right margins for factums;
- align headings to the left in a larger, bolded font. Use a smaller bolded font for sub-headings;
- readers like "white space", and makes the rest easier to read and remember.

<u>No. 11</u>: Avoid run-on sentences & big words

12. Most law students & lawyers write sentences that are too long. Usually small words work better than big ones.

13. And lawyers, when writing, use words and phrases that nobody (including them) would ever use in normal verbal communication – as Justice Laskin has noted, people:

- don't talk about their motor vehicles, they talk about their cars
- don't talk about where they're employed, they talk about where they work
- don't talk about utilizing the proceeds of their remuneration to construct a summer dwelling place, they talk about using what they saved to build a cottage.

<u>No. 12</u>: Drop the legalese

14. Don't clutter your writing with long literary language that only lawyers can be bothered to decipher. Legalese may now be second nature to you, but it sounds *e*xclusive rather than *i*nclusive.

<u>No. 13</u>: Good writing = reader feels smart; bad writing = reader feels dumb

15. Write in ordinary simple-to-understand language. If you're writing it and it makes you feel smart, it probably makes the reader feel dumb. Good writing makes the reader feel smart. Bad writing makes the reader feel dumb.

<u>No. 14</u>: Use normal language

16. Use ordinary day-to-day language. Don't use any of the following (unless you're applying for a government grant):

- synergy
- paradigm shift
- value-added
- core competency
- strategic alignment
- outside the box
- win-win
- empowerment
- leverage
- benchmark
- knowledge base
- collaborative consultation.

17. Bottom line: good legal writing looks as if someone other than a lawyer has written it.

18. G.K. Chesterton: a *good* novel tells the truth about its *hero;* a *bad* novel tells the truth about its *author*.

<u>No. 15</u>: Avoid the usual cr*p – formulaic qualifiers and phrases

19. They're a waste of space and add nothing to the quality. Classic examples include:

- The appellant respectfully submits... (there's only so much respect even a judge can absorb)
- For all the foregoing reasons...
- We would submit…
- Essentially…

<u>No. 16</u>: And drop the smart sounding lingo too

20. Don't use verbose/fancy-dancy intros/fillers:

Instead of	**Use**
At that point in time	Then
By means of	By
By reason of	Because
By virtue of	By
For the purpose of	To
For the reason that	Because
From the point of view	For
In accordance with	By
In connection with	About
In favour of	For
In order to	To
In relation to	About
In terms of	In
In the event that	If
In the nature of	Like
On the basis of	By
Prior to	Before
Subsequent to	After
With a view to	To
With reference to	About
With regard to	About
With respect to	About
The fact that she had died	Her death
He was aware of the fact that	He knew that
Despite the fact that	Although
Because of the fact that	Because
In some instances	Sometimes
In many cases	Often
In the case of	When
In the majority of cases	Usually
It is not the case that he	He did not
During the time that	While
For the period of	For
There is no doubt but that	No doubt
Whether or not	Whether
The question as to whether	Whether
Until such time as	Until
Attend at	Go to

No. 17: Nothing is absolute

21. Absolute expressions (*all, always, every, invariably, never, none, totally, undoubtedly*) are rarely accurate and should be used lightly.

22. Absolutes tend to trigger a reader's perversity; once told that, "the campaign was a total failure," many readers begin to hunt for signs of partial success.

23. So avoid what Justice Laskin calls "false intensifiers" such as "certainly," "clearly," "absolutely", which actually weaken rather than strengthen whatever you're saying.

24. Understatement works much more strategically than overselling.

No. 18: Your mother was right: "If it doesn't help, don't say it"

25. Don't quote or summarize your opponent's argument. Familiarity doesn't breed contempt, it may breed acceptance, so the less the judge hears about the other side's case, the better.

26. Likewise if you're the appellant, don't repeat a lower court's adverse findings of fact. These facts only emphasize potential problems with your case.

No. 19: Write visually

27. Pictures, charts and diagrams help communicate. Particularly for legislation or complex corporate relationships, consider a foldout chart.

Options include:

- diagram, in phases, of how matter in litigation occurred
- sequencing, in diagram/written "box" form of what happened
- chart of key relationships/key factual findings you want the judge to rule on/make.

No. 20: Making your legal story work

28. Writing a story isn't easy (if it was we'd all be John Grisham and wouldn't have our day jobs). Figure out what your story is, map out the main components, write it down and then build the necessary legal elements around that framework. Include a couple of simple elements:

- setting your story in a particular time and place;

- including a human element;
- some familiar details;
- simple, ordinary and disarming language;
- visual words;
- an event of personal importance that everyone can relate to;
- an absence of argument (the reader doesn't want to feel like you are manipulating them down a garden path).

No. 21: Telling your story in the present tense

29. The present tense is really important. Telling the story in the past tense turns the reader into an observer. In contrast, the present tense makes them a participant, wondering what's going to happen next.

No. 22: Point-first writing – don't write it like a mystery novel

30. Make sure you clearly and explicitly state your **point** or proposition before you start; try and develop or discuss it. Avoid writing the factum (or even a paragraph) like a mystery novel, focusing on the details upfront and revealing only the point or the conclusion at the end. The reader shouldn't have to figure it out. You're trying to persuade the reader to accept your argument, not show how clever you can be at telling a convoluted story. It's better to provide context before detail, tell the reader off-the-bat what issue or idea or topic you're going to discuss in the paragraph, articulate it in the first sentence (usually our conclusion or submission on that issue) and the remainder of the paragraph is there to support your position.

No. 23: Your legal story got a theme?

31. Every case should have a central theme or themes that evolve from one or more issues. It's your job to find that **central** theme of your case that on the facts and applicable law creates for us a strong arguable case. It's your job to strongly articulate such a theme in your factum — and the job of opposing counsel to puncture that theme or frustrate it and take it apart.

No. 24: What the most powerful themes are

32. The most powerful themes go beyond one idea and lock two opposing ideas in conflict, creating a dialogue. For instance "the defendant valued money more than safety." In such instances, it is not the moral of the story that involves the reader so much as the struggle between the two opposing points of view in the theme.

No. 25: Write your theme down – here's how to start

33. For best effect, write down your theme before you start drafting your document. Writing the story or the theme in a paragraph before you start writing lets you add and subtract facts to make the more compelling parts of that story last longer and shorten or delete parts that are simply boring or not in your favour. Start "this case is about…".

No. 26: How to stay on theme – use a thesaurus, & make a list of synonyms

34. Oftentimes, your theme can be tightly articulated by a pithy phrase or even a single word. Reduce your story to a workable outline or a set of topical words and use a dictionary that has synonyms to come up with other words that say the same thing in different degrees of shading, and use these words in painting the picture.

No. 27: Use clichés – you're clichéd

35. Expressions worn thin by countless repetition are not persuasive and should be avoided.

36. Everyone's familiar with the expressions below – familiarity is precisely the problem:

- Add insult to injury
- Bitter end
- Blind as a bat
- Turn for the worst.

No. 28: The importance of the analogy

37. As a practical reality, most people reason from analogy based on their experience. People decide what *feels* right. Many non-lawyers (and judges) cannot easily accept a new proposition unless it's a logical extension of an already-held view. A simple analogy can go a long way toward convincing your listener, either to confirm what they already accept, or move one step sideways from an accepted position.

No. 29: Examples of (actual) analogies used

- Jehovah's Witness religious rights case:

  "A blood transfusion these days is like skating on thin ice"

- A firm of actuaries faced with a Discipline Committee, one of whose members is from a competing firm:

  "The legal equivalent of a cow wandering into an abattoir"

- Products liability:

  "Letting the industry self-regulate according to a voluntary set of standards and guidelines is like letting a shark guard the fish tank/Colonel Sanders babysit the chickens"

  "A smoke detector that's rendered ineffective by an ordinary short-circuit is like a life preserver that keeps you afloat until it gets wet"

  "Before the factory worker could loosen her grip, her hand was yanked into the machinery like a rag doll through an old wringer washer"

- After a rotary power lawnmower had hurled a rock into the eye of a 13-year-old, the analogy used was:

  "Toro had sent a four-wheel cannon into a residential neighbourhood"

- Where the disability of a person or machine is alleged to be small:

  "Like a clock that only loses 5 minutes per hour"

  "Like a chemical plant near your home with only a small leak"

  "A scar is only small on someone else's face"

38. If your analogy or your theme is meaningful and strong – easy to remember, easy to repeat helps too – some judges may use it in post-appeal deliberations to convince others who are on the fence.

<u>No. 30</u>: Hey, be realistic – maybe there's another side to this?

39. Every case has two sides. If you close your eyes to the other side's case your client will suffer. Your credibility will be affected if you ignore, or worse deny, indisputable problems.

40. A good strategy is to be the first to reveal the damaging information. Do not describe it as a "problem", call it a "challenge". Tell the judge before your adversary stands up and does it for you. Sounds simple, but be **fair** — it builds reputation.

41. Justice Laskin: "Nothing instills trust more than facing up to your weaknesses. Better it come from you than from your opponent. The right

concession not only enhances your credibility, it is itself a persuasive technique and, I may say, an underused technique. A well-timed concession does not merely narrow the focus of the appeal, which judges like, but also makes your strong arguments seem even stronger."

42. For example, your client's an alcoholic. Tell the judge/jury/C.A. about it before you opponent does. Sure you're fearful of bringing up ugly stuff about your client, but better you than your opponent. The decision-maker is less likely (particularly at first instance) to hold a 'weakness' against you if you're up front about it – in fact, they may respect you for being forthright.

No. 31: Adverse authority: put it in & deal with it

43. Confront applicable adverse authority expressly and early — not merely because you're an officer of the court, but because it's more strategic to do so. The other side will probably cite it anyway, and even if they don't, the clerks will find it, or the judge may know it. Not all precedents are created equal. Even if you are faced with adverse authority, consider whether your case is one where you should ask the court to make new law.

No. 32: Argue less, persuade more

44. The harder you argue, the less persuasive you are. The reason is simple. The more you press, the more you hype, and the more you wheedle and urge, the more sales resistance you create and the more you start to sound like the guy from Fred's Water Beds on Saturday night TV.

45. Real persuasion takes place when the reader thinks the conclusion is his or her own idea. Your job as a writer is to help them find the right ideas in themselves that will lead them to decide the case your way.

No. 33: Let go the little stuff

46. Minor misstatements of the law or facts by the Court below aren't going to win your appeal (appeal courts aren't professors grading papers). Don't set out to just whack the Court below or judge below, rather identify major mistakes and criticize the *rationale* of the lower court's decision.

47. Don't whack the other side either — use courtesy (especially when it's tough to do so) as a strategic tool. Advice given to Ed Bayda, former Chief Justice of Saskatchewan, during his first summer job (selling "waterless" cooking pots door to door): "People buy things from people they like".

<u>No. 34</u>: Tick-off-the-Judge no. 1 – cite tons of cases (because you're smart)

48. Only cite the leading case, or, at most, the two leading cases. Safety lies in authority not in numbers. Citing 15 cases for the same point of law tells the judge one of three things:

- there isn't any real authority for your position
- you can't tell the difference between important and pointless precedents (or else you haven't thought enough about which cases really help you)
- you're simply the kind of person who likes making lists (and probably list what clothes you put in the dryer in case you lose a sock).

49. Two options:

- double-L rule
- triple-L rule
- **(explain verbally).**

<u>No. 35</u>: Tick-off-the-Judge no. 2 – put in lots of quotes, long ones (you're smart, remember?)

50. People hate to (and usually don't) read long block quotations. Paraphrasing is usually a better strategy than direct quotation. If you must include a quote, the best approach is to knit it directly into the paragraph, or at a minimum:

- keep it really short
- edit (use three periods…when you edit out)
- add emphasis.

<u>No. 36</u>: Tick-off-the-Judge no. 3 – skip the page/para. no – you've read the whole case, so can they; and, you know the whole case cold (because smart is what you are)

51. Obviously double-check all cites. But also highlight (yup, with a yellow highlighter) each key extract/sentence in your Book of Authorities/ Authorities tab so the judge doesn't have to search for your point. An (acceptable and better) alternative to highlighting is sidelining and underlining the master copy — so you only do it once, it gets copied through to all other copies, and you don't have to highlight in multiplicity.

52. **Always** when citing a case put the actual page/paragraph that your point/quote is on — just giving the judge the standard cite with what page the case

starts on and forcing him/her to go read the whole case to find a single sentence is an unnecessary annoyance to a judge — if you're in for a vasectomy why insult the guy (or gal) with the knife?

<u>No. 37</u>: If you're writing a factum, why it's important – before, during, after

53. Justice Ruth Bader Ginsburg of the U.S. Supreme Court: "As between [factum] and argument, there is a near-universal agreement among federal appellate judges that the [factum] is more important – certainly it is more enduring. Oral argument is fleeting – here today, it may be forgotten tomorrow, after the court has heard perhaps six or seven subsequent arguments."

54. Your factum must serve different purposes at the different stages of the appeal process:

- ***Before Oral Submissions***
    - the factum should make a strong first impression that the court will carry throughout the rest of the appeal process;
    - the factum should introduce the issue and the law to the members of the court, who may or may not be familiar with the precise legal problem you are addressing;
    - the factum is the Court's principal source of information about the case and the law.
- ***During Oral Submissions***
    - your factum should act as a blueprint and reference that the Court can follow during your oral argument;
    - the factum should be carefully structured to coincide with your oral argument such that it minimizes the need for note taking by the judges who are then free to follow the logical flow of your argument.
- ***After Oral Submissions***
    - if you have done everything properly, the factum will act as a memory aid for judges writing reserved judgments;
    - ask yourself whether the court is likely to reserve judgment in your case.
    - Oftentimes, judges will lean heavily on a good factum when writing their decision.

No. 38: Openings – crashes, first page, Tim Horton's

55. Mr. Justice Estey used to say most plane crashes happen during take-off. Likewise your opening.

56. "The first page rule". The first page should say it all. Every factum should contain an overview statement (no longer than one paragraph) that tells the reader what the case is about, who did what to whom, what the issues are, and outlines our position on those issues.

57. Tell your story in human terms (my own personal technique is to close the office door, think I'm in a line-up at Tim Horton's, I've just ordered a medium double double, and cashier says "so what's your case about?").

No. 39: Opening paragraph — by definition you've only one chance to make a good first impression

58. Having the reader's attention is a necessary precondition for persuasion. A strong opening statement will grab the reader's immediate attention by:

- leading with strength. Hit the reader between the eyes with your strongest argument right away;
- express the message clearly and in a way that the reader will have no trouble understanding;
- structure the presentation within the framework of the reader's knowledge, beliefs and attitudes. People approach problems from a certain perspective, it is your job to make sure that your factum fits into that judge's perspective.

No. 40: It's OK to be brief

59. Most factums are too long. At rock bottom, most cases really aren't that complicated. Select the facts, events and legal arguments likely to control the outcome of the case (and leave the rest out).

60. Too many factums are puffed up with all sorts of extra arguments. Generally, this reflects the uncertainty of counsel as to which issue is likely to grab the Court's attention and the misguided belief that the client's interest is best served by presenting every conceivable argument, like you're a chef at a hotel putting on the biggest breakfast brunch possible to impress the locals. The put-everything-in tactic generates a large number of 'throwaway' arguments — and may tempt the Court that's what should be done with the rest of your factum.

No. 41: Your table of contents may be your opening – why headings are important

61. In all likelihood, your table of contents will be read first. The purpose of the table of contents is to help the reader navigate through the body of your submissions. Therefore, your headings and subheadings summarize your position; mirroring the logical flow of your argument.

62. Choose headings and subheadings (so they'll show up in the table of contents) that:

- make a positive statement
- develop a logical flow.

No. 42: Drafting points in issue – amongst the toughest things to do well

63. The ability to ferret out the real issues and organize the presentation of evidence and argument according to those issues is indispensable.

64. Some counsel operate under the mistaken assumption that everyone will agree on the principal issue of a case. In reality, the ability to define the issue and thereby control the agenda is invaluable since it's the way that the question is framed that may ultimately determine the ultimate judgment.

65. Don't start with the word "whether". If possible, do *not* ask a question.

66. Weave concrete facts into the way you write the issues, so (if at all possible) you tell the story in miniature.

67. Write the issues so the answer you want is highly suggested — in some cases directly suggested, in other cases it may be more strategic not to be so direct.

No. 43: Hold something back for oral argument? (This isn't Hollywood)

68. Put all your best arguments into the factum. In the past some counsel would save the best part (or a good part) for oral argument. Today written submissions are much more important than they once were and so this is no longer an advisable strategy (if it ever was). It's possible to overcome an inadequate factum during oral argument but it's an uphill battle. Why put yourself in that position if you don't have to?

69. Jon Fauld, Q.C.'s "Series of Dots Theory of Advocacy": in some cases it may be strategically better to hold something back in written argument **[explain verbally]**.

No. 44: When you're the respondent – play your own game

70. A factum should be a self-contained, comprehensive argument. It should review all of the essential facts, summarize the legal issues and present the arguments in a complete and methodical form. Cross-referencing over to the appellant's factum is a pain in the butt. Give the judge the ability to take your factum home and read it on his/her knee without having to jump around. Even if an authority is in the appellant's factum and you're referring to it, still put it in yours. If you absolutely must refer to something in the appellant's factum, include the full quotation.

No. 45: Conclusions – make sure there is one

71. Make sure there is a conclusion. Don't just end by outlining the relief requested; remind the court why relief is required in your case.

No. 46: Conclusions – relief requested

72. Occasionally, the relief requested can be tricky. Although there is a tendency to simply ask that the application or appeal be allowed or dismissed, it's obviously worthwhile to carefully consider all of the alternatives before deciding.

No. 47: Conclusions – Option #1; tell the court why

73. A good closing will encapsulate two or three compelling reasons for the court to adopt your position. In brief, make your conclusions clear and make your reasons explicit. What you are really trying to do is draft the judge's decision.

No. 48: Conclusions – Option #2; answer your own questions

74. Writing the conclusion is simple if the opening was well-drafted. A good advocate will close by answering the questions posed in the issues section. However, it isn't enough to simply give the answers, a good conclusion will also outline the reasoning that leads inevitably to the answer provided.

No. 49: Conclusions – Option #3; finish where you began

75. Pick up the theme of your opening. Restate it, refine it, re-develop it. It can build a logical solidity, can close the circle.

No. 50: And last, the power of simplicity

77. The speaker before Abraham Lincoln at Gettysburg on Nov. 18, 1863 was Congressman Edward Everett, who was also a senator, governor of Massachusetts, minister to Great Britain, secretary of state, and also president of Harvard. Some considered him a spell-binding orator – perhaps he did too,

because he spoke for two hours. Does anyone remember what he said, or even that he said anything at all? Few. The speaker after – Lincoln – spoke for less than 3 minutes. A total of 272 words. A single paragraph really. Here's that paragraph:

> "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But, in a larger sense, we can not dedicate -- we can not consecrate -- we can not hallow -- this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us -- that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion -- that we here highly resolve that these dead shall not have died in vain -- that this nation, under God, shall have a new birth of freedom -- and that government of the people, by the people, for the people, shall not perish from the earth."

Lincoln was mistaken in saying "the world will little note, nor long remember what we say here." A century and a half later, we do note, we do remember – the power of simplicity.

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SELECTED BIBLIOGRAPHY[1]

Online Articles

Meyers, Bev, *Effective Legal Writing Techniques: Draft Clear & Persuasive Legal Documents*, July 3, 2024

Williams, Carolyn V., *Bracing for Impact: Revising Legal Writing Assessments Ahead of the Collision of Generative AI and the NextGen Bar Exam,* February 15, 2024

9 Relevant Ideas for Writing Legal Articles for Your Law Firm [Updated – 2024], March 1, 2024 – Content Whale

Guberman, Ross, *Case Study: Fry v. Napoleon Community Schools—Five Ways to Write Like Justice Kagan*, June 3, 2023 – Brief Catch

Guberman, Ross, F*ive Ways to Write Like Warren Buffett*, June 3, 2023 – Brief Catch

Books

Aldisert, Ruggero J. *Winning on Appeal: Better Briefs and Oral Argument* (New York: Thomson Legal Publishing, 1992), c. 2, 8.

Berry, Edward. *Writing Reasons: A Handbook for Judges* (Emond Montgomery Press, 1998).

Butt, Peter & Richard Castle. *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge 2001)

Cromwell, Thomas. *Preparation of Factums* (Canada Law Book, 1996). Cromwell, Thomas. *Effective Written Advocacy* (Canada Law Book, 2008)

Greene Ian et al. *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Lorimer, 1998).

Hendricks, Mary. *Court Motions Handbook*, 2nd Ed. (Carswell, 1996).

Kolb, Harold. *A Writer`s Guide; The Essential Points* (Harcourt Brace, 1980). Meehan, Eugene *et al*. *Supreme Court of Canada Manual: Practice & Advocacy*

(Canada Law Book, 2015), Chapter 10.

Morton, James C. & Freeman, Michael E. *Written Advocacy* (Butterworths, 2001). Morton, James & Iacovelli, Michael. *Procedural Strategies for Litigators*

*(*Butterworths, 1998).

Mowat, Christine. *A Plain Language Handbook for Legal Writers* (Carswell, 1998). Rosenberg, Alvin B. & Huberman, Marvin J. *Appellate Advocacy* (Carswell 1996).

[1] Updated September 26, 2024

Ross-Larson, Bruce. *Go It Yourself: A Manual for Everyone Who Works With Words*

(New York: W.W. Norton & Co. Ltd., 1996).

Sopinka, John & Gelowitz, Mark. *The Conduct of an Appeal* (2nd ed. Butterworths, 2000).

Stark, Steven D. *Writing to Win* (Doubleday 2000).

Stuesser, Lee. *An Advocacy Primer* (4th Ed. Toronto: Carswell, 2015).

White, Robert B. & Hon. Joseph J. Stratton. *The Appeal Book* (Canada Law Book, 1999).

Zinsser, William. *On Writing Well*, 5th ed. (New York: HarperCollins, 1994).

Articles in Books, Journals and Conference Materials

Steinfeld, Mikel, "Use Dialogue, Not Quotes. Legal Writing That Compels Reading", *Arizona Attorney*, June 2024.

"Why legal writing is so awful", *The Economist*, May 31, 2023.

Strathy, Chief Justice George, "Advocacy in the Court of Appeal for Ontario", *The Litigator*, Dec. 2017, pp. 14-21.

Siegel, Martin, "How to Winnow Arguments on Appeal", *ABA Litigation*, Winter 2014.

Kennelly, Hon. Matthew, "Over-Arguing Your Case", *ABA Litigation*, Winter 2014.

Bastarache, Hon. Michel. "Supreme Advice to the Successful Litigator: Advocacy in the Supreme Court of Canada", County of Carleton Law Association, Civil Litigation Updated, Mont Tremblant, Nov. 7, 1998.

Binnie, Hon. Ian. "Random Thoughts About Charter Advocacy", County of Carleton Law Association, Civil Litigation Updated, Mont Tremblant, Québec, Nov. 7, 1998.

Conway, Thomas. "Getting Your Motion" in *The Pragmatic Litigator: Practicing Efficiently and Effectively in Hard Times* (Toronto: Canadian Bar Association- Ontario, 1994).

Cooney, Mark. "The Dating Game", *Trial*, Aug. 2005, p. 60.

Cooney, Mark. "Snap, Crackle, Pop" 2013, Vol. 92, No. 12 *Michigan Bar Journal* p. 40.

Doody, Peter. "Rule 20 Motions - A useful tool for the practical litigator" in *The Pragmatic Litigator: Practicing Efficiently and Effectively in Hard Times* (Toronto: Canadian Bar Association-Ontario, 1994).

Foy, Patrick. "The Factum in Civil Appeals – 1994". C.L.E.S. B.C., May 1994. Garner, Bryan. "The Deep Issue: A New Approach to Framing Legal Questions" in *The Scribes of Legal Writing*, Vol 5, 1994-95 3-4.

Garner, Bryan A. "Issue-framing: the upshot of it all". *Trial*, April 1997, p.74.

Garner, Bryan. "10 tips for better legal writing" *ABA Journal*, Oct. 1, 2014 http://www.abajournal.com/magazine/article/10_tips_for_better_legal_writing/.

Gilbert, Lyon. "Motions and Pre-trials - The Importance of Preparation" in *Winning in Small Claims Court* (Toronto: Canadian Bar Association-Ontario, 1994).

Ginsburg, Justice Ruth Bader. "Remarks on Appellate Advocacy," 50 S.C.L. *Rev.* 567, 567-68 (1999).

Koeltl, John G. "Brevity" (2003) 30 *Litigation (Journal of the A.B.A Section of Litigation*) 3.

Laskin, Hon. John I., "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums", *The Advocates' Society Journal*, Summer 1999. http://www.ontariocourts.on.ca/court_of_appeal/speeches/forget.htm

Laskin, Hon. John I., "What persuades (or, What's going on inside the judge's mind)", *The Advocates' Society Journal*, June 2004, page 3.

Lepofsky, M. David, "The unsung art of written advocacy: Strategies, tips, and a call for unorthodoxy", *The Advocates' Society Journal*, Summer 2004, page 10.

McElhaney, James, W. "Close with a Big Finish" (November 2002) *A.B.A. Journal 56*.

McElhaney, James, W. "Good words for writing" (May 2002) *A.B.A. Journal 50*. Meehan, Eugene. "Intervening in the S.C.C." (1994) 16 Advocates' Quarterly 137.

Murnyka, Daniella. "Give Me One Good Reason: The 'Principled Approach' in Canadian Judicial Opinion" in *Queen's Law Journal 2015*, p. 40 Queen's L.J. 609

Robinson, Sandy. "Injunctions" in *Avoiding Motion Sickness* (Canadian Bar Association-Ontario, 1995).

Rutherford, The Hon. Douglas. "Judging a Summary Judgment Motion: A View from the Bench" in *The Pragmatic Litigator: Practicing Efficiently and Effectively in Hard Times* (Toronto: Canadian Bar Association-Ontario, 1994).

Rutherford, The Hon. Douglas. "Just Write for Reading", C.C.L.A. New Lawyers & Articling Students Group, Ottawa (March 8, 2001).

Newspaper/Magazine Articles

Bailey, William. "Tie Your Case Together With A Good Theme" in *Trial*, (February 2001) 58-63

Bell, Judith. "Avoiding Motion Sickness - Effective Advocacy on Motions" in *Civil Litigation Updated* (Toronto: Canadian Bar Association-Ontario, 1995).

Binnie, The Hon. Ian. "A Survivor's Guide to Advocacy in the Supreme Court of Canada" in *The Advocates' Society Journal* (August 1999) 13-19.

Blair, The Hon. R.A. "Oral Advocacy before Superior Court Judges" in *The Advocates' Society Journal* (August 1999) 26-29.

Blue, Lisa & Hirschhorn, Robert. "Lessons From the Campaign Trail", *Trial*, July 2005 p. 26.

Bobb, Patricia. "Remember the no-no's of openings" in *Trial*, (April 1998) Stephen B. Bight. "Developing Themes in Closing Argument and Elsewhere:

Lessons from Capital Cases" in *Litigation*, (Fall 2000) 40-44.

Catzman, The Hon. Marvin. "The Wrong Stuff: How to Lose Appeals in the Court of Appeal" in *The Advocates Society Journal* (August 2000) 3-5. Cohen, David. "Writing Winning Briefs" in *Litigation,* (Summer 2000) 46.

Daisley, Brad. "'Focus' the Key to Winning Cases, Binnie tells Seminar" in *The Lawyers Weekly* (July 21, 2000) 6.

Drummond, The Hon. Mark A. "Hollywood Help for Opening Statements" in *Litigation News*, Vol. 25 (July 2000) 8.

Finlayson, The Hon. George D. "Appellate Advocacy in an Abbreviated Setting" in *The Advocates' Society Journal* (August 1999) 22-25.

Garner, Brian A. "Issue-Framing: The Upshot of it All" in *Trial* (April 1999) 74-76.

Hamlin, Sonya. "Who Are Today's Jurors and How Do You Reach Them?" in

Litigation (Spring 2001) 11.

Keenan, Don. "When a client is your child" in *Trial* (September 2002) 38-40. Kimble, Joseph. "A Modern Wish List for Legal Writing" in *Trial* (January 2000) 89-92.

MacInnes, Norman. "Laskin lists habits of effective appellate advocates" in *The Lawyers Weekly*, (March 1, 2002) 12.

Maxx, D.T. "How 2,988 Words Changed a Presidency", *Ottawa Citizen,* Oct.13, 2001, B4-6

McElhaney, James. "Balanced Persuasion: Let the Facts Characterize the Case, Without Adding Your Spin" in *American Bar Association Journal*, (March 2002) 60-61.

Nolan, Kenneth. "More Than Just Words" in *Litigation*, (Spring 2001) 66.

Perdue, Jim. "Starting Strong" in *Trial* (July 2002) 34-36.

Perlman, Peter. "Analogies in Summation" A.T.L.A. pamphlet, Summer 2000. Schneiderman, Simon. "Helping Pleadings Speak Visually" in *Canadian Lawyer* (March 2000) 35-37.

Stolley, Scott. "Vital Transitions" in *Writer`s Corner*, (May 2000) 61.

Stolley, Scott Patrick. "Aphorisms to Write By" in *For the Defence*, May 2000. Trognitz, Laura C. "Bench Talk" in *ABA Journal* (March 2000) 56-107.

Vigil, Jacob. "Good Counsel" in *Trial*, (February 2001)109.

Watts, Shelley. "Technology creates winning visual evidence" in *Trial* (September 2000) 68-73.

Vesper, Thomas J., Orr, Richard. "Making time palpable by using per diem arguments" in *Trial* (October 2002) 59.

Law Student/Articling Student/New Lawyer Articles

Beckman, Joseph, "Starting Your Law Career 101". *American Bar Association Litigation News,* Vol. 30, No. 5, July 2005.

Cleveland, Grover E. "Helping New Grads Be Better Lawyers Faster". *Law Practice Magazine*, 2013, Volume 39 Number 3.

Gruenke, Peggy "Tech Tips for Young Lawyers to Get and Stay Organized" In *GPS Solo*, Vol. 32 No. 3 May/June 2015.

Harvey, Ian "Step Up And Listen – 24 Things You Won't Have Learned In Law School". *Canadian Lawyer Magazine,* Oct. 2015

Hernandez, Andres "5 Tools For Attorneys On The Go". In *Arizona Attorney*, *Well Oiled Office Machine*. October 2015.

Kennedy, Dennis "Smooth Sailing". *Canadian Bar Association*, 2006.

Kramer, Jeffrey "Kramer's 51 Tips for the Successful Practice of Law". The *Advocates' Society Journal*, June 2002.

Pfeifer Jr., William L. "Practical Advice for New Law School Graduates". In *GPS Solo*, May/June 2015.

Maurer, Matt "Articling Interview Advice From an Interviewer". *Slaw* August 9, 2015 (Posted in: Education & Training Education & Training: Law Schools).

Reno, Janet "Lawyer as Salesman". In *Arizona Attorney*, *Well Oiled Office Machine*, October 2015.

"Student to Lawyer – 20 Tips For A Successful Transition". *LAWPRO Magazine, Student Issue #1, 2012*.

Van Dyke, Susan "The Ten Most Important Tips for Articling Students and New Lawyers", in *SLAW*, Aug. 2013.

TAB 2

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for
the Province of Ontario)

BETWEEN:

ACME BUILDING AND CONSTRUCTION LIMITED

APPLICANT
(Plaintiff)

-and-

THE CORPORATION OF THE TOWN OF NEWCASTLE

RESPONDENT
(Defendant)

MEMORANDUM OF THE RESPONDENT ON APPLICATION FOR LEAVE TO APPEAL

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TAB 2

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TAB 2

TAB 3A

(EXTRACT)

FIRST DRAFT

STATEMENT OF FACTS

1. On Thursday, July 1, 1999, the accused, Donna Cora Lawrence, was convicted following trial before a Supreme Court Judge sitting with a Jury of two charges of criminal negligence causing death/bodily harm and two charges of impaired causing death/bodily harm.

2. On May 28, 1997, the Appellant, Donna Cora Lawrence, was involved in a car collision with a motor vehicle driven by Barbara Marie MacRae. The passenger in the MacRae vehicle, Marjorie MacRae, subsequently died of the injuries she suffered in the accident. Barbara MacRae also suffered from injuries amounting to bodily harm. [See Agreed Statement of Facts, Exhibit No. 5, Tab 4, p. 319, lines 2-18; p. 320]

3. The trial commenced in Baddeck, Nova Scotia on June 12, 1999. Crown witness Scott MacLean testified that he came upon a car that was parked across the yellow line just past the Englishtown turnoff and that he had to come to a complete stop [Tab 4, p. 332, Q. 10]. The vehicle blocking his course backed up and Mr. MacLean was able to pass. He observed the vehicle, later identified as the Appellant's vehicle, following behind him and that it was weaving between the yellow line and the white line in its own lane [Tab 4, p. 334, Q. 16; p. 349, Qs. 62-63]. He further testified that it appeared as if the driver was lost and was consulting a road map [Tab 4, p. 350, Qs. 69-70].

4. Crown witness Frank MacRae testified that he was driving behind the vehicle driven by his sister-in-law, Barbara MacRae, and that both vehicles were travelling at approximately 80-90 kilometers an hour [Tab 4, p. 359, Q. 37]. Both the witness's car and Barbara MacRae's car were travelling in the same lane. Just before the St. Ann's turnoff, Mr. MacRae noticed a car coming into their lane [Tab 4, p. 359, Q. 38-40]. Mr. MacRae testified that he had a good view of the oncoming vehicle, that he saw Barbara MacRae swerve from her lane into the opposite lane and that he then noticed that the oncoming vehicle did the exact same thing, returned to her own lane, and the vehicles collided [Tab 4, p. 365, Q. 50, p. 373, Qs. 100-103; p. 374, Qs. 104-108; p. 375, Q. 109; p. 376, Q. 112; p. 377, Qs. 113-116]. He testified that he checked the Lawrence vehicle, that the Appellant did not appear to be injured, and that he did not smell any alcohol emanating from her [Tab 4, p. 378, Qs. 120-123].

5. Barbara MacRae testified that she had no recollection of the accident [Tab 4, p. 385, Q. 17-18]. However, neither could she explain the full bottle of rum in her vehicle [Tab 4, p. 389, Q. 38]. The rum had not been seized by Officer Towle as an exhibit [Tab 4, p. 848, Q. 209; p. 849-850, Qs. 216-222]. Ms. MacRae also testified that the vehicle she had been driving the day of the accident was uninsured [Tab 4, p. 392, Qs. 61-62]. She confirmed that she had not been charged with operating a vehicle without insurance, nor had she been charged with operating a vehicle left of the centre line [Tab 4, p. 395, Qs. 82-86].

(EXTRACT)

MIDDLE DRAFT

PART I – STATEMENT OF FACTS

(a) Test Case

1. This test case is about juror bias and whether the presumption of juror impartiality is rebuttable at law under the current test for determining judicial bias. It is also about lost evidence and the right to counsel; and whether an accused person can be convicted twice for the same delict.

(b) Brief Chronology of Facts

2. A brief chronology of facts are as follows:

- **On Wednesday, May 28, 1997, Donna Lawrence, the Applicant herein, a 47 year-old working mother of two arose at 5:00 a.m. to prepare for her day. As a business development officer with the Economic Department and Tourism Department for the Province of Nova Scotia she was scheduled to give a presentation, at 3:30 p.m., on economic development to more than 100 women at the Gaelic College, St. Ann's Bay, Cape Breton, Nova Scotia. Mrs. Lawrence gave herself at least two hours to make the trip as she had not been to St. Ann's before. Her presentation along with the networking session and dinner to follow meant that she would not return home until 10 p.m. that evening.**

  Ref.: Trial Transcript, pp. 1114-1118, paras 42-62 [Tab E.26]

- **As part of her employment, Mrs. Lawrence was enrolled in a correspondence course with the University of Waterloo and her final paper was due the following day. She worked on her paper at home throughout the morning as her office computer was not functioning. Mrs. Lawrence made several calls to her office to collect messages. She left home around 12:30 p.m. and drove to her office to pick up material for the presentation and proceeded on to the Gaelic College at about**

TAB 3C

(EXTRACT)

S.C.C. No.

FINAL DRAFT

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

DONNA LAWRENCE

Applicant
(Defendant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Crown)

APPLICATION FOR LEAVE TO APPEAL

Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended

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PART I - STATEMENT OF FACTS

(a) Test Case: Effect of Police Losing Evidence, Right to Counsel, Juror Bias and Duplicitous/Duplicative Charges

1. This test case is about:

- key evidence lost by police
- the right to counsel
- juror bias
- whether a person can be charged and convicted twice for the same delict.

(b) Brief Chronology of Facts

2. A brief chronology of the facts are as follows:

- On Wednesday, May 28, 1997, Donna Lawrence, a 47 year-old married working mother of two woke at 5:00 a.m. to prepare for her day. As a business development officer with the Economic Development Department for the Province of Nova Scotia she was to give a presentation, at 3:30 p.m. that day, on economic development to 100 women at the Gaelic College, St. Ann's Bay, Cape Breton. Donna gave herself at least 2 $^{1}/_{2}$ hours to make the trip as she had never been to St. Ann's before.

  Ref.: Trial Transcript, pp. 1114 -1118, paras 42-62 [Tab 2A]

- Donna is very good at her job, very seldom has a drink, and is highly thought of and respected by supervisors, colleagues and others, as noted below.

- Donna's supervisor in the Nova Scotia Department of Economic Development is Mr. Ron Kennedy, and of the 14 years he knew Donna was her supervisor for the last 9. He says he "is not aware of any alcohol use by [Donna], either during or after work hours, other than on one occasion in fourteen years when she had one glass of wine with a meal."

  Ref.: Presentence Report, p. 4 [Tab 2B]

5. As to difficulty walking/staggering:

- Three days after the accident Donna went to emergency because she still had difficulty walking. Dr. MacLean said she had a painful foot, sore knees and a bruise on her head. X-rays confirmed that Donna's foot was broken in two places and that the particular nature of the breaks would have made walking difficult. The doctor also testified that Donna, still three days later, had a positive neurological sign called the Dabinsky sign indicating an injury to the central nervous system - in layperson's terms, that Donna had suffered a concussion. Dr. MacLean also testified that the doctor who saw her right after the accident may not have been able to diagnose the concussion because that diagnosis is often formed after the fact.

Ref.: Trial Transcript, p. 933, paras. 7-8, p. 934, paras. 11-12, p. 935, paras. 19-21; p. 941, para. 49, p. 948, paras. 92-94 [Tab 2A]

6. In summary:

Who Testified Confused/Disoriented	**Who Testified Difficulty Walking**	**Who Testified No Smell of Alcohol**	**Who Testified Smell of Alcohol**
Osborne Burke	Osborne Burke	Osborne Burke	-
-	-	Ronald Bonnar	Austin MacKenzie
Shane MacFarlane	-	Janet MacCuspic	Shane MacFarlane
Roland Genge	Roland Genge	Frank MacRae	Roland Genge
Duncan MacLean	-	-	Duncan MacLean
-	-	-	-
-	Lynn Dunlop	-	Travis MacNeil
-	Sally MacDonald	-	Lynn Dunlop
-	-	-	Sally MacDonald
Michael Towle	Michael Towle	-	Patricia Nicholson
-	Travis MacNeil	Travis MacNeil (initially)	Michael Towle

7. Donna took the stand in her own defence, and testified:

- She drank no alcohol that day.
- She was not impaired.

Ref.: Trial Transcript, pp. 1130-31, para 125; p.1131, paras 126-127 [Tab 2A]

8. Donna was convicted on all four counts:

- Criminal negligence causing death.
- Causing death in the operation of a motor vehicle.
- Criminal negligence causing bodily harm.
- Causing bodily harm in the operation of a motor vehicle.

9. The day after the trial, Donna's lawyer happened to be in Baddeck near where the trial was, and was approached by a man he happened to know who'd been told what one juror said to another juror in court before the trial started. As a result of that conversation, Donna's lawyer hired an investigator to take statements from persons concerned. Those statements - involving Juror No. 12 - were used as a basis for the Donna's Application under s. 24(1) of the *Charter*. In that Application, Donna's lawyer raised the issue of juror bias and its impact on the *Lawrence* trial.

Ref.: Notice of Motion for Stay of Proceedings re: Jury Bias [Tab 2C];

Trial Transcript at pp. 1374-1382 [Tab 2A]

10. What happened was that before the trial, Juror No.12 told another prospective juror, while both were sitting in the courtroom waiting for the judge to enter: "**I don't know why they would be having a trial over this**, the woman was drunk and on the wrong side of the road". The Court of Appeal said this comment did not give rise to any reasonable apprehension of bias.

Ref.: Reasons of Court of Appeal, at par.97-131 [Tab 3B]

11. Donna said she "feels awful and wishes she had died rather than the victim".

Ref.: Presentence Report, p. 7 [Tab 2B]

12. Donna now lives at home with her (retired) husband. They live on Canada Pension ($800 her, $465 him; their total family income). Their two boys attend local universities (Chris 3rd year, Acadia; Jessie 2nd year U. N. B.). They have a

house worth $120,000, and debts of $125,000). Donna now sees a psychiatrist for depression; and long term disability payments of 70% of her previous income from a previous accident have been cancelled because of this accident. Her husband says "He loves his wife and family very much and the complete family is very close."

Ref.: Presentence Report, pp. 3-5, 7 [Tab 2B]

PART II – POINTS IN ISSUE

13. This case raises the following issues of public importance that warrant the consideration of and guidance of this Honourable Court:

(a) Where Juror Bias at the Very Beginning of the Trial Makes the Trial Unfair

- Is the test for partiality applicable to cases where it is argued that trial fairness has been compromised by juror bias at the outset of the trial?

(b) Jurisdiction of the Superior Court

- Does the judge presiding over an accused's trial before a judge sitting with a jury have the jurisdiction to declare a mistrial, on the basis of juror bias, once the jury has rendered a guilty verdict but before the judge has given sentence?

(c) Key Evidence Lost

- Where the evidence (here mouthwash containing alcohol) is seized by police then lost by police (absolutely critical evidence because the officer at the scene used the apparent smell of alcohol to both arrest and charge) such evidence is pertinent and crucial.

(d) Breach of Right to Counsel is Never of "No Affect"

- A breach of a person's right to counsel at the time of arrest on the basis that the person did not know the full extent of her legal jeopardy, is never of "no affect" as claimed by the Court of Appeal.

(e) Duplicity/Multiplicity of Charges

- Where on the basis of one motor vehicle accident the indictment charges two death-causing charges to one individual (criminal negligence causing death and causing death in the operation of a motor vehicle), and two bodily-harm causing charges to another individual (criminal negligence causing bodily harm, causing bodily harm in the operation of a motor vehicle), is this duplicitous/multiplicitous in that one person has in law been charged (and here, convicted) of killing one person twice, and causing bodily harm to another one person twice?

PART III – STATEMENT OF ARGUMENT

(a) WHERE JUROR BIAS AT THE VERY BEGINNING MAKES THE TRIAL UNFAIR

14. Is the test for partiality applicable to cases where it is argued that fairness has been compromised by juror bias at the outset of the trial?

TAB 4

S.C.C. File No.:

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

B E T W E E N:

CLAUDE JOHN and ROSE JOHN

Applicants
(Plaintiffs)

- and-

SHAWN FLYNN, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, EATON YALE LTD., ROBERT BLAKE and WALLACEBURG GLASSWORKERS INC.

Respondents
(Defendants)

APPLICATION FOR LEAVE TO APPEAL
Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c.S-26, as amended
VOLUME ONE Pages 1-200

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PART I – STATEMENT OF FACTS

(a) TEST CASE: Employer liability for known conduct of employee on premises, causing harm to third party off premises.

1. This test case is about an employer's liability for the actions of its employee that injure a third party, where the employer controls the circumstances leading to the harm, and the harm occurs just after the employee leaves work.

(b) Brief Chronology of Facts

2. A brief chronology of the facts is as follows:

The Company's Control Over The Workplace and Employee

3. Eaton Yale ("the company") operates a leaf spring manufacturing plant in Wallaceburg, Ontario. It is a large, heavy manufacturing facility that makes leaf springs for trucks. It is a multi-national company.

   Ref.: Court of Appeal below, para 3, per Finlayson, J.A. [Tab 4E]

4. Sean Flynn works there since 1984. His job is in the forge, where he operates and sets up the machinery that forms large, heated metal sheets into shapes. Some of the machines are two and three times the height of the operator. His job has multiple steps, some of which are:

   - "Check set up by operating eye machine and punch press, check for proper eye closing, eye size that eyes are parallel…Read detailed prints showing eye size and type centre bolt hole position material necessary."
   - "Training: Know lock out procedure [turning off the machine and then locking]…Identify safety hazards…SPC locking and charts."
   - "Potential Risk: loss of finger or hand…Slips and falling on walking beam."

   Ref.: Court of Appeal below, para 4, per Finlayson, J.A. [Tab 4E]
   Trial Exhibit 91 [Tab 2B]
   Trial Exhibit 3 (excerpts only – index) [Tab 2B]

5. The company imposes safety procedures on its employees, to prevent injuries in the moving equipment and machinery, including

   "safety glasses, safety shoes, ear plugs, long sleeved gloves, shop coats or overalls. Lockout procedures, is a seven-step process, shuts the machine down during repair, setup and like activity."

   Ref.: Trial Exhibit 91 [Tab 2B]
   Trial Exhibit 3 [Tab 2B]

6. The plant is noisy, hot and covers a number of acres. It is divided into sections, each supervised by a foreman. A general foreman is in charge of the entire plant floor operation.

   Ref.: Trial Transcript, p. 568, lines 18-20 [Tab 2A]

7. The company employs 500-600 people, and operates three shifts of 150 employees each, to maximize production. Employees "swing" from – days (7 am to 3 pm) – to afternoons (3 pm to 11 pm) – to nights (11 pm to 7 am) on two-week rotations. Breaks over the night shift are at 1 am, 3 am and 5 am. The company lets employees take their breaks in their cars in the company lot.

   Ref.: Trial Transcript, p. 560, lines 18-24; p. 43, lines 15-20 [Tab 2A]
   Court of Appeal below, para 5, per Finlayson, J.A. [Tab 4E]

8. Flynn works in an area known as the "backend" of the plant. The backend area gives on to the company lot. The Trial Judge found that the "company had absolute control over that work place and the company parking lot."

   Ref.: Trial Transcript, p. 159, lines 16-31; p. 160, lines 1-31; p. 369 lines 13-30 [Tab 2A]
   Trial Exhibit 16 [Tab 2B]
   Decision on Application, para 7, per Donnelly, J. [Tab 4B]

9. The company lot runs the entire length of the plant. At the rear of the lot, opposite the building, it abuts a farm, leased by an employee of the company, Al Bishop. The back of the company lot is "virtually in darkness prior to the installation of those lights" according to the maintenance supervisor, Doug MacLennan.

   Ref.: Trial exhibit 16 [Tab 2B]
   Trial Transcript, p. 170, lines 24-26; p. 819, lines 2-9 [Tab 2A]

10. Drinking in the company lot has gone on since at least 1978, when the company posts a notice to its employees that read:

    > "Apparently, some employees are drinking alcoholic beverages in the parking lot during their lunch and rest breaks – this must cease immediately".

    It did not stop. The company did not stop it. Because they did not, the applicant cannot walk today.

    Ref.: Trial Exhibit 11 [Tab 2B]
    Charge to the Jury by Donnelly J. at p. 863 [Tab 4A]
    Decision on Application, paras 2 and 4, per Donnelly J. [Tab 4B]

11. The company lot drinking is described by forge employee, Mike Paolone:

> "I'd say close to 30 to 40 percent of the work force at the backend would be probably participating in drinking either before work or during work…Well it was pretty…I'd say rampant…"
>
> *Ref.*: Trial Transcript, p. 159, lines 20-31 [Tab 2A]

12. General foreman tells the company about the drinking:

    - Ivan Bilodeau, retired general foreman, speaking of 1980:
      "When I told him [Personnel Manager] about the problem he instructed me and Mr. Bedell to go outside and check this problem out; and he says: Bring me back some evidence. [So what did you do]. I went and got a box…a cardboard box, two feet by a foot and a half by two feet deep…towards the back of the parking lot…I filled the box right up…(with) whisky bottles, beer bottles, gin bottles, rum bottles…just plain alcohol bottles."
    - Mr. Bilodeau concludes that employees must have had a drinking problem: "Well they must have…like, you know…what are all these bottles doing there? Why else would the bottles be there?"
    - Mr. Bilodeau proposes solutions to the problem, like " restricting access to the lot, fencing the lot, increased security, checking lunch pails"

    There is no company response. No restricted access, no fencing, no increased security, no checking lunch pails.

    - Bev Howard, retired general foreman, finds alcohol bottles in the company lot:
      "Well I've seen them myself when I'm out".
    - Mr. Howard reported this to the Personnel Manager.

    No company response.

    Ref.: Trial Transcript, p. 73, lines 13-30, p.74, lines 1-14; p.80 lines 14-29; p.81, lines 1-10; p. 85, lines 14-30; p.86, lines 1-23 p.128, lines 7-10 [Tab 2A]

13. Security personnel hired by the company reported finding evidence of drinking in the company lot. No company response.

14. The current personnel manager, Vincent Vlamink, says this about Bilodeau's concerns and proposed solutions:

    > "If I had a member of management coming forward saying: I think there's incidence of drinking going on…? (yes?) And here are some solutions that I have to address those? That would be something that would have to be taken seriously."

    Even then, no company response.

    Ref.: Trial Transcript, p. 777, lines 17-30, p. 778, lines 1-19 [Tab 2A]

15. Al Bishop, the employee of the company who farms the adjacent lot for 20 years has to clear a case of twenty-four beer bottles and other liquor bottles from the field each spring and fall, when he cultivates his land to avoid fouling his equipment.

    Ref.: Trial Transcript, p. 169, lines 1-31 [Tab 2A]

16. The company rarely patrols the company lot. Security is not responsible to supervise company employees in the company lot or elsewhere. Because the company has not lit its lot, the lot's in darkness, and as a result in darkness along the fence adjacent to the farmer's field. Employees' vehicles at the back of the company lot are not supervised, nor visible.

    Ref.: Trial Transcript, p. 764-8 and 819, lines 2-13 [Tab 2A]

17. The company posts notices, or puts notes in pay envelopes from time to time about not drinking on the premises. Flynn, his co-workers Paolone, and Robert Blake, knew it wasn't allowed.

    Ref.: Trial Exhibit 16 [Tab 2B]
    Trial Transcripts, p.145, lines 8-13; p.164, lines 8-31;
    p.165, lines 1-19; p.427, lines 10-18; p.429, lines 30-430, line 4 [Tab 2A]

18. Flynn, Paolone and Blake said that's why they drink in the back of the company lot, so as not to get caught.

    Ref.: Trial Testimony, p. 162, lines 1-10; p. 166, lines 23-30;
    p. 167, lines 1-9; p. 145, lines 19-28; p. 433, line 7; p. 434
    line 8 [Tab 2A]

19. Ron Beckett is a foreman who supervises Flynn from time to time. He says the company makes it clear that foremen are evaluated according to their production numbers and those numbers are very important. The company makes "it tough on him" to make a decision to send an employee home, even if drinking, since that could reduce production, and reduced production could affect his evaluation and pay raises.

    Ref.: Trial Transcript, p. 595, lines 5-30; p. 596, lines 1-31 [Tab 2A]

20. Beckett agrees

    > "… if Mr. Flynn had been drinking that night, with all that stuff on him [safety glasses, gloves, boots] and all that noise around him the only way you'd have been able to have a chance to pick up on whether he was impaired is if he was staggering".

    Ref.: Trial Transcript, p. 597, lines 12-30 [Tab 2A]

21. The company participates in an Employee Assistance Plan (EAP) directed at and designed to deal with drinking by employees on and off the premises, and having two goals:

    - increase productivity lost by absenteeism due to drinking, and
    - offer assistance to the employee to stop.

    Absenteeism is a "red-flag" of alcohol abuse by an employee.

    Ref.: Trial Exhibit 2 [Tab 2B]

22. Part of the EAP is a "Last Chance Contract" that outlines specific return-to-work requirements for an employee who has been off work because of alcohol abuse. A positive prognosis from a dry-out centre is needed for the employee to go back onto the line and operate machinery.

    Ref.: Trial Exhibit 2 [Tab 2B]

23. The Learned Trial Judge states the company "had a claimed policy of zero tolerance for alcohol in the workplace. It had a policy of intervention to supervise known alcoholics. It gave mouth honour to those policies by sporadic postings on notice boards. In relation to Flynn both policies were disregarded."

    Ref.: Decision on Application, para 4, per Donnelly, J. [Tab 4B]

24. The company toxicologist, Dr. Kalant, says availability of alcohol in the company parking lot, combined with lax enforcement, could actually encourage workplace drinking by an alcoholic.

    Ref.: Trial Transcript, p. 687-90 [Tab 2A]

25. Company policy requires an employee who is caught drunk to be sent home in a taxi, or with a union representative, other than in his own car. Vlamink, the personnel manager says,

    > "Oh, the reason we send them home in a cab is, if we deem them not to be fit for work, we also would take that step to make sure that they get home safely."
    > "They're a safety hazard, possibly to themselves or to other employees".

    Ref.: Trial Transcript, p. 742, lines 23-31; p. 743, lines 1-13 [Tab 2A]

26. Beckett, the foreman agrees the system of leaving the employee's car in the parking lot is a "safe system".

Ref.: Trial Transcript, p. 589, lines 5-16 [Tab 2A]

27. Howard, the general foreman said employees are not sent home in their own cars because:

> "… if anything happened to him on the way home you could be in a lot of trouble [Anything like?] An accident."

Ref.: Trial Transcript, p. 140, lines 2-11 [Tab 2A]

28. None of this happened in Flynn's case, if it did, Claude John wouldn't be in a wheelchair now.

Sean Flynn's History At The Company

29. Flynn lives 20 to 25 minutes from the factory.

Ref.: Trial Transcript, p. 878, line 25; p. 396, lines 6-8 [Tab 2A]
Decision on Application, para 9, per Donnelly, J. [Tab 4B]

30. He has a long-standing pattern of absenteeism and coming in to work late. His absentee record is described as "not very good" by the general foreman, Howard.

Ref.: Trial Exhibit 1 [Tab 2B]
Trial Transcript, p. 131, lines 19-21, 132-143 [Tab 2A]

31. The company knows Flynn is an alcoholic because

- Flynn tells the personnel manager;
- Flynn has long-standing absenteeism problems;
- Flynn participates, with the support of the company, in a dry-out program for 90 days starting on May 15, 1990;
- The dry out program's prognosis given to the company on August 22, 1990 (i.e. three months later) was that **"His chances for continued sobriety are poor"**;
- He does not "graduate" from the dry-out program. He would "have to attend Chatham Brentwood meetings at least three times per week for three months…" in order to graduate. He does not.
- Flynn, the company and a union representative sign a "Last Chance" contract. It has alcohol abstinence requirements;
- The company takes no steps to ensure Flynn doesn't drink on the job or in the company lot after he gets back on the line.

Ref.: Trial Exhibit 1 [Tab 2B]; Trial Transcript, p. 377, lines 23-378, 13;
p. 379, lines 12-26; p. 380, lines 10-382, 19; p.388, lines 25-386, 8;
p. 390, lines 5-7 [Tab 2A]; Trial Exhibit 19 [Tab 2A]

32. After attending the dry-out program so he can return to work (August, 1990), Flynn's absenteeism pattern resumes. The company writes him up twice, the second

time in September of 1992. A written record of absentee problems is preceded by a number of informal and formal verbal "counselling" sessions.

Ref.: Trial Exhibit 1 [Tab 2A]
Trial Transcript, p. 713, lines 28-31; p. 714, lines 1-6 [Tab 2A]
Trial Exhibit 19 [Tab 2B]

33. The September 1992 counselling report states there is room for "100% improvement" and that "if he needed it, there was an Employee Assistance Program available." Flynn does not access it. The company takes no steps to monitor Flynn.

Ref.: Trial Exhibit 2 [Tab 2B]
Decision on Application, para 4, per Donnelly, J. [Tab 4B]

Claude John

34. Claude John is a married man with two children. He and his wife Rose have an 11 year old daughter, Stephanie, and a 6 year old son, Michael. Claude is a former heavy-equipment operator who is unable to work in that capacity since an industrial accident. He continues to do contracting locally and is a wood lot operator and hunting and fishing guide around their home on Walpole Island.

35. In 1992, Rose John is taking a university degree at the University of Windsor as a full-time student, while working full-time in Windsor at the Federal Business Development Bank, over an hour from their home. This leaves Claude with the primary responsibility of caring for their two children, taking them to school, activities, preparing meals, laundry and cleaning. They drive a blue Econoline family van.

Ref.: Trial Transcript, p. 10, line 18 [Tab 2A]

The Last Shift Before The Crash

36. Flynn works the night shift on December 8-9, 1992. By his own evidence, he drives home, sleeps briefly and then drives back to Wallaceburg where he picks up a high school transcript, attends a dental appointment, and drops off the transcript off at the company. He starts drinking at 2:30 that afternoon. He drinks

- five 8-oz beers at the Glassworkers Union Hall which is across the street from the factory;
- three to four 2-oz shots of vodka/Clamato at a friend's home;
- one bottle of beer at home;
- four to six 8-oz beers, ordering two at a time, in the 45 minutes immediately before he reports for work, again at the Union Hall, after parking his pickup truck in the company lot.

$976,046.36. Collateral benefits from the no-fault policy total $355,993.68. The Learned Trial Judge gives equal benefit to both the company and Flynn of a deduction for those benefits from the damages awarded.

Ref.: Reasons of Judgment of Donnelly, J. dated March 16, 2000 [Tab 4C]

56. After hearing literally no evidence, the Court of Appeal reverses the jury, saying "There is no duty of care on the part of [the company] to members of the driving public…and if there was such a duty, it did not extend beyond the point where Flynn left the company premises…any suggestions as to how [the company] could have controlled Flynn's activities beyond that point are hopelessly speculative".

Ref.: Court of Appeal below, para 50, per Finlayson, J.A. [Tab 4E]

PART II – POINTS IN ISSUE

57. This case raises three issues of public importance that warrant the consideration of and guidance of the Honourable Court;

Issue No.1: Is there a general duty of care on employers because of what happens at work?

58. Is there a general duty of care owed by employers to third parties where employers are negligent because of what happened at work, and the work negligence damages someone else within 15 minutes of the end of the shift?

Issue No. 2: Is there a special duty of care because of special workplace knowledge?

59. Is there a special or new duty of care on employers where employers have specific workplace knowledge of problem employees' negative behaviour in the workplace, then do nothing about it?

Issue No. 3: Is a tortfeasor who does not contribute to the collateral benefit scheme entitled to deduct those benefits from damages awarded to the plaintiff?

60. Where one of two tortfeasors does not participate in a provincial no-fault insurance scheme, and the tort victim is given some immediate medical and other care from the

Response to a Leave to Appeal, **First Draft** of Facts
section (------ v. ------, S.C.C. file no. 23937)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT

PART I: STATEMENT OF FACTS

1. The Orders of the Honourable Mr. Justice V.W.M. Smith dated May 25, 1993 under appeal (the "1993 Order") were granted after a lengthy chambers application during which the evidence and authorities were carefully reviewed by the learned Chambers Justice. The Applicant's Appeal was unanimously dismissed by the Honourable Madam Justice C.A. Fraser, Chief Justice of Alberta, Mr. Justice R.P. Kerans and Madam Justice M.J. Trussler (ad hoc) of the Alberta Court of Appeal following two hours of oral argument by the Applicant and a detailed review of the evidence and authorities on the issues.

2. Following the granting of the Decree Nisi on March 10, 1983, the chronology of events is as follows:

a)	January 31, 1986	-	Applicant's Motion to vary support Dismissed without costs August 8, 1986
b)	November 10, 1986	-	Applicant's Motion to vary support Abandoned by Applicant
c)	April 7, 1988	-	Applicant's Motion to vary support Substantially dismissed without costs May 17, 1988
d)	September 8, 1989	-	Parties consent to vary custody and support
e)	December 11, 1991	-	Respondent's Motion for child support Order of the Honourable Mr. Justice D.W. Perras consented to March 23, 1992
g)	February 8, 1993	-	Applicant's Motion to cancel child support and arrears Dismissed with costs May 25, 1993

1395Response to a Leave to Appeal, **Final Draft** of Facts section (------ v. ------, S.C.C. file no. 23937)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT

PART I: STATEMENT OF FACTS

A. Present circumstances of the parties.

1. The Applicant is a Corporal with the R.C.M.P. earning a gross annual income of $53,000.00. The Respondent is a letter carrier with Canada Post earning a gross annual income of approximately $35,000.00. Corporal ------ was required to pay $200.00 per month child support for the one remaining child of the marriage, Raymond, under an Order granted March 23, 1992. In February 1993, Corporal ------ applied to cancel both ongoing child support and arrears.

(Applicant Motion Book, Tab 2, pp. 201-202)

B. Corporal ------'s motion to cancel child support and arrears dismissed.

2. The Orders of the Honourable Mr. Justice V.W.M Smith dated May 25, 1993 under appeal (the "1993 Orders") dismissed Corporal ------'s motion to cancel ongoing child support and arrears. Mr. Justice Smith granted Ms. Banso ------'s cross-application to increase child support for Raymond to $600.00 per month, increasing to $750.00 per month upon the termination of a monthly Canada Pension Plan Disability Benefit of approximately $150.00 now being received by Raymond as Corporal ------'s dependant.

(Applicant Motion Book, Tab 2, pp. 202-203)

C. Corporal ------'s Appeal unanimously dismissed.

3. The 1993 Orders were granted after a lengthy chambers application during which the evidence and authorities were carefully reviewed by the learned Chambers Justice. The Orders of Mr. Justice Smith were upheld by a unanimous Court of Appeal, and Corporal ------'s Appeal was unanimously dismissed by the Honourable Madam Justice

TAB 6

Court File No.:

IN THE SUPREME COURT OF CANADA

(On appeal from the Supreme Court of Newfoundland and Labrador, Court of Appeal)

BETWEEN:

ARCHEAN RESOURCES LTD.

Applicant
(Appellant)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR, AS REPRESENTED BY THE HONOURABLE THE MINISTER OF FINANCE FOR THE PROVINCE OF NEWFOUNDLAND AND LABRADOR AND HER MAJESTY'S ATTORNEY GENERAL FOR NEWFOUNDLAND AND LABRADOR

Respondents
(Respondents)

APPLICATION FOR LEAVE TO APPEAL
(Archean Resources Ltd., Applicant)
(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c.S-26, as amended)
VOLUME I – Pages 1 - 220

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18. Confusion as how statutes should be interpreted is evident in recent Court of Appeal cases that emanate from different provinces - no consensus exists as to whether the purposive or pragmatic methodology of statutory interpretation should be favoured or whether the plain meaning approach should be applied.

Purposive or Pragmatic Approach	**Plain Meaning Approach**
Approach: • the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament **Court of Appeal below:** • the Court favoured the purposive or pragmatic methodology of statutory interpretation	**Approach:** • statutory language is given its plain ordinary grammatical meaning -in the absence of ambiguity resort to other interpretive devices or principles, or to extrinsic aids, is unnecessary and inappropriate **Court of Appeal of Newfoundland and New Brunswick:** • the Court of Appeal of Newfoundland in *R. v. Wonderland Gifts Ltd.* and the New Brunswick Court of Appeal in *Parlee v. New Brunswick (Workers' Compensation Board)* applied the plain meaning approach. Ref: *R. v. Wonderland Gifts Ltd.* (1996), 140 Nfld. & P.E.I.R. 220 (Nfld. C.A.), para. 28 [TAB 7S] *Parlee v. New Brunswick (Workers' Compensation Board)* (1991), 82 D.L.R (4^{th}) 764 (N.B.C.A.), para. 10 [TAB 7P]

19. The inconsistency in interpretative approach has extended to appellate tax cases. The approach of the Court of Appeal below may be contrasted with the plain meaning approach to the interpretation of a logging tax statute adopted and applied by the British Columbia Court of Appeal in *Slocan Forest Products Ltd. v. British Columbia*.

Reference: *Slocan Forest Products Ltd. v. British Columbia* (2002), 142 B.C.C.A. 315 (C.A.) [TAB 7Y]

(ii) Divergent Interpretation Approaches in this Honourable Court

20. Divergences of views as to the appropriate interpretative approach to statutory interpretation may be found in the decisions of this Honourable Court. In her concurring judgment in *2747-3174 Québec Inc. v. Québec (Regie des permis d'alcool)*, L'Heureux-Dubé J. suggested that this Honourable Court was "wavering at random" between the purposive or pragmatic approach and the plain meaning approach.

Reference: *2747-3147 Québec Inc. v. Québec (Regie des permis d'alcool)*, [1996] S.C.R. 919 at para. 170 [TAB 7A]
Will-Kare Paving & Contracting Ltd. v. R., [2001] 1 S.C.R. 915, per Binnie J. (dissenting) [TAB 7DD]

Purposive or Pragmatic Approach	**Plain Meaning Approach**
• in *Stubart Investments Ltd. v. The Queen* and *Bell Expressvu Limited Partnership v. Rex et al* this Honourable Court cited from *Driedger on Construction of Statutes* : Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Ref: *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536 at 578 [TAB 7Z] *Bell Expressvu Limited Partnership v. Rex e* 26 [TAB 7C] • the Driedger formulation of principle has also been identified with the plain meaning interpretation approach. Ref: *Canada v. Antosko*, [1994] 2 S.C.R. 312, pp. 326-327 [TAB 7D] *Friesen v. Canada*, [1995] 3 S.C.R. 103 at para. 15 [TAB 7H] *Alberta (Treasury Branches) v. Canada*, [1996] 1 S.C.R. 963, paras. 14 and 15 [TAB 7B]	• in *R. v. Multiform Manufacturing Co*, (which O'Neill J.A. in the Court of Appeal below said might appear to support the Archean argument) this Honourable Court applied the plain meaning rule, as follows: ….When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament has clearly expressed its intention in the words it has used in the statute. Ref: *R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624 at p. 630 [TAB 7R] • the plain meaning rule has also been applied in a number of recent tax cases – in *Shell Canada Ltd. v. Canada*, this Honourable Court stated: …It is well established in this Court's tax jurisprudence that a searching enquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction.

	Where the provision at issue is clear and unambiguous, its terms must simply be applied…Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act. Ref: *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 at paras. 40 and 43 [TAB 7W] *Singleton v. Canada*, [2001] 2 S.C.R. 1046 paras. 24-31 [TAB 7X] *Ludco Enterprises Ltd. v. Canada*, [2001] 2 S.C.R. 1082 paras. 38 and 39 [TAB 7J] *Friesen v. Canada*, [1995] 3 S.C.R. 103 at para. 15 [TAB 7H] *Canada v. Antosko*, [1994] 2 S.C.R. 312 (S.C.C.), pp. 326-327 [TAB 7D]

B. Confusion as to recourse to extrinsic interpretative aids

21. Inconsistency also exists in appellate courts regarding the extent to which there may or may not be recourse to extrinsic interpretative aids in statutory interpretation cases – can interpretive aids be used in all cases or only in cases of ambiguity?

Extrinsic Interpretive Aids All the Time	**Extrinsic Interpretative Aids Only When Necessary**
Court of Appeal below: • the Court of Appeal below applied the purposive or pragmatic interpretative approach: it considered all indicators of legislative meaning, including a 1974 Report of the Royal Commission on Mineral Revenue regarded to be the impetus for the *Mining and Mineral Rights Tax Act*. Ref: Judgment of Court of Appeal below, paras. 27, 45 [TAB 4D]	**Court of Appeal of Saskatchewan and New Brunswick:** • appellate courts from different provinces have held that recourse to extrinsic interpretative aids is appropriate only in cases of ambiguous language • the Saskatchewan Court of Appeal in *Parlee v. New Brunswick (Workers' Compensation Board)*, and in *Sunnyside Nursing Home v. Builders' Contract Management Ltd.*, the Saskatchewan Court of Appeal stated that: …Courts must be guided by the language of the statute to determine the intent of the legislators, and only in the event of ambiguity is there justification for seeking the

TAB 7B

S.C.C. No.

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JAMES SAPARA

Applicant
(Applicant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

Pursuant to Section 40 of the *Supreme Court Act,* R.S.C. 1985, c. S-26, as amended

---

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Eugene Meehan, Q.C.
Adriana I. Cargnello
Ottawa Agent for the Applicant

TAB 7B

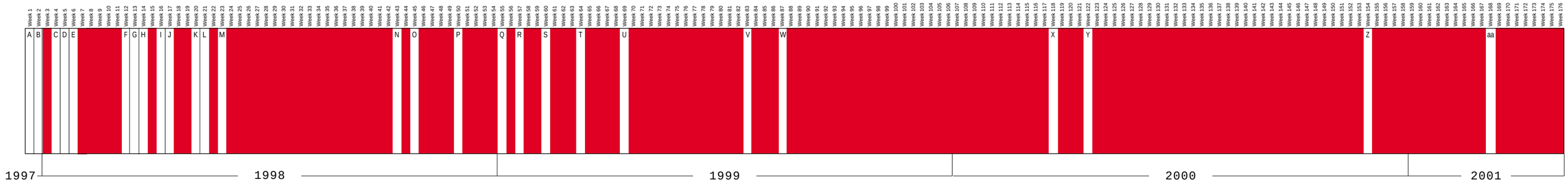
= Nothing happened

= Something happened

Delay Diagram: Procedural History Timeline*

Date Charged
December 17, 1997

Still No Trial
May 2001



Week 1
A. December 17, 1997 - Mr. Sapara charged.

Week 2
B. December 22, 1997 - Counsel for Mr. Sapara requests disclosure.

Week 3
Nothing happened.

Week 4
C. January 7, 1998 - First appearance. Plea entered.

Week 5
D. January 19, 1998 - Counsel for Mr. Sapara requests disclosure.

Week 6
E. January 15, 1998 - Preliminary disclosure.

Weeks 7-11
Nothing happened.

Weeks 12-14
F, G, H. March 5, 13, and 18, 1998 - Counsel for Mr. Sapara requests disclosure.

Week 15
Nothing happened.

Week 16
I. March 30, 1998 - Other co-accused's counsel withdraws.

Week 17
J. April 1998 - Other co-accused finally retains.

Weeks 18-19
Nothing happened.

Week 20
K. April 25, 1998 - Other co-accused and Crown discuss adjourning the Preliminary Inquiry.

Week 21
L. April 29, 1998 - Fixation of new date for Preliminary Inquiry adjourned to May 13, 1998.

Week 22
Nothing happened.

Week 23
M. May 13, 1998 - The Preliminary Inquiry rescheduled for November 2, 1998 and the pre-preliminary conference is set for September 11, 1998.

Weeks 24-42
Nothing happened.

Week 43
N. October 23, 1998 - Counsel for Mr. Sapara requests disclosure.

Week 44
Nothing happened.

Week 45
O. November 2, 3 and 4, 1998 - The Preliminary Inquiry.

Weeks 46-49
Nothing happened.

Week 50
P. December 10 and 16, 1998 - Preliminary inquiry.

Weeks 51-54
Nothing happened.

Week 55
Q. January 5, 6 and 20, 1999 - The Preliminary Inquiry.

Week 56
Nothing happened.

Week 57
R. The other co-accused's counsel withdraws.

Weeks 58-59
Nothing happened.

Week 60
S. February 10, 1999 - First arraignment delayed by a month.

Weeks 61-63
Nothing happened.

Week 64
T. March 10, 1999 - Second Arraignment - Other co-accused is still unrepresented . Matter is adjourned.

Weeks 65-68
Nothing happened.

Week 69
U. April 14, 1999 - Third Arraignment - Other co-accused is still unrepresented . Trial scheduled for September 27, 1999.

Week 70-82
Nothing happened.

Week 83
V. July 19, 1999 - Pre-Trial Conference - Other co-accused is still unrepresented. Sometime after, counsel is appointed for the co-accused. Trial is adjourned. August 11, 1999 set to fix new trial date.

Week 87
W. On August 11, 1999, Fourth Arraignment. Trial is rescheduled to April 3, 2000.

Weeks 88-117
Nothing happened.

Week 118
X. March 10, 2000 - Pre-trial conference.

Weeks 119-121
Nothing happened.

Week 122
Y. April 3, 2000 - Trial. Judicial stay granted for unreasonable delay.

Weeks 123 -153
Nothing happened.

Week 154
Z. November 29, 2000 - Appeal heard.

Weeks 155 -167
Nothing happened.

Week 168
aa. March 5, 2001- Reasons of the Court of Appeal filed.

Weeks 169 -176
Nothing happened.

*All references as to "Nothing Happened/Something Happened" taken from Judicial Stay Hearing or C.A. Reasons, para. 4 of both judicial reasons.

TAB 7A

S.C.C. No.

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JAMES SAPARA

Applicant
(Applicant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

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Adriana I. Cargnello
Ottawa Agent for the Applicant

control over the process and fulfill it's constitutional duty to protect Mr. Sapara's individual rights and to ensure his trial takes place within a reasonable time.

- **Brief Procedural Chronology**

14. The following is a brief chronology of the delays in the proceedings:

- **Day 1** – Mr. Sapara charged December 17, 1997.
- **Day 5** — Counsel for Mr. Sapara requests disclosure on December 22, 1997.
- **Month 1** — First appearance on January 7, 1998. Mr. Sapara enters election and plea without the benefit of disclosure. Counsel for Mr. Sapara again requests disclosure on January 19, 1998. The availability of the other co-accused's counsel causes delay in scheduling the Preliminary Inquiry.
- **Month 1** — January 15, 1998 — Preliminary disclosure sent to defence counsel.
- A series of delays due to the co-accused requesting later court dates.
- **Month 3** — March 5, 13, and 18, 1998, counsel for Mr. Sapara requests disclosure again.
- **Month 3** - March 30, 1998 – The other co-accused's counsel withdraws.
- Counsel for Mr. Sapara continues to express concern over delays and requests advice and direction from the Court.
- **Month 4** — The other co-accused finally retains counsel sometime in April 1998.
- **Month 4** — The other co-accused and Crown discuss adjourning the Preliminary Inquiry on or around April 25, 1998. Mr. Sapara and his counsel, were neither consulted, nor participated in these discussions.
- **Month 4** — April 29, 1998, Counsel for the other co-accused seeks an adjournment, and fixing of a new date adjourned to May 13, 1998.
- **Month 5** — May 13, 1998 – The Preliminary Inquiry finally rescheduled for November 2, 1998 for three days, and the pre-preliminary conference is set for September 11, 1998.
- **Month 10** — October 23, 1998 — Counsel for Mr. Sapara requests further disclosure.
- **Month 11** — November 2, 1998 — The Preliminary Inquiry begins. However, it takes longer than three days because of the complainant's behaviour on the witness stand and because the Crown decides to call more witnesses.
- **Month 12** — Preliminary inquiry continues.

- **Month 13** — The Preliminary Inquiry finally concludes January 20, 1999, more than 13 months after Mr. Sapara was charged.
- **Month 13** —The other co-accused's counsel withdraws.
- **Month 14** — February 10, 1999 – First arraignment delayed by a month.
- **Month 15** — March 10, 1999 — Second Arraignment – The other co-accused is still unrepresented and the matter is adjourned again.
- **Month 16** — April 14, 1999 — Third Arraignment — The other co-accused is still unrepresented and the trial is scheduled for September 27, 1999 and the co-accused is cautioned by the Court to get a lawyer quickly so the lawyer can prepared for trial.
- **Month 19** — July 19, 1999 — Pre-Trial Conference — The other co-accused is still unrepresented despite numerous warnings form the Court.
- **Month 19** — Counsel is finally appointed for the other co-accused after efforts from Mr. Sapara's counsel and the Crown. The trial is adjourned and August 11, 1999, was set to fix a new trial date.
- **Month 20** — More delays — On August 11, 1999, fourth arraignment. Counsel for the other co-accused requests a new trial date. Trial is rescheduled to April 3, 2000, more than 28 months after Mr. Sapara was charged.
- **Month 27** — Pre-trial conference on March 10, 2000.
- **Month 28** — Trial on April 3, 2000. A judicial stay is granted to Mr. Sapara after he brings a *Charter* motion pursuant to s.11(b) of the *Charter* before the Learned Trial Judge who enters a judicial stay of proceedings. The trial judge concludes that the delays were unreasonable which constituted an unjustified violation of Mr. Sapara's constitutional right to a trial within a reasonable time.
- The Crown appeals the stay.
- At the same April 3, 2000 trial, the other co-accused successfully argues section 8 violation of the *Charter* based on the fact the Authorization for interception of private communications was not lawfully obtained as the RCMP had omitted key facts from the affidavit which were never presented to the judge who granted the Authorization. The Trial judge concludes that the Authorization was invalid and all the evidence obtained through it excluded. The Crown calls no further evidence, advising the Court that there

was no reasonable likelihood of conviction without the excluded evidence. And then the Crown appeals this too.

Ref. Judicial Reasons at par. 4 [Tab 3A]
Reasons of Court of Appeal at par. 4 [Tab 3C]
Pull-out Delay Diagram [Tab 2]

15. There was a preriod of approximately 34 months from the time of the arrest and the time the trial would likely conclude.

Ref. Judicial Reasons at par. 35 [Tab 3A]

16. So in other words, through all of 1998, all of 1999, all of 2000, and half of 2001, and the Crown can still not give the applicant a trial. To date, a total of 41 months.

PART II – POINTS IN ISSUE

a) Are serious Delays Caused by a Co-Accused "Neutral" Delays

17. Whether or not delays resulting in denial of an accused person's right to trial within a reasonable time caused by a co-accused's failure to properly instruct and retain counsel, are "neutral delays".

b) What is the Extent of the Crown's Obligation to Bring an Accused Person to Trial Within a Reasonable Time when a Co-Accused Causes Serious Delays in the Proceedings

18. Where multiple accused persons are jointly charged and where one co-accused steadfastly asks the Crown to be tried in a speedy fashion, and another co-accused consistently fails to return and instruct counsel thereby occasioning delays, and the other co-accused consistently fails to retain and instruct counsel, what duty is there on the Crown to protect the 11(b) rights of the co-accused to a trial within a reasonable within time?

Prompting The Law:
Overcoming Challenges in Legal AI Content Generation

By

Frédéric Pelletier
VP Legal Information, Lexum
Chief Editor, CanLII

Bench and Bar Education Event
Yellowknife, Northwest Territories
2024-11-01

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Contents

1. From NLP to GenAI
2. Lexum / CanLII GenAI Projects
3. Content Generation Workflow
4. The Future
5. Conclusion

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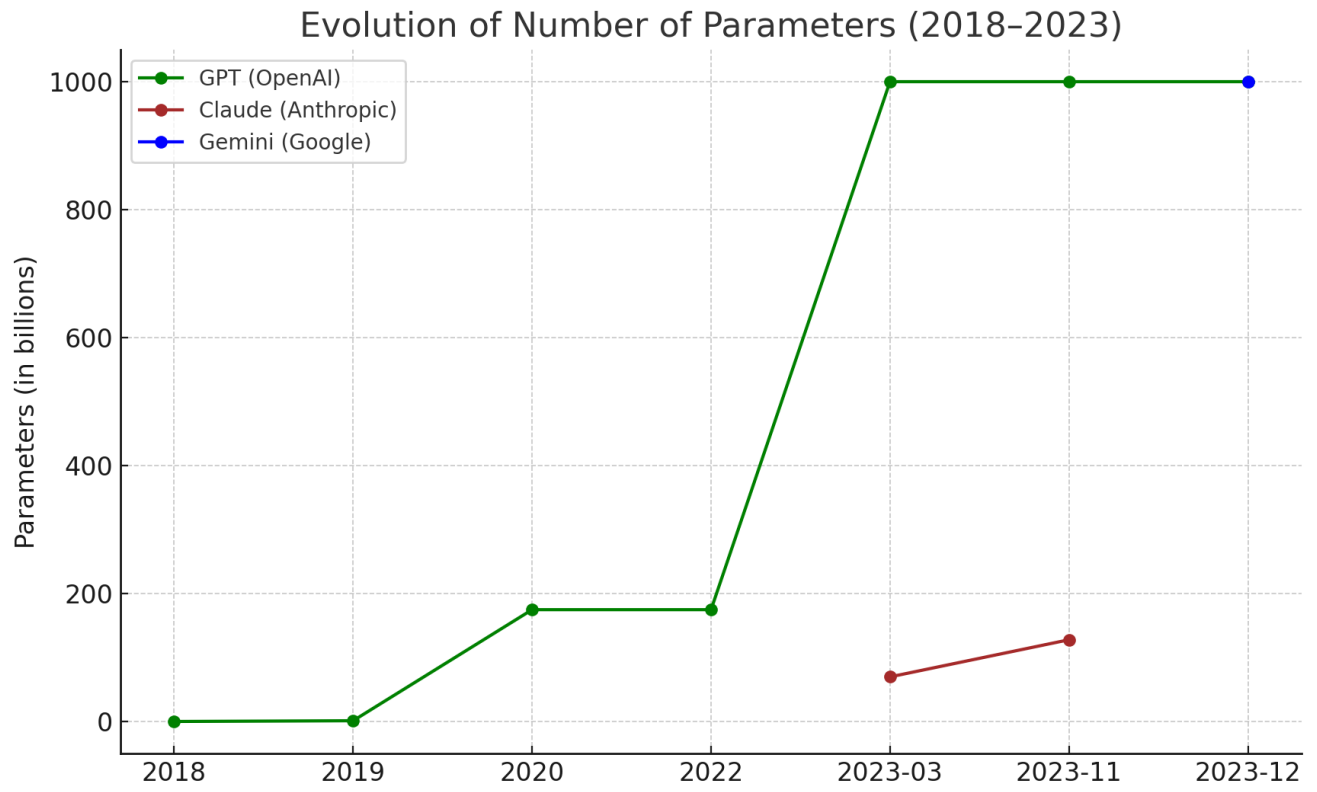
1. From NLP to GenAI

Natural Language Processing (NLP) milestones

- 1950–1980: Symbolic (rules-based learning)
- 1980–2000: Statistical (learning from data)
- 2000–2017: Neural networks (deep learning)
  - “Embeddings”
  - “Parameters”
- 2017–Present: Transformer (parallel processing)
  - “Context window”
  - “Tokens”

1. From NLP to GenAI



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Attention Is All You Need

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Abstract

The dominant sequence transduction models are based on complex recurrent or convolutional neural networks that include an encoder and a decoder. The best performing models also connect the encoder and decoder through an attention mechanism. We propose a new simple network architecture, the Transformer, based solely on attention mechanisms, dispensing with recurrence and convolutions entirely. Experiments on two machine translation tasks show these models to be superior in quality while being more parallelizable and requiring significantly less time to train. Our model achieves 28.4 BLEU on the WMT 2014 English-to-German translation task, improving over the existing best results, including ensembles, by over 2 BLEU. On the WMT 2014 English-to-French translation task, our model establishes a new single-model state-of-the-art BLEU score of 41.0 after training for 3.5 days on eight GPUs, a small fraction of the training costs of the best models from the literature.

Tokenizer

Learn about language model tokenization

OpenAI's large language models process text using **tokens**, which are common sequences of characters found in a set of text. The models learn to understand the statistical relationships between these tokens, and excel at producing the next token in a sequence of tokens. Learn more.

You can use the tool below to understand how a piece of text might be tokenized by a language model, and the total count of tokens in that piece of text.

GPT-4o & GPT-4o mini | GPT-3.5 & GPT-4 | GPT-3 (Legacy)

"tokens" generally correspond to a single word, part of a word, or even a character, depending on how the model tokenizes the text. Tokenization splits text into smaller units, often breaking down commonly occurring sequences of characters into distinct tokens. For example, frequently used phrases or subwords may be represented as single tokens, whereas uncommon or complex words may be split into multiple tokens.

Clear Show example

Tokens	Characters
78	416

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Text Token IDs

Tokenizer

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Clear | Show example

Tokens	Characters
78	416

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[1100, 64329, 693, 12190, 11095, 316, 261, 4590, 2195, 11, 997, 328, 261, 2195, 11, 503, 1952, 261, 5855, 11, 14537, 402, 1495, 290, 2359, 6602, 6370, 290, 2201, 13, 17951, 2860, 76848, 2201, 1511, 13679, 13306, 11, 4783, 24212, 1917, 22378, 51667, 45665, 328, 9862, 1511, 16913, 20290, 13, 2214, 4994, 11, 18728, 2061, 39432, 503, 1543, 10020, 1340, 413, 27328, 472, 4590, 20290, 11, 30629, 69794, 503, 8012, 6391, 1340, 413, 12648, 1511, 7598, 20290, 13]
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Text | Token IDs

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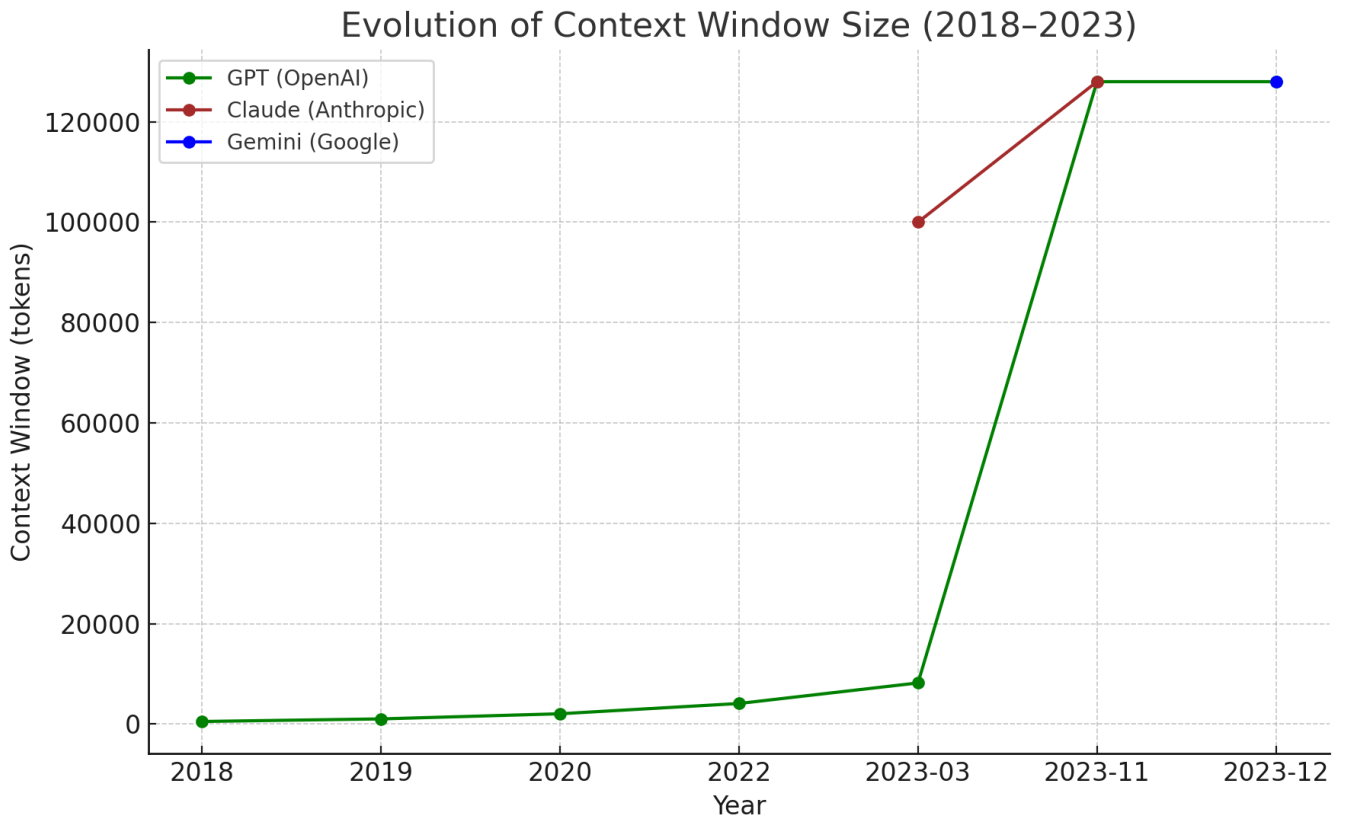

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Towards Infinite LLM Context Windows

It all started with GPT having an input context window of 512 tokens. After only 5 years the newest LLMs are capable of handling 1M+ context inputs. Where's the limit?

Krzysztof K. Zdeb · Follow
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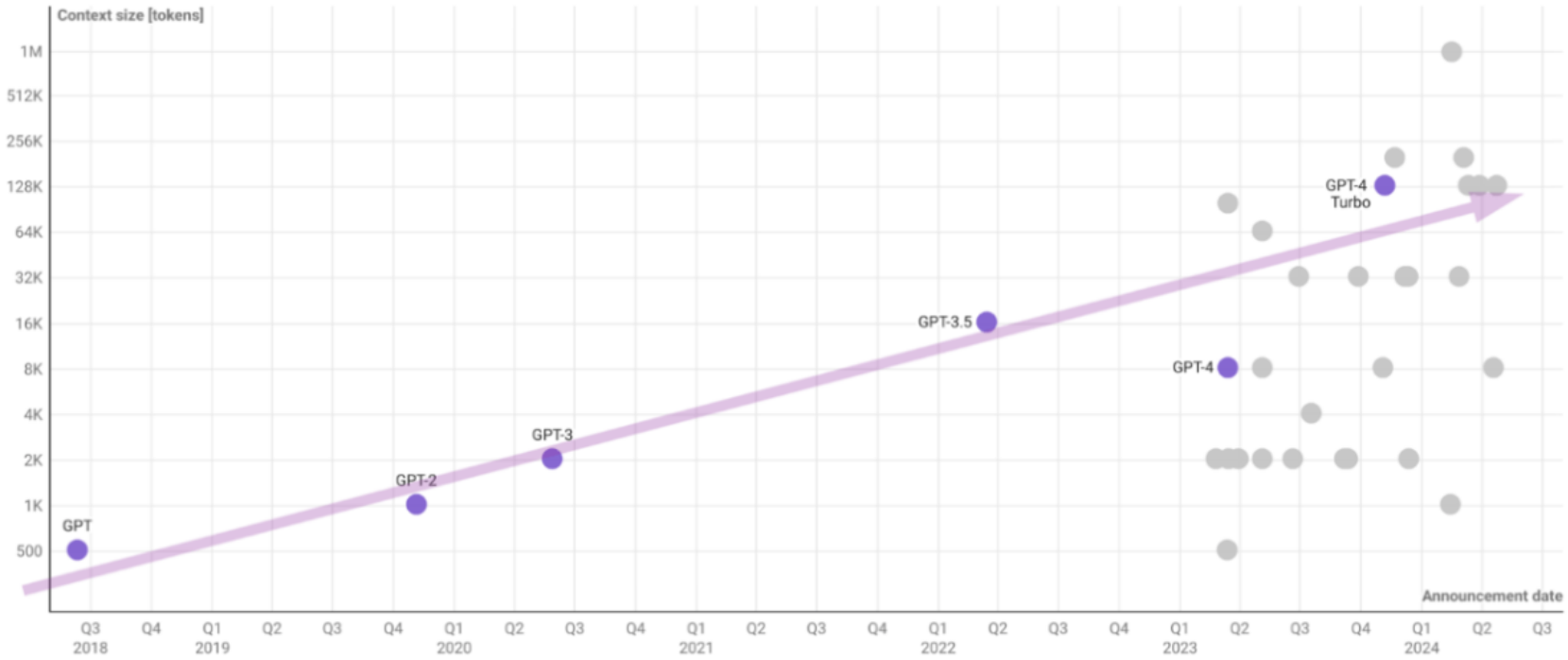

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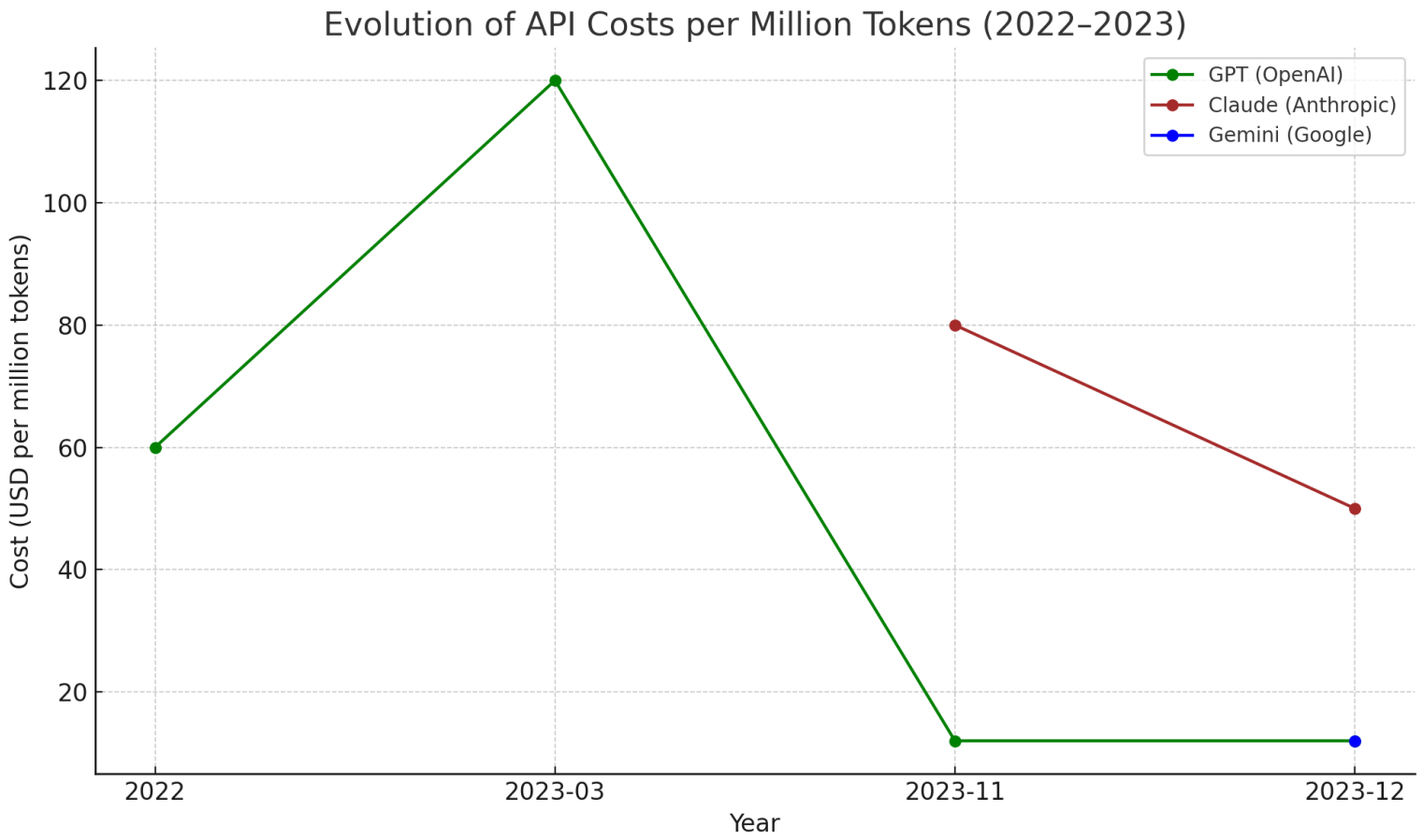

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1. From NLP to GenAI

Generative AI (GenAI) produced with large language models (LLMs) resembles human-created data, but…

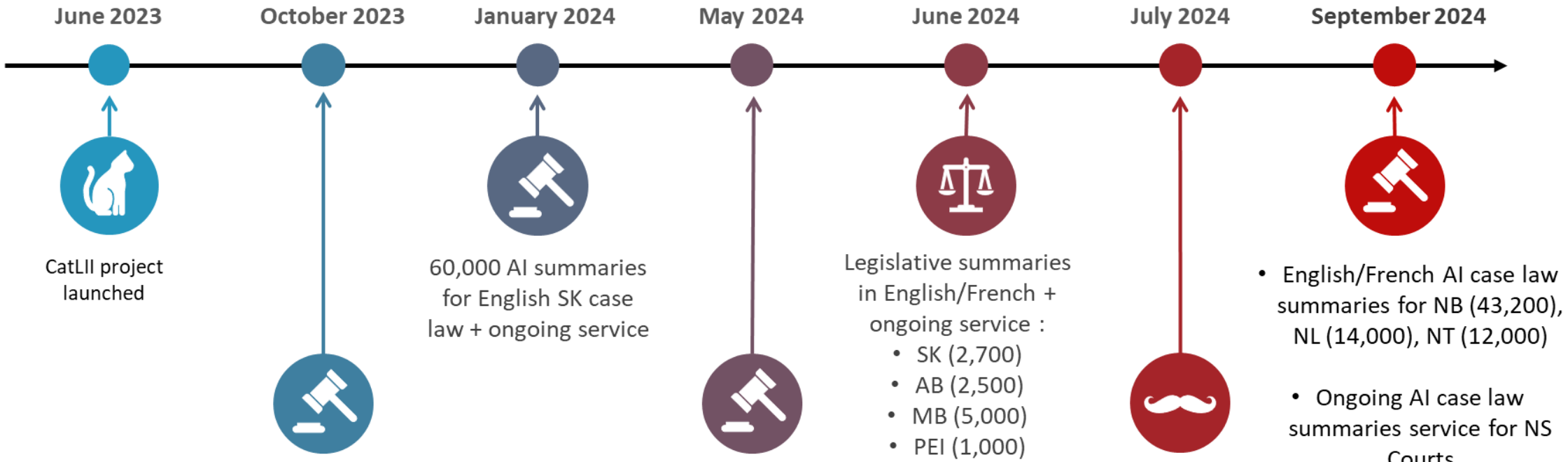
- Operates on probabilistic, non-deterministic models
- Does not aim to produce meaning
- Requires context to function properly

GenAI is good for straightforward document processing tasks

- Extracting data
- Summarizing information
- Drafting or reviewing short texts

GenAI is not independently effective for information retrieval

2. Lexum / CanLII GenAI Projects



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Mondal v. Kirkconnell (AI Case Analysis)

Mondal v. Kirkconnell, 2023 ONCA 523 (CanLII)

0 CONCURS

by CatLII — Lexum Lab
Nov 6, 2023

Re Imanpoorsaid (Analyse IA de l'affaire)

Re Imanpoorsaid, 2023 QCCA 1111 (CanLII)

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EF Institute for Cultural Exchange Limited v. WorldStrides Ca...

EF Institute for Cultural Exchange Limited v. WorldStrides Canada, Inc., 2023 ONCA 566 (CanLII)

0 CONCURS

by CatLII — Lexum Lab
Nov 2, 2023

4489705 Canada inc. c. Agence du revenu du Québec (Analyse IA...

4489705 Canada inc. c. Agence du revenu du Québec, 2023 QCCA 1346 (CanLII)

0 CONCURS

by CatLII — Lexum Lab
Nov 1, 2023

Obolus Ltd. v. International Seniors Community Care Inc. (AI ...

Obolus Ltd. v. International Seniors Community Care Inc., 2023 ONCA 708 (CanLII)

0 CONCURS

by CatLII — Lexum Lab
Oct 31, 2023

Air Palace Co., Ltd. v. Rotor Maxx Support Limited (AI Case A...

Air Palace Co., Ltd. v. Rotor Maxx Support Limited, 2023 BCCA 393 (CanLII)

0 CONCURS

by CatLII — Lexum Lab
Oct 30, 2023

Sauvetage Animal Rescue c. Ville de Longueuil (Analyse IA de ...

Sauvetage Animal Rescue c. Ville de Longueuil, 2023 QCCA 1329 (CanLII)

0 CONCURS

2177546 Ontario Inc. v. 2177545 Ontario Inc. (AI Case Analysi...

2177546 Ontario Inc. v. 2177545 Ontario Inc., 2023 ONCA 693 (CanLII)

Ville de Boisbriand c. Centre communautaire religieux hassidi...

Ville de Boisbriand c. Centre communautaire religieux hassidique, 2023 QCCA 1301

Lithium Royalty Corporation v. Orion Resource Partners (AI Ca...

Lithium Royalty Corporation v. Orion Resource Partners, 2023 ONCA 697 (CanLII)

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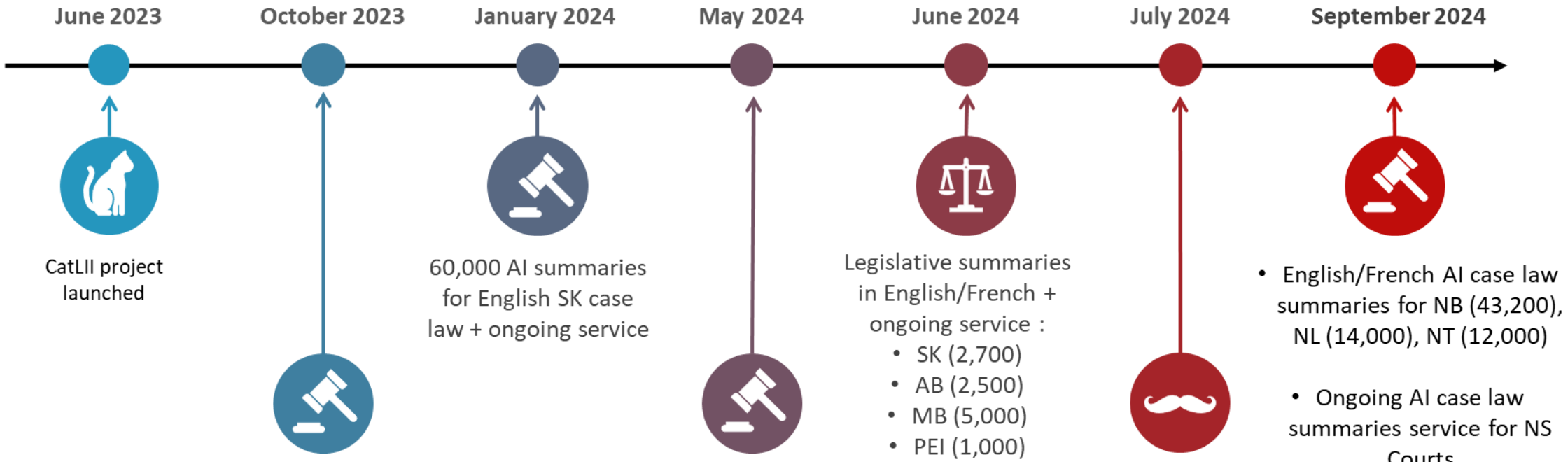

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Brandt Properties Ltd. v Sherwood (Rural Municipality), 2023 SKCA 5 (CanLII)

Facts

- The case involves property tax assessments for several commercial properties in the Rural Municipality of Sherwood (RM). The property owners, represented by the same tax agent, appealed their 2020 assessments to the Board of Revision (Board), arguing errors in the Saskatchewan Assessment Management Agency's (SAMA) assessment model. The Board dismissed the appeal, and the subsequent appeal to the Assessment Appeals Committee of the Saskatchewan Municipal Board (Committee) was also dismissed (paras 1-3, 5-9).

Procedural History

- 2022 SKMB 7, Regina: The Board dismissed the property owners' appeal against the 2020 assessments (para 3).
- Assessment Appeals Committee of the Saskatchewan Municipal Board: The Committee dismissed the subsequent appeal by the property owners (para 3).

Parties' Submissions

- Appellant: Argued that the Committee made material errors of law in its decision and that the matter should be remitted for reconsideration. They contended that the Board and Committee failed to apply the correct standard of review, did not properly consider the substance of the evidence, and improperly relied on decisions from previous years (paras 14, 22, 26, 34).
- Respondents: SAMA suggested that the standard of review issue was not raised with the Committee and therefore should not be a basis for appeal. They also argued that the Board's decision was reasonable and that no significant new evidence was presented to warrant a reversal of previous decisions (paras 15, 17-18, 28).

Legal Issues

- Whether the Committee incorrectly found that the Board of Revision had selected and applied the correct standard of review (para 12).
- Whether the Committee erred in law by failing to apply the reasonableness standard of review established in Vavilov (para 12).
- Whether the Committee erred in law by depriving the Appellant of its right of appeal by failing to remedy errors of law found in the Board Decision or by failing to address a ground of appeal (para 12).
- Whether the Committee erred in law by failing to find that the Board had improperly required the Appellant to demonstrate how the alleged errors and/or proposed remedy would impact the population as a whole (para 12).

Disposition

- The appeal was allowed.

Reasons

- Per Richards C.J.S. (Whitmore and Tholl JJ.A. concurring): The Committee made material errors of law by endorsing the Board's use of an incorrect standard of review, failing to apply the reasonableness standard of review as explained in Vavilov, and by improperly diluting the Appellant's right of appeal by requiring significant new evidence to reverse previous decisions. The Committee also erred by not recognizing that the Appellant's only obligation was to establish an error in the assessment of its property, not to demonstrate the impact on the entire population. The matter is remitted to the Committee for reconsideration with the direction that the Appellant is entitled to costs (paras 14-18, 20-24, 26-30, 33-37).

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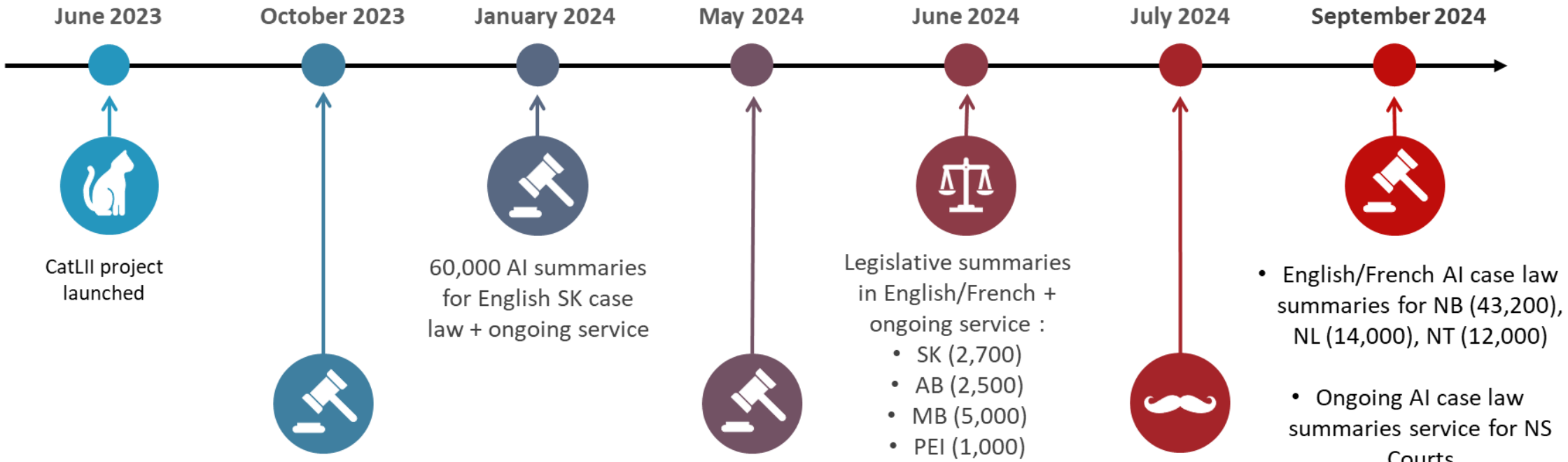

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Police Act, RSA 2000, c P-17

Overview

The Police Act of Alberta establishes a comprehensive framework for the organization, administration, and operation of police services in the province. It delineates the responsibilities and powers of various entities involved in policing, including ministers, government bodies, police services, and review boards. The Act emphasizes the importance of maintaining public safety, upholding justice, and ensuring that policing services are conducted in a manner respectful of community needs and legal standards. Key aspects of the Act include the establishment of the Law Enforcement Review Board, the creation of municipal and regional police services, and detailed provisions for handling complaints and disciplinary actions against police officers. The Act also outlines the roles and responsibilities of the Minister in setting policing standards and priorities, and it provides mechanisms for the establishment of independent agency police services.

Provisions' Outline

Definitions (section 1)

- Defines key terms used throughout the Act, such as "Board," "Chair," "commission," and various types of police services and officers.

Part 1: Administration (sections 1.1-8)

- Outlines the guiding principles for policing in Alberta, responsibilities of ministers and the government, and the establishment of the Director of Law Enforcement.

Part 2: Law Enforcement Review Board (sections 9-20.1)

- Establishes the Law Enforcement Review Board, detailing its composition, powers, and functions, including handling appeals and conducting inquiries.

Part 3: Police Services and Commissions (sections 21-33)

- Describes the structure and operation of provincial, municipal, and regional police services, including the establishment of police commissions and their responsibilities.

Part 3.1: First Nation Police Services (sections 33.1-33.3)

- Provides for the establishment of police services for First Nation communities through agreements, outlining their jurisdiction and application of the Act.

Part 3.2: Independent Agency Police Services (sections 33.4-33.94)

- Details the creation and governance of independent agency police services, including the roles of chiefs and the Oversight Board.

Part 4: Police Officers (sections 34-42)

- Specifies qualifications, appointments, and the authority of police officers, including disciplinary procedures and liabilities.

Part 5: Complaints and Discipline (sections 42.1-52.1)

- Covers the process for handling complaints against police officers and chiefs of police, including the role of the Public Complaint Director and procedures for appeals.

Part 6: General (sections 53-63)

- Includes general provisions related to police operations such as lock-ups, impersonation of officers, and service of documents.

Schedules 1-3

- Provide the oaths of office for members of police commissions, policing committees, and police officers, respectively.

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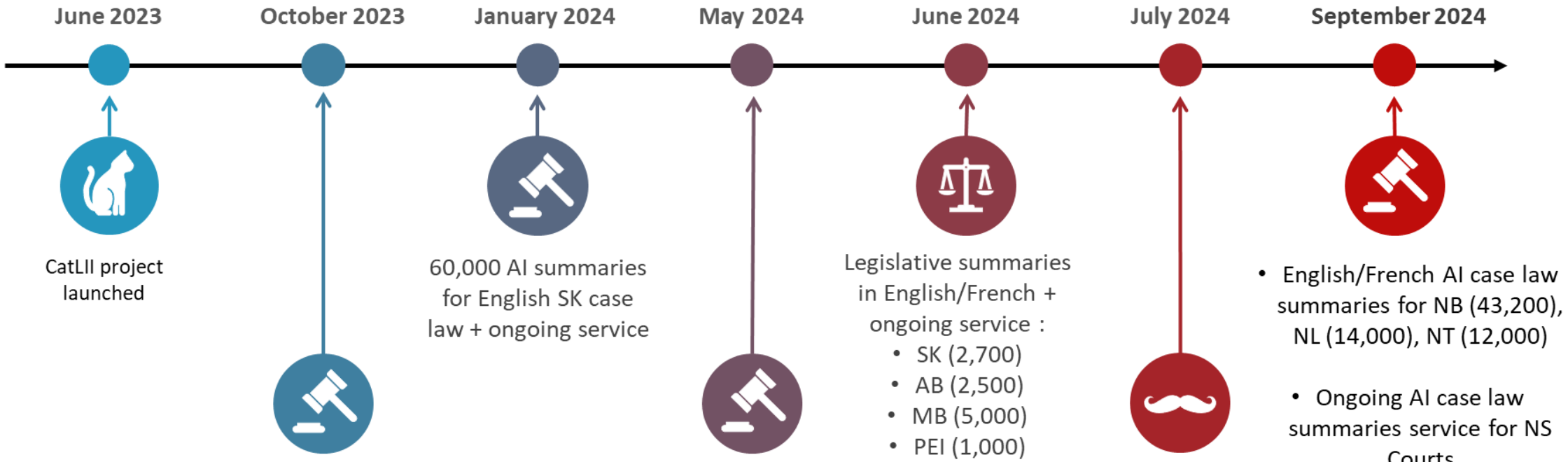

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Colville Lake Renewable Resources Council v Northwest Territories (Minister of Environment and Natural Resources), 2024 NWTCA 8 (CanLII)

Facts

- The case involves the management of the harvesting within the Sahtú region of the migratory Bluenose West Caribou Herd, including the implementation of community conservation plans. The dispute centers on the interpretation of section 13.9.4(b) of the Sahtú Dene and Metis Comprehensive Land Claim Agreement (Treaty) concerning the powers of wildlife management bodies under the Treaty (para 2).

Procedural History

- Colville Lake Renewable Resources Council v Northwest Territories (Minister of Environment and Natural Resources), 2023 NWTSC 22: Judicial review decision regarding the management of the Bluenose West Caribou Herd (para 1).

Parties' Submissions

- Applicant (Attorney General of Canada): Argued that Canada has a special interest in the interpretation of section 13.9.4(b) of the Treaty and will be directly affected by the Court's interpretation. Canada also emphasized the broader implications for the interpretation and implementation of the Treaty and other modern treaties, particularly in relation to the United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP) and the United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA). Canada asserted that its participation is necessary for the Court to properly decide the matter (paras 3-4).
- Respondents (Colville Lake Renewable Resources Council, Behdzi Ahda" First Nation, Ayoni Keh Land Corporation, Government of the Northwest Territories): Consented to the intervention by the Attorney General of Canada (para 5).

Legal Issues

- Whether the Attorney General of Canada should be granted leave to intervene in the appeal concerning the interpretation of section 13.9.4(b) of the Sahtú Dene and Metis Comprehensive Land Claim Agreement.

Disposition

- The application for leave to intervene by the Attorney General of Canada was granted (para 6).

Reasons

The Honourable Justice Jane A. Fagnan:

Justice Fagnan considered the factors set out in Yellowknife Public Denominational District Education Authority v Euchner, 2008 NWTCA 1 at para 5, and concluded that the application should be granted. The Court acknowledged that Canada has a special interest in the interpretation of section 13.9.4(b) of the Treaty and that its participation would provide a unique perspective on modern treaties, self-government rights, and the role of UNDRIP and UNDA in treaty interpretation. The Court also noted that the intervention would not cause delay, widen the issues, prejudice the parties, or transform the Court into a political arena (paras 3-6).

The applicant was permitted to file and serve an intervenor factum not exceeding 15 pages by September 27, 2024. The appellant and respondents were allowed to file and serve a written reply to the applicant's submissions, not to exceed 5 pages each, by October 11, 2024. The panel hearing the appeal would determine whether to grant permission for the applicant to present oral argument and any associated time limits (paras 7-8). Any costs associated with the application would be addressed at the appeal hearing (para 9).

Ryland v Public Service Alliance of Canada, 2022 NWTTC 3 (CanLII)

Facts

- The Plaintiff, a unionized employee, alleges that he rented his vehicle to the Defendant, Public Service Alliance of Canada (PSAC), for a construction project in February 2020. He claims that PSAC agreed to pay him $20 per hour for 12 hours, totaling $240, but has refused to pay. PSAC denies the existence of such an agreement and argues that the dispute falls under the collective agreement between PSAC and the Canadian Union of Labour Employees (CULE) (paras 1-4).

Procedural History

[Not applicable or not found]

Parties' Submissions

- Defendant/Applicant: PSAC argues that the Plaintiff's claim is ultra vires of the court's jurisdiction as it arises from the collective agreement and should be resolved through arbitration, not the courts (para 4).
- Plaintiff/Respondent: The Plaintiff contends that he entered into a separate commercial agreement with PSAC for the rental of his vehicle, which falls outside the scope of the collective agreement (paras 17-18).

Legal Issues

- Whether the court has jurisdiction over the Plaintiff's claim.
- Whether unionized employees can enter into separate contracts with their employers.
- Whether disputes arising from such separate contracts require arbitration under the collective agreement.

Disposition

- The Defendant's application for summary judgment is dismissed (para 43).

Reasons

Chief Judge Robert Gorin:

- Jurisdiction and Summary Judgment: The court has the authority to hear applications for summary judgment under the Civil Claims Rules of the Territorial Court, which incorporate the Supreme Court Rules (paras 6-9). The court must determine if there is a genuine issue requiring a trial (paras 10-14).
- Separate Contracts: Unionized employees can enter into separate contracts with their employers unless prohibited by the collective agreement or applicable labour code. No such prohibition was found in the collective agreement or the Labour Code of Canada (paras 24-26).
- Arbitrability: The court must determine if the dispute arises from the collective agreement. If it does, it falls under the exclusive jurisdiction of the labour relations system (paras 28-30). The Plaintiff's claim, based on his affidavit, appears to be a separate commercial agreement and not a claim for a vehicle allowance under the collective agreement (paras 31-41).
- Conclusion: The court has jurisdiction over the Plaintiff's claim as it falls outside the ambit of the collective agreement. The application for summary judgment is dismissed, but no findings are made regarding the ultimate merits of the Plaintiff's claim (paras 43-44).

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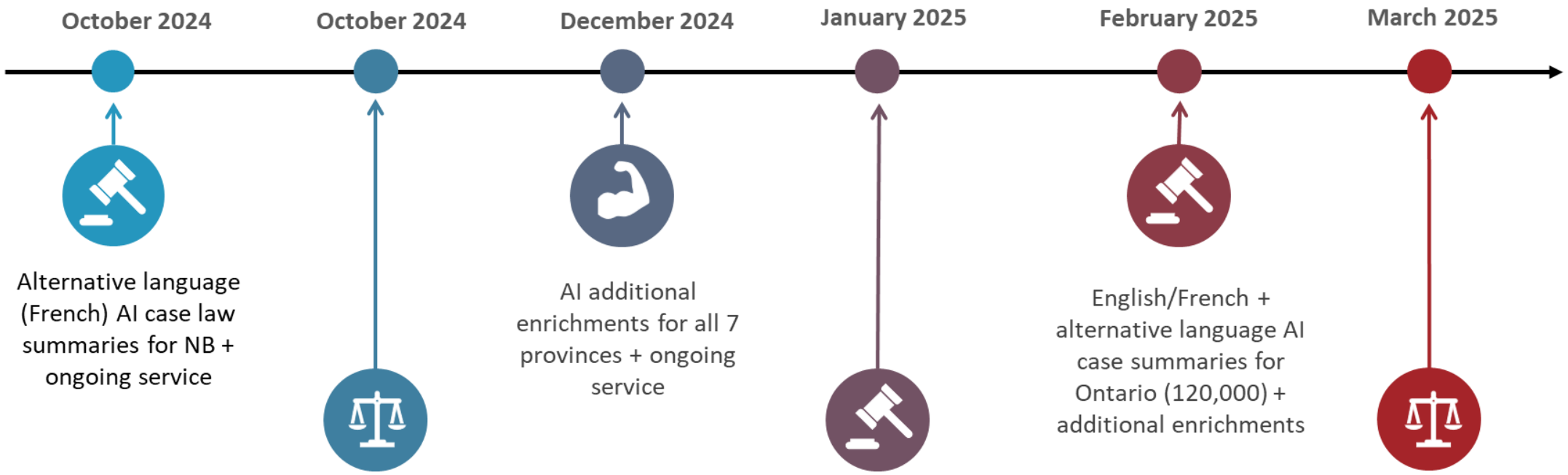

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Lapointe et Cie minière Québec Cartier, 1989 CanLII 6959 (QC CALP)
Commission d'appel en matière de lésions professionnelles du Québec — Québec
1989-01-16 | 15 pages | cité par 9917 documents

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Constitutional law — *Charter of Rights — Fundamental justice — Presumption of innocence — Reasonable limits — Section 33.1 of Criminal Code p...*
Constitutional law — *Remedy — Declaration of invalidity — Whether declaration of unconstitutionality issued by superior court pursuant to s. 52(1...*
Criminal law — *Appeals — Appeals to Supreme Court of Canada — Jurisdiction — Accused convicted of indictable offence at trial — Court of Appeal setting asid...*

The Court allowed an appeal against quashing a seizure before judgment, holding that the right to partition family patrimony is transmissible to a spouse's heirs, and thus procedural remedies are also available to them. The Court found the lower court erred in its restrictive interpretation and in prematurely addressing prescription, which should be reserved for the merits of the case.

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3. Content generation workflow

Trial-and-error approach

Prompting

- No foolproof prompt writing tool or technique
- Clear and unambiguous directions
- Terms of art, not newly defined concepts
- Missing or unreliable information management
- Context
- Chain of thought

A rigorous content generation workflow must be implemented

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Playground

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Prompts

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Canlii Reference 2000 NBCA 56 (CanLII)

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Budget Code INFO-OPENAI

Reload

Result Prompt Metadata Document

[The following was generated directly from the original decision written in French]

FACTS

The appellant, a seasonal worker employed by the respondents for 15 years, was dismissed without reasonable notice. His position was filled by a family member of the respondent. The appellant sought compensation for the financial loss incurred due to the lack of adequate notice (paras 1, 4-8).

PROCEDURAL HISTORY

- Cour du Banc de la Reine, June 26, 2000: The trial judge awarded the appellant damages equivalent to six months' notice, totaling $38,018.40 (para 1).

PARTIES' SUBMISSIONS

- **Appellant**: Argued for a longer notice period and increased compensation, claiming the trial decision did not adequately reflect the legal principles and that the awarded damages only covered half of his financial loss (para 2).
- **Respondents**: Contended that the dismissal occurred earlier than determined by the trial judge, which would reduce the notice period and damages owed (para 3).

LEGAL ISSUES

- Whether the appellant was entitled to a reasonable notice period for his dismissal.
- Whether the trial judge erred in determining the date of dismissal.
- Whether the trial judge erred in calculating the notice period and corresponding damages.

DISPOSITION

- The main appeal was allowed, and the cross-appeal was dismissed.
- The respondents were ordered to pay the appellant $76,036.80 in damages, with interest at 6% from October 4, 1996, until the date of judgment (headnotes).

the SUMMARY STRUCTURE.

Inspiration, Not Duplication

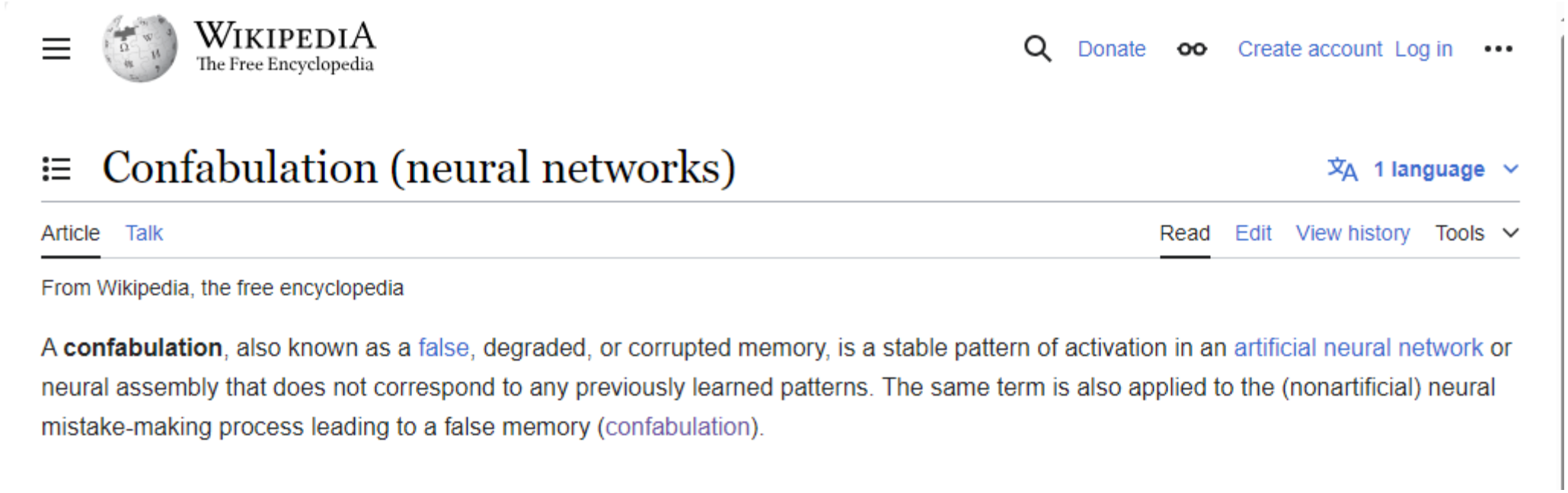
The examples provided between the tags and serve to enrich your understanding and spark creativity. They are intended to inspire your response and demonstrate the depth and breadth of possible summaries. While you may draw inspiration from these examples, it is crucial that you create original content. Direct replication, mere rephrasing, or repurposing of these examples in your SUMMARY is not allowed. Strive to use the examples as a springboard for generating unique and insightful summaries that reflect your own interpretation and synthesis of the information provided.

Indicate missing information with “(N/A)”

If any SUMMARY element cannot be reliably found in the DECISION TO ANALYZE's text, indicate it by writing “(N/A)” next to the element.

Cite paragraph numbers

“This act demonstrates that the Government of Manitoba is sensitive to the hardships of disabled persons.”



lexum

CanLII

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You are a Canadian case law editor responsible for creating headnotes for decisions from
various legal bodies. These headnotes are intended to facilitate legal research for lawyers.
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The text of the DECISION TO ANALYZE written in French, formatted in plain text:
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{{document}}
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lexum

CanLII
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```
## Reproduce named entities and cited authorities in their original language

Identify names of companies, organizations or other named entities in the DECISION TO ANALYSE.

Identify titles of acts, regulations, orders, commentary as well as case names and their citations
or other cited authorities in the DECISION TO ANALYSE.

In your SUMMARY, when you refer to the named entities and cited authorities identified above,
reproduce them in their original language without translating them. Add “[sic]” after the named
entity or cited authority to make it clear to the reader that this phrase is provided as found in
the original document.
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3. Content generation workflow

1. Determination of the expected content and format
2. Writing a prompt and perform preliminary testing
3. Project-specific testing
   - Terms to monitor
   - Structure and format validations
   - Post-processing
4. Setting up the product-specific workflow
5. Simulation of the production launch
   - Detect monitored terms
   - Back to step 2 and 3 as needed
6. Monitoring ongoing and past generated content

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4. The future

GenAI with fine-tuning

- Provide the LLM with actual input/output examples besides its context window
- More control over the generated content, with simpler prompts

MLOps – LLM Monitoring and Observability

- Using an LLM to assess the quality of what it produces
- Letting the LLM improve and adjust the prompting by itself

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5. Conclusion

Content produced by GenAI systems

- Is not in and of itself meaningful
- May appear accurate and truthful at first glance, while being biased, incomplete, erroneous, or even false

Best practices for using GenAI systems

- Choose an appropriate task and tool for professional use
- Experiment with the tools to learn their benefits and limits
- Provide clear, precise instructions and context
- Keep humans involved!

lexum

CanLII

Civility as a Tactical Tool

by

Eugene Meehan, K.C.*

for

Yellowknife Bench and
Bar Education Event
Yellowknife
Friday, November 1, 2024

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Revised Sept. 5, 2024

Contents

1. Introduction [1]

Our profession is an adversarial profession, and gladiators for justice do not always follow the motto in the movie Gladiator: "Strength and honour". **Some lawyers use litigation as a flamethrower.**

You know anyone whose go-to litigation/negotiation strategy is to out-asshole the other side?

How to recognize an a-hole? You know the traits, which include:

- Narcissism. (I'm the most special of all of you.)
- Impatience. (If I want it, I want it now.)
- Aggressiveness. (Get out of my way.)
- Entitlement. (That's mine. Because it is.)
- Delusion. (Who are you calling an asshole?)
- Obliviousness. (Are you crying?)
- Also: Utter predictability[2].

Do any of us personally knows lawyers who, given a choice, we'd rather be smacked across our heads with an annotated *Constitution* for two days straight than be snowed-in with them in a remote cabin for a weekend?

We all know folks who practise/espouse uncritical conformity to what they consider group norms, believing others will thereby think better of them; that way they can also dissipate any sense of personal responsibility.

The bottom line is: there are some people you simply will not be able to change. What you *can* change is your *attitude* in dealing with such people, and also your *strategy* in dealing with such people.

There is an eminently practical reason you should give up trying to change other people, and instead change *your* attitude when *you* deal with such people: the folks who *should* be reading this, won't. The folks on the other side of the file, they won't change. Stop trying to do so.

2. Civility as a tactical tool

The adversarial nature of the legal system directs lawyers to a radical kind of individualism in a contest to trump rights. This context can foster patterns of discourteous, thoughtless, and rude behaviour towards one another:

[1] Ideas for this paper taken from writer's personal experience and other material, including in *Select Bibliography*, and in quotes from other material therein.
[2] Ross McCammon, *How to Deal with Assholes*, Esquire, November 2015, p. 42

- the talking down (by a senior lawyer to an opposite junior lawyer: "You're not a partner there yet?")
- the belittling (the lawyer on the other side says "How are articles going?")
- the sexist behaviour ("Are you the lawyer or his secretary?")
- the threats ("If you don't do XYZ by Friday, I'll report you to the Law Society.")
- the over-your-head game (calling someone "higher" up in your firm)
- during discoveries the constant interrupting, bickering, answering for the witness, and the continual and deliberately evasive "I'll take that under advisement"
- the satisfaction-of-undertakings document dump on a Friday at 4:50 p.m.
- the service on your receptionist-on-her-way-out-the-door at 4:55 p.m. (so you get it the following Monday)
- the 2-page letter attacking you personally, copied to your client, copied to his client (or trying to be clever, attacking your legal assistant personally)
- being told that the other sides' response to my court motion was to "F___ off."
- abuse of procedural motions/processes (under the guise of zealous advocacy of course)

One judge has written that the problem is exacerbated by:

- lawyers telling clients only what they want to hear
- clients shopping their cases, and being told how and when they'll succeed, instead of risks
- lawyers ("many" the judge says) believing the hallmark of the adversarial system is keeping relevant information from the other side for as long as possible
- lawyers who take the position "I won't cooperate until the *Rules* say I have to" or whose attitude is "*You'll have to drag it out of me*".

3. Trying to legislate civility is impossible—not to mention impractical?

I suggest that instead of thinking of civility as something that must be regulated or that will come naturally, we rather think of civility and courtesy strategically, as tools.

Sincere civility is the expression of a state of mind, a sign of character and personality. But more significantly, civility is a tactical tool all too often overlooked by lawyers. The practice of civility is usually undertaken on the basis of individual lawyers voluntarily restraining their impulses in favour of the greater good. But seen another way, however, civility is an inherent component of any legal strategy: in the same way that **good oratory is a good person speaking well, so good lawyering is a good person acting well.**

4. A time-waster, a money-waster

A common objection to civility is that it diminishes advocacy for the client. Yet, the reality is that incivility disserves the client because it wastes time and energy. Billable hours that should be spent working on the case are wasted by working the opposing counsel over.

An English proverb says: "the robes of lawyers are lined with the obstinacy of clients." Is it also that the obstinacy of one lawyer lines the pockets of another—and the escalating tensions are matched by escalating fees?

5. A strategic option

Don't be civil because it's the proper thing to do. Be civil because it's the strategic thing to do.

6. Ten points for using civility as a strategic tool

No. 1: To most judges bad behaviour makes bad advocacy

Belligerent and discourteous behaviour in the eyes of strong judges is not persuasive. In fact, discourtesy in delivery can undermine an otherwise strong argument:

- "Incivility does not go unnoticed. The lives of judges are rather circumscribed. Often, we only have each other to talk to. In our region, we have lunch together almost every day. Invariably, the lunch discussions are about lawyers. We can't help ourselves. Occasionally, we talk about good and effective lawyers. More often, we talk about poor lawyers and poor advocacy. Often, the poor advocacy is rooted in incivility. I think that all judges will agree that incivility is just as bad advocacy. Why? Because it is distracting, wasteful and guaranteed to leave a negative impression with the judge".[3]

Points are won by being personally attacked, and you standing your ground, saying little or nothing, and instead of responding to the attack, responding only to the issues.

- "So, what can you do when you encounter or witness incivility? If you are the target of incivility, frustration and anger are among the immediate reactions. The best strategy is to 'kill with kindness'. Take a deep breath. Talk softly. Your reasoned and polite approach underscores the uncivil conduct. They might even pick up on the fact that their behavior [sic] is inappropriate. Probably not. Others, including judges, will.[4]

Judges know some people blow out other people's candles so theirs burn a little brighter. Remember: **judges are just lawyers with a whistle**—they know what it's like to be a lawyer.

[3] Hon. Danial Newton, *Incivility=Bad Advocacy*, The Litigator, December 2017, pp. 31-33.
[4] *Ibid*.

As Justice Goudge (formerly Ont. C.A.) has said (quoting): "Never argue with an idiot; they'll drag you down to their level, and beat you with experience".

And, Judge Richard Mills: "… there are two very difficult things to achieve in this world. One is to make a good name for yourself. The other is to keep it." [5]

And also, be respectful to court staff (actually, why not be respectful to *everyone*?): "Counsel who are rude and unpleasant with court staff are not doing themselves any favours either. The court services officers, registrars and reporters can be your best friends and provide you with some insight into your judge and help you with any courtroom protocol questions you may have. If you are difficult with court staff, trust me, we will hear about it." [6]

No. 2: Incivility has a price

The principles of civility may not have the force of law, but reported cases indicate that advocates who prefer Rambo-style intimidation eventually do so at their peril.

In one case[7], of the Ontario Superior Court gave a costs order of $25,000 (inclusive of fees, disbursements, and GST) on the basis that "substantial indemnity costs are reserved for cases in which the court demonstrates its disapproval of the party's conduct", concluding "this is one of those rare cases".

The motions court judge (Regional Senior Madam Justice H. M. Pierce) made the following points:

- A law clerk at a law firm filed an affidavit exceeding 40 pages, replete with scandalous allegations about the behaviour and personal life of a solicitor
- Also alleged the firm's articling student was complicit in an alleged failure to practise professionally by a solicitor
- The inclusion of irrelevant and scandalous material in the record had the effect of greatly lengthening the proceeding
- It maligned the professional reputations of both a solicitor and student
- It is reprehensible to make irrelevant and scandalous allegations against a lawyer in a public record and persist in these allegations even when they have been rejected by the court
- "A lawyer's reputation is delicate. He or she works for a lifetime to establish it. It can be shattered in a moment by careless or vengeful pleading…"
- "The reputation of a lawyer for integrity is fundamental to his ability to earn a living in a practice. It is his calling card in the community. When a lawyer's reputation is damaged, so too is the personal credibility he brings to the court…

[5] The Bencher (Magazine of the American Inns of Court), September/October 2008.
[6] Hon. Danial Newton, *Incivility=Bad Advocacy*, The Litigator, December 2017, pp. 31-33.
[7] *1013952 Ontario Inc. et al v. Sakinofsky, Rosso, Lawyers Professional Indemnity Company, et al,* 2010 ONSC 411

Deveau v. Fawson Estate[8]:

- $3250 costs payable by a lawyer personally
- for "…habitual failure to respond or acknowledge reasonable requests from opposing counsel; …. failure to communicate with the court; … filing of an affidavit that does not meet the basic requirements of the *Rules* or the law of evidence…"

Beatty v. Wei[9]:

- costs ordered jointly against lawyer and client for "improper" conduct during a discovery
- objecting to proper questions
- improperly answering questions on behalf of the client
- telling counsel on the other side what questions to ask.

Best v. Ranking[10]:

- lawyer to pay costs of over $84,000 personally under Rule 57.07
- and appeal costs of a further $30,000.

Saleh v. Nebel[11]:

- "[p]laying uncivil, tactical, inappropriate, old-school, trial by ambush games…"
- successful defendant is "deprived of a $100,000 costs award to which it would otherwise have presumptively been entitled".

Sandhu v. Sidhu[12]

- "special costs" to be paid by counsel personally
- for "improper conduct in the proceeding that is readily described as reprehensible because it was persistent and worthy of punishment" (and set out by the judge as (a) through to (j)).

Catford v. Catford[13]

- *Galganov v. Russell (Township)*, 2012 ONCA 410 quoted as setting out the "legal test for when costs will be awarded against a solicitor personally".
    1. whether the lawyer's conduct caused costs to be incurred unnecessarily.
    2. consider, as a matter of discretion and applying the extreme caution principle, whether, in the circumstances, the imposition of costs against the lawyer personally is warranted.

[8] *Deveau v. Fawson Estate*, 2013 N.S.C.A. 54
[9] *Beatty v. Wei*, 2017 ONSC 2922
[10] *Best v. Ranking*, 2015 ONSC 6269
[11] *Saleh v. Nebel*, 2015 ONSC 3680. See also at Ont. C.A. & Div. Ct.: 2016 ONCA 948, 2018 ONSC 452 respectively.
[12] *Sandhu v. Sidhu*, 2023 BCSC 1860
[13] *Catford v. Catford,* 2014 ONSC 133

- the court sets out (para. 12) three "failings" by "both counsel" on one side and three further by one of those two counsel.
- $17,740.44 payable by both "within 30 days".

Smith v. Bruised Head[14]

- a series of failings, including "repeatedly failed to comply with … undertakings" and failure to appear at a scheduled Judicial Dispute Resolution meeting
- the lawyer "was provided an opportunity to consider the issue of costs against him personally", and "concedes that a measure of costs was in order" (para. 14)
- $700, $350 to each of the two Applicants, and "the clerk's office [directed to] draft a costs order…" (para. 19)

Law Society of Ontario v. Guiste[15]

- "engaged in professional misconduct when … he failed to treat the court and others with courtesy and respect, failed to serve his client to the standard of a competent lawyer, and acted without integrity" (para. 1)
- $225,000 costs, to be paid personally in equal yearly payments of $45,000, interest on any overdue amount to accrue at 7% (paras. 118-120)

No. 3: Civility in communications

Every communication with opposing counsel can be an opportunity for employing strategic civility. Lawyers have long memories—judges too. Civility frames common expectations about trust and respect in seeking resolutions through dialogue.

As one lawyer said, without mutual confidence, there cannot be an effective meeting of the minds as a way to resolve social disputes and problems. Lawyers often wind up talking past each other or sinking to the lowest common denominator to strike a short term advantage. What's ultimately important, and ultimately strategic, is doing what is right regardless of the circumstances and not being deliberately distracted from your goal by what the other side does.

No. 4: Avoiding acrimonious language

Do not attribute bad motives or improper conduct to opposing counsel unless it is relevant to the issue at hand and even then only when well-founded and provable.

In every single interaction – in your law day-job and otherwise – you have choices. Life doesn't give you lemons; it gives you choices.

In Ontario the matters which formed the largest class of claims made against lawyers are from categories such as libel and slander allegations by lawyers against lawyers, claims that counsel should pay the costs of proceedings personally and claims arising from a breakdown in the solicitor/client relationship.

[14] *Smith v. Bruised Head,* 2024 ABCJ 155
[15] *Law Society of Ontario v. Guiste,* 2024 ONSTH 78

For example, the following letter cc'd to the other side's client may be defamatory:

> "I notice that you have still not delivered a Statement of Defence on behalf of [ ]. My friendly advice to you is that you are being negligent.
> I do not wish to take advantage of your apparent lack of knowledge. I will give you one last chance and give you some homework to do. Please refer to Rule 16.08 of the Rules of Civil Procedure and to any textbook on Civil Procedure on service of court process. You will no doubt realize that your insistence on "personal service" is in error.
>
> The letter you wrote me copied to your client misrepresents what happened to the point of untruthfulness.
>
> In any case you must deliver the Statement of Defence on or before [ ]. If you fail to do so, you may regret the consequences."

No. 5: Setting a flexible tone

Make efforts to avoid scheduling conflicts. Agree to reasonable requests for scheduling changes. Do not attach unfair conditions. Remember: what goes around comes around. **You smack someone today, you'll get smacked later.**

When consistent with your client's interests, co-operate with opposing counsel in an effort to avoid litigation and resolve litigation that has already commenced.

Return telephone calls and answer correspondence promptly. Not because that's the proper thing to do but because the other lawyer, her client, your client, will report you to the Law Society. That means, even when you're vindicated, you have to respond to that complaint letter from the Law Society in a proper, full, and therefore time-consuming way.

Don't deliberately schedule the service of papers to cause disadvantage to your opposite number. Do not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

What if you're dealing with I'll-never-change-my-mind-and-you-can't-make me? Or, a bit lower on the scale, am-just-plain-stubborn-and-I-know-it?

Try this:

- it's important to understand why people are often stubborn. For many, their beliefs and opinions are part of their identity. Challenging those beliefs can feel like a personal attack. It's like telling someone their favourite colour is wrong. They're not just defending a colour; they're defending a part of themselves.

- when you encounter a stubborn person, start by listening. Really listen. This doesn't mean you have to agree with them, but showing that you're willing to hear them out can lower their defences. It's like giving someone a microphone at a concert; they're more likely to sing than shout.

- next, find common ground. Even if you disagree on major points, there's usually something you can agree on. It's like finding a mutual friend at a party; it creates a sense of connection and can make the conversation smoother.

- and, when presenting your point of view, use "I" statements instead of "you" statements. For example, "I feel that…" instead of "You're wrong about…" This way, you're sharing your perspective without directly challenging theirs. It's like talking about the weather; it's a way to share information without making it a debate.[16]

No. 6: In the Court of Appeal, (or anywhere, really) let go the little stuff

Minor misstatements of the law or facts by the Court below aren't going to win your appeal. Don't set out just to whack the Court or judge below, rather identify major mistakes and criticise the rationale of the lower court's decision.

Don't whack the other side either - use courtesy. Advice given to Ed Bayda, former Chief Justice of Saskatchewan, during his first summer job (selling "waterless" cooking pots door to door): "**People buy things from people they like**."

It's like making the decision not to swat that fly because the fly will fly off on its own. Save your energy for bigger stuff.

No. 7: Dealing with stress

Much has been written about how stressful the practice of law has become. One of the most effective ways of handling stress is simply to avoid creating unnecessarily stressful interactions with colleagues. Strategic friendliness is a way of doing this. Instead of wasting time trying to think of how best to create a detriment to the other side, consider what one lawyer has termed an "ethic of care" which is described as "considering the needs of all the parties involved as well as their relationships and attempting to find a solution that will satisfy everyone, rather than selecting a winner and a loser."

No. 8: Practical reasons why civility is important

The harder you argue, the less persuasive you are. The more you press, the more you hype, and the more you urge, the more sales resistance you create and the more you start to sound like the guy from *Fred's Water Beds* on Saturday night TV.

Real persuasion takes place when the reader thinks the conclusion is his or her own idea. Your job as an advocate is to help the judge find the right ideas herself that will lead her to decide the case your way. **Offer a reasoned solution to the judge instead of arguing**: here's why I am right and here's why you the judge must agree with me. **Change your overall strategy over to the following: here's the problem, but here's also a reasoned solution. It works better - and you'll win more.**

[16] *How to Deal With Stupid People*, Kevin Carrillo, p.25, December 18, 2023

One lawyer has written that the most important trick about good advocacy is the trick of abandoning trickery. You can be the greatest legal orator the legal system has known, but if you're not credible it simply doesn't work. A child can win an argument with very simple language that innocently reveals the truth, or innocently reveals the logic. People win arguments because they are believed.

No. 9: Never respond in kind

As difficult as this may be, never resort to similar conduct, you open yourself to counter-charges or worse, damage your own credibility. Make a practice of preparing yourself in advance of the next communication and anticipate the situation. This will allow you to control your emotions and responses.

Remember the three Pig Rules:

Pig Rule # 1: **Never wrestle with a pig—you only get dirty; and the pig enjoys it**.

Pig Rule # 2: **Never try to teach a pig to dance – it wastes your time; and it only annoys the pig.**

Pig Rule # 3: Never try to teach a pig to whistle – it won't whistle; and eventually it'll get pissed off.[17]

[17] Danny Shook, Brevard, North Carolina.

You remember Scotty on *Star Trek*? He'd put up a Force Shield around Starship Enterprise? That's what holding-back-patience is. Protects you from getting agitated by what folks say/do. Important, because you need to give your brain time to switch from *react* mode to *respond* mode (and sometimes respond mode is a big fat zero – you do *not* respond).

As the learned jurist Jay Z says "A wise man told me don't argue with fools. Cause people from a distance can't tell who is who". [18]

Remember the obvious: "Clients, not lawyers, are the litigants." [19]

To avoid responding the same way, simple technique I have used is not to respond directly to the incivility, not to make a statement, but rather be interrogatory; ask a question: "Why would you do that?". They will not give you a straight answer of course, but the clear subtext to the question is this: I know what you are up to.

No. 10: Ten practical tactical tools

Prepare yourself strategically for confrontations with incivility.

Ten tactical tools to respond to incivility:

1. **Insulted/baited**

   when opposing counsel insults or baits you in telephone conversations simply inform him/her that unless they agree to be civil, all future communications must be in writing.

2. **The constant interrupting shtick**

   when the other side is constantly interrupting discoveries or cross-exams on an affidavit with silly objections (i.e. the know-it-all, think they have a Ph.D. in Everything), try to create a transcript describing the reasons you are prematurely adjourning until you can get a ruling on the appropriateness of the conduct of opposing counsel. You can also inform opposing counsel that you will be asking for costs. And, best way to deal with the know-it-all Ph.D. folks? Listen (i.e. do *not* interrupt – only gets worse – they *want* you to interrupt them); nod; move on. And if it's not them, it's their cousins – the Drama Queens and Kings. You *know* them. You could make a list. Everything's a crisis. Got one in your firm?

3. **Needless abuse**

   when opposing counsel is being needlessly abusive, I just sit back and say, "Go ahead, get it off your chest. When you're finished, I've something to

[18] Harvey Schachter, *How to fend off those toxic people*, Globe and Mail, January 11, 2015.
[19] ABA 1908 Canons of Professional Ethics.

add." **Patience is idling your engine when you feel like stripping your gears.**

4. **They get personal**

   when your opposite number says you don't belong in the practice of law, says you don't know what you are doing, or insults the Law School where you received your degree; exude self-confidence and, with exaggerated humility, say something like "well in your mind you may be right, but I'm here to stay and it's a problem you will have to learn to live with." Your own self-esteem does not depend on affirmation from this person. **Accept that some days you're the statue, and some days you're the pigeon.**

5. **They talk over you**

   when a lawyer consistently talks over you, wait until they take a breath, then say: "Listen, let's make a deal: when you're talking, I'll listen and not interrupt; but when I talk, the deal is you too listen and not interrupt." If, when they don't (inevitably) abide by the deal, simply remind them (on the record).

6. **They shout over you**

   when a lawyer I know (later a judge) gets shouted over in discoveries her standard response is to say: "Shouting your questions and your responses doesn't give the force of your statement additional weight beyond that of additional noise. Madame Reporter we'll take a 10 minute break so Mr. X may compose himself", and walks out with the client. And the transcript so records.

7. **Anticipate the objections**

   another lawyer I know tries to figure out in advance each objection he thinks the other lawyer will make during the discovery/exam-on-affidavit, whether his client is being examined or vice versa, whether the objections are polite or impolite, then types his detailed responses into his laptop, and when the objection comes, he reads it into the transcript. When the inevitable motion to produce/answer comes, the transcript always makes him look like a star.

8. **The "shocked and appalled" missive**

   when you get a letter full of dictated invective, the person sending it to you wants you to be shocked and appalled and respond the same way. Don't. Respond, saying only: "I am in receipt of your letter of [date]." Don't sign it yourself, have your secretary initial it. **A personalized attack letter from an attack-dog lawyer has all the credibility of a disbarred lawyer on a book tour.** Don't join the book tour.

9. **When it gets extreme**

   respond to extreme hostility and baiting (as one Alberta judge did when called a "Motherf___g b_____d" by an accused) with "Lucky guess".

10. **They are "none the wiser…"**

    and last, hope for the opportunity that once in your legal career another lawyer (or perhaps a judge) will say to you: "Mr./Ms. ____, I have read your material and I must tell you I am none the wiser"—just so you can respond: "Perhaps, your Honour, but certainly better informed."

11. **One more – How to deal with the illogical mind/argument?**

    "Dealing with people who argue illogically can feel like trying to catch a fish with your bare hands – slippery and frustrating. You present facts, and they slip through the gaps of their reasoning like water.

    … First, it's important to recognize that you're not dealing with a lack of information; you're dealing with a different way of thinking. An illogical argument is like a house built without a plan; it might look okay from a distance, but up close, it's a mess. Your job is to point out the missing bricks and the shaky foundation, but in a way that doesn't make the other person feel attacked.

    On technique is to use simple questions. When someone makes an illogical statement, ask them to explain it. Say, 'I'm not sure I follow, can you explain that a bit more?' It's like asking someone to explain the rules of a game."[20]

7. What if the incivility is coming from the Bench?

First piece of advice is from a judge:

> "If you have been around courtrooms long enough, you know that judges aren't immune to the incivility virus. I would like to think that most judicial bad behaviour is situational – a response prompted by poorly prepared counsel, time-wasting counsel, and counsel who do not know when to sit down. But, we are human too. The best advice I received early on from a judicial colleague was that you rarely get into trouble for what you don't say".[21]

The Alberta Court of Appeal[22] wrote as follows:

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[20] *How to Deal With Stupid People*, Kevin Carrillo, p.13, December 18, 2023
[21] Hon. Danial Newton, *Incivility=Bad Advocacy*, The Litigator, December 2017, pp. 31-33.
[22] *Destine v. Cloutier*, 2022 ABCA 331 (Justices Rowbotham, Pentelechuk and Feehan; appeal from Justice Malik).

"The father submits that the chambers judge's numerous comments throughout the hearing demonstrated his personal negative feelings towards the father. … This resulted in the chambers judge failing to consider the children's needs and circumstances and to pre-determine the result.

The test for a reasonable apprehension of bias is whether "an informed person, viewing the matter realistically and practically … and having thought the matter through" would conclude that "it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly"...

A review of the transcript reveals numerous instances of troubling comments made by the chambers judge. The comments are in some instances in relation to the father, some are made with reference to the father's counsel, and some speak to the chambers judge's own decision-making process.

The chambers judge stated that he "doesn't have a lot of empathy" for the father and he had "zero, zero patience, zero patience, for a payor parent who says, I didn't know." He began his discussion of the father's expenses by saying, "I will fall off this chair and roll down the street - and I live on a fairly lengthy street - if what...your client...is telling me…" As regards the overall quantum of the award against the father he said, "...it's going to hurt. And it's going to hurt and I'm not (sic) unapologetic about that."

His first words to the father's counsel, as she began her opening submissions, were that the facts were against her and he was going to give her "a very hard time today." On four occasions he said to the father's counsel that she was going to be mad at, or unhappy with, the chambers judge.

The chambers judge said more than once that he was unapologetic and that "if you need me to make a decision, I will make the decision. I'm not frightened of doing so." Referring to the father, he said "He's put himself in the situation that he's in, you haven't. And so, if he has anyone to blame frankly, it's only himself. This was not a difficult decision."

…Taken alone, none of these comments leads to the conclusion that the chambers judge did not remain impartial. Taken together they raise concerns, but we do not conclude that they satisfy the test to establish a reasonable apprehension of bias. However, they do warrant some comments.

We pause to ask whether as judges, we would have condoned these comments had counsel made them about the opposing party or opposing counsel. The comments were unnecessary, derisory, and disrespectful of both the father and his counsel.

> A great deal is said and written about civility in the courtroom. Judges often express concern about the way counsel deport themselves in their dealings with the court, other members of the bar and litigants. It is our duty as judges to lead by demonstrating civility and we do so in the manner in which we run our courtrooms. When counsel speaks out of turn, we remind them to wait their turn. When counsel speaks personally and in a derogatory manner about opposing counsel or a litigant, we admonish them and remind them that those comments are unacceptable as officers of the court. We set the standard. It may be that in this recent age of virtual appearances, the decorum expected in a courtroom has been diminished. But we cannot let that alter our fundamental obligation to be civil and courteous.
>
> The father was entitled to advance his position through his counsel. The court is entitled to ask questions and to probe the parties' positions. As judges we may signal that we have difficulty with an argument, and we may ask for assistance from counsel with our concerns. However, at all times we must remain civil and courteous so that the public has respect for our courts."[23]

It goes the other way of course – almost all the time – the judge *is* courteous and civil. One judge has five "invaluable tips on combating incivility and making yourself look good in the process":

1. If you're in court with an a-hole, don't point it out to the judge. The judge can pretty much see it for herself.
2. Behave well. The more professionalism and integrity you show, the greater the contrast with the other lawyer.
3. Surprise attacks are a bad idea. Don't be dragged down by the combative attitude of the other side.
4. Don't interrupt the judge.
5. Don't talk among yourselves and disregard the judge, you know, who is running the courtroom.
6. Arrogance and swagger are not a show of competence[24].

[23] Paras. 37-47.
[24] Justice Susan Healey, Ontario Superior Court, Barrie. Quoted in Gail Cohen *Be the better person*, Canadian Lawyer, March 5, 2012

But sometimes you just have to be practical: "Judges develop reputations as stern, crotchety and so forth. You just go in there with your helmet on"[25]

8. Conclusion

My mother was right, when I was a kid: "Eugene, if you've nothing nice to say, don't say it". As a strategic response to incivility, it still works.

As Calgary lawyers Maureen Killoran K.C. and Anne Kirker K.C. have written: "We have evolved, [we] hope, from a place where the winner was the one with the biggest stick, to the loudest bully in the village, to trial by fire, to where we are today: the use of persuasion though reason."

But also remember this: "Civility is a choice we make. We stay civil not because others always are, but because *we* are".[26]

9. And very last: the smart (or smarter?) comeback

We all wish for a smart comeback. By us of course. I have had a few court-related. Really good ones. But always 10-12 hours late, usually around 2/3a.m. when I wake up wishing I had said ABC or XYZ.

A Wall Street Journal article[27] from a few years ago has been really helpful, and I have used several with other counsel (and also used several more in my non-law life).

Some basic helpful and practical take-aways from the article:

- "There's an art to the comeback line. The best ones put the offender on notice and allow us to stand up for ourselves or someone else."
- "It can be good to pause, rather than blurt out the first thing that comes to mind."
- "A good comeback line rebalances the power in the conversation. It allows us to be hard on the problem but respectful of the person." (quoting Selena Rezvani)
- A handy phrase: "That's a strange thing to say out loud".
- When asked a nosy/inappropriate question, respond with a question of your own: "why do you ask?"
- Replying to a person who is "just plain nasty": "Bad day, huh?"
- When someone is being rude, Karena Schwenk responds with "Good for you". She had confided to a friend that she (Karena) was getting a divorce, and the friend responded with "Well, my marriage is better than ever", to which Karena said "Good for you."
- No response is OK. "Silence can be effective. There's power in a raised eyebrown, a pointed look, or by ending the conversation." (quoting Andrea Wachter).

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[25] Wendy Davis, *Bullying From the Bench*, ABA Journal, March 2019.
[26] Jennifer Breheny Wallace, *The Costs of Workplace Rudeness*, Wall Street Journal, April 18, 2017, quoting Daniel Buccino.
[27] Elizabeth Bernstein, *What You Wished You Said: The Power of a Great Comeback Line.* WSJ, Sept. 13, 2023

- Some go-to lines for different situations:
    - short and sweet: "Oh." "Got it." "Mmm." (Psychologists call these responses the "gray rock" method, because it's deliberately meant to be dull and boring). Works particularly well with people trying to provoke you.
    - direct approach: "I don't feel comfortable about this."
    - asking someone to repeat what they said can (sometimes) make them stop and think about it: "I'm sorry, what did you say?"
    - hold up a mirror: "I hope your day gets better."

End Quote

Nelson Mandela/Carrie Fisher (not clear who):

"Resentment is like drinking poison,
and waiting for the other person to die".

Addendum

I received the following practical suggestions from other lawyers by email/letter on the issue of civility that I think is useful to add here, to see how other colleagues have dealt with the problem in a pragmatic way. Reproduced with permission.

1. The name of the incivil lawyer below is changed to Mr. Smith:

"I couldn't agree more with your point that civility can be used tactically. It also makes life much more enjoyable not to have to squabble interminably with opposite counsel.

I will always remember Gerry Morin's [later Mr. Justice Morin] piece of advice on civility. I had a fatal accident case years ago where one of my clients was killed while standing on the shoulder of the road by a client whose defence lawyer was my old nemesis Mr. Smith. [He had] sent me a letter telling me my claim was "frivolous and vexatious" and I should consider a "change of venue to Disneyland and a guest appearance on the Gong Show".

I was much younger then with a much lower outrage threshold. What I wasn't going to do to him – Law Society, demand apology yadda, yadda. The day I received the letter I had a call from Tom Conway about another file and I ranted to Tom about the letter and my plans to whack away at the *. Tom told me the story of a similar letter he had received from the same Mr. Smith – Tom had actually never heard of a lawyer getting the Gong Show AND the Disneyland reference in the same letter – a bit of a badge of honour.

Anyway, Tom had written an excoriating draft letter to Mr. Smith demanding apology, dastardly consequences etc. He took it in to Gerry Morin to review before he sent it out and Gerry ripped the letter in half before Tom's startled eyes. He explained patiently to Tom that was not the way to deal with Mr. Smith. The right way to deal with him and like-minded litigators was to completely ignore the provocative remarks and under no

circumstances should you refer to it in writing, or in conversation. Just ignore it as if it never existed and respond politely and professionally to the substantive issues in the letter.

I accepted Gerry's derivative advice and it works like an absolute charm. I never once lost my temper with his eminence or other provocative counsel since then."

Barry Laushway, *Laushway Law Office*, Prescott, Ontario (now deceased).

2. "Mr. Laushway's/Gerry Morin's advice reminded me of Fraser Goddard's advice to me in a similar situation. I prepared a sharp riposte to a sneer (in writing) I had received. I showed it to Fraser. He told me that it was a fine answer, and it was probably a good idea to write it. However, I should on no account send it because "you can't win piss-fights with skunks". When I have to expurgate that advice, I just say you can't win fights with skunks. They're stinkers, and you get some on ya. There is a lawyer in Edmonton, quite senior at the bar, who was renowned for his rudeness when I was a junior lawyer. On the phone, he never said good-bye, he just hung up, often in the middle of what his caller was saying. He did builders' liens, so I had the privilege of having many files with him. To remedy the situation, I started being as friendly to him as I could possibly be. I chatted with him in elevators, asked him about his holidays, etc. etc. Before long, he reciprocated quite warmly. And there was no more rudeness. I believe I became the only friend he had, or ever had had, among lawyers with whom he practiced. … I have repeatedly and very self-consciously adopted a similar very friendly demeanour with lawyers who have reputations for being difficult to deal with. Not very many people are nice to them in any given day. It has paid off."

Elsa Rice, K.C., *Scorgie Wilson Rice*, Edmonton, Alberta

3. "… your paper made me remember the early days (1970s) in San Francisco as a young woman lawyer, a bit sheltered and shy in spite of having graduated from Berkeley. I entered a deposition once and the opposing counsel, after asking if I was the court reporter, tried to kiss my hand. At the time, I found it awkward and weird. I also noted that he did not know how to do that properly (the guy's lips are NOT supposed to actually TOUCH the lady's skin; it is a gesture). If I had known THEN, what I know NOW, I would have halted right there in front of everyone and given him lessons in correct hand-kissing. Over and over. Had I been sufficiently coarse, I could have invited him to kiss my posterior part as well … but then, that would not have been civil, would it? The fact today, at least in my US experience, is that only a minority of lawyers are actually raised with good manners. Dog-eat-dog and jungle survival tactics take over. The goal of many is to win, to wear the other side down with paper. Sadly, lawyers in the federal government do more of this than many others, having deep resources.

Oregon is far more gentle than California or New York. We talk about that among ourselves here. One reason is that this is a small state and Portland is a small town. What goes around, comes around. If one gets the reputation of being a jerk, well-mannered opposing counsel will not be inclined to grant favours, such as stipulated extensions, when requested or needed. One will not get referrals in conflict of interest situations. One will not be sought after by in-house counsel. It is true that the most successful lawyers here follow the rule of civility. To do otherwise demeans the profession and is a disservice to

the client, needlessly exacerbating tensions and emotions within the dispute resolution process, and wasting economic resources. Preaching the higher expectation as the norm does have an impact – so that the tactics you describe will be seen for what they are: the unprofessional conduct and rantings of inferior jerks and dweebs who believe they must fall back on such games and foul play in order to "win"."

Carol A. Emory, *Emory Law Group PC*, Portland, Oregon.

4. "I am a tax litigation counsel for the Province of BC. As such, I defend tax assessments. Some counsel (usually counsel who are not tax counsel), adopt their client's persona in their initial dealings with me and the client (and hence the lawyer) often harbours a deep anger at the tax authority. These lawyers begin their litigation by taking strong positions on timing and rules of court and use strong and often intemperate language in their letters and telephone communications. I do not respond in kind but maintain a calm and civil approach. This invariably has the effect, as Barry Laushway's story suggests, of neutralizing the counsel's approach. In fact, a few such counsel have become outright sycophantic."

Hunter Gordon, Sales Tax Lawyer, Victoria, BC

5. "I am an associate with Laurie Allen and she is a huge proponent of the civility strategy. It is amazing how a civil response completely disarms a boorish adversary. Laurie is a master of the technique."

Gay M. Benns, *Moe, Hannah & McNeill LLP*, Calgary, Alberta.

6. "I agree with your assertion that I don't need to seek validation from opposing counsel. To thine own self be true. Law is a funny thing, with many people who seem to be insecure in their place in the universe, and lawyers often tend to see everything as a competition. I was reminded of this (and of the value of not joining the party) at a bar dinner several years ago. There is an annual dinner where the articling students are introduced to the Bar. The repartee often takes the form of taking shots at each other. In other cases it takes the form of rather merciless teasing of the students (which is a particularly bad form of predation on the weak, in my view). Not that it is offensive in any way, because it is restrained, but there are times it just strikes me as genteel name-calling. Without really thinking about it, I adopted a rather self deprecatory approach, telling some funny stories on myself, and then introduced my student, by giving him a pat on the back. Never really thinking about it, I was surprised afterward when one of my partners approached me and told me that the female members of the bar had almost uniformly remarked on the fact that I was the only speaker who hadn't taken the time at the podium to take a shot at someone else."

Kim Anderson, B.C. Ministry of Attorney General, Victoria, B.C.

7. "Barry's story reminds me of a lawyer's response I saw years ago (not sent to me or my firm), written in answer to a provocative, uncivil letter from another lawyer. On expensive letterhead, after all the usual formal date, name, address, re: lines, it succinctly stated: "Well, excuuuussssse me…" Signed off with "yours very truly"."

Elisabeth Sachs, Barrister & Solicitor, Orangeville, Ontario.

8. "I have a note stuck to the window ledge next to my computer to remind me that a thoughtful response is always better than a reaction. This was pasted there after hearing a quote attributed to Melody Beattie: "Much of what we react to is nonsense"."

Laurie Gordon*, L.M. Gordon Law Office*, Nanton, Alberta.

9. "Lawyers should note that they meet other lawyers on the way up and on the way down. … you meet other lawyers and must be able to negotiate with them at all times. … since 98% to 99% of most lawsuits get settled without going to Court, it is especially important to keep good lines of reasonable communications open."

Emanuel Sonnenschein, Q.C., *Sonnenschein Law Office*, Saskatoon, Saskatchewan.

10. "I am old enough to remember the day when an older lawyer with much senior experience who was opposing me on an estate matter, and addressing me as Mrs. V. (as I was then known) kindly, and ever so politely, pointed out several errors I had made in an estate matter, that would have been to my client's detriment. He did it so diplomatically that it took me some minutes to figure out that he was actually pointing out my mistakes to me so I could fix them, instead of taking advantage of me and them. This, I understand was his duty then and still is our duty today. But do you think anyone today ever points out his or her opponent's errors?"

Nadia Senyk, Corporate Counsel, Canadian Red Cross, Ottawa, Ontario.

11. "I read Barry Laushway's story with interest. Over the course of my 24 years of practising law, I have been told to "shut up" by counsel considerably senior to me and called a communist on a couple of other occasions. I learned to smile (only when on the phone, as I agree with Mr. Justice Morin's advice to show no reaction) and take comfort that counsel has no persuasive logic or reasoning to rely upon. Without exception, those cases resolved favourably for my client. When confronted by rude behaviour, I remind myself that discourteous behaviour conveys weakness and fear. Civility conveys strength and confidence."

Dale K. Beck, Provincial Mediation Board and Office of Residential Tenancies, Regina, Saskatchewan.

12. "It was great to read Barry's story, which I remember well because I really took Gerry's advice to heart. His was one of the best mentoring tips I received in my early days of practice. I have tried, not always successfully I confess, to follow his advice every day of my professional life since. It is no coincidence, I'm sure, that the very same advice made the very same impact on Barry. I estimate that my exchange with Gerry years ago took less than two minutes, but here his advice shows up again a dozen years later and is disseminated by you to an even larger audience. What I have noticed over the years about practitioners like Gerry and Barry is that, by refusing to take the bait and by maintaining high standards of civility and professionalism, they become the tide that lifts all boats. One cannot help but respond in kind when ambushed by unrestrained, uncompromising civility. A postscript: The ways of "Mr. Smith" eventually caught up to him. He later resigned from the profession. No one was sad to see him go. A needless ending for him. Ironically, "Mr. Smith" and his demise are a cautionary tale to those of us who occasionally draft scathing

rebuttals to imagined adversaries: remember the advice of Gerry Morin and the end of "Mr. Smith", and toss the angry intended missives into the blue box where they belong."

Tom Conway, *Conway Baxter, LLP*, Ottawa.

10. <u>Select Bibliography</u>

Law Society of Alberta, *Civility Best Practices* (October 2024)

Leah Teague, *Civility Matters: Why Law Schools Must Teach Students to Disagree Without Being Disagreeable* (2024) Baylor Law Review (draft)

Julie Sobowale, *New report recommends mentorship and regulatory enforcement to improve civility and professionalism*. Law Times, Dec. 13, 2023

Toronto Lawyers Association, *Report on Civility and Professionalism in the Legal Profession*, Dec. 2023

Rachel Feintzeig, *Don't Be a Jerk at Work. (But Don't Be Too Nice Either)*. WSJ, July 30, 2023

John Hyde, *News Focus: Guidance on 'mindful' litigation seeks to address mental health issues*. Law Society Gazette, Mar. 10, 2023

Tessa West, *How to Deal with Office Jerks*. WSJ, Feb. 19 2022

Jemma Slingo, *'Sense of how to behave' at risk, says High Court Chancellor*. Law Society Gazette, Mar. 15, 2021

Elizabeth Bernstein, *How to Handle a Jerk*. WSJ, Aug. 18, 2020

Barb Cotton & Christine Silverberg, *Being rude in court: Disciplinary sanctions*. The Lawyers' Daily, Aug. 5, 2020

Barb Cotton & Christine Silverberg, *Being rude in court: Crossing the Line*. The Lawyers' Daily, July 29, 2020

Ross Todd, *Expletive-Laden 'Negotiating Tactic' Could End in Sanctions for SoCal Lawyer*. Law.com, Dec. 5, 2019

David L. Hudson, *I Pledge to be Civil*. ABA Journal, Practice Matters, Sept. – Oct. 2019

Wendy Davis, *Bullying From the Bench*. ABA Journal, Mar. 2019

When the Badly-Behaved Party is Opposing Counsel (no author indicated), National Self-Represented Litigants Project, Feb. 18, 2019

John "Sean" Doyle, *Creating a Culture of Civility in the Practice of Law*. ABA Law Practice Today, Jan. 4, 2019

William McGurn, *Playing the Civility Card*. WSJ, Sept. 10, 2018

Alice Wooley, *Does Civility Matter?* SLAW, Sept. 5, 2018

Anne T. Donahue, *Cleansing Your Life of Toxic People*. Ottawa Citizen, Aug. 3, 2018

Cheryl Suann Williams, *Smart, practical ways to hand high conflict between lawyers*. Lawyers' Daily, July 20, 2018

Lee Akazaki, *"A Trial Is Not a Tea Party", Is What They Will Say*. SLAW, June 3, 2018

Alex Vakula, *Dealing With Difficult Lawyers*. Arizona Attorney, President's Message, May 2018

Hon. Danial Newton, *Incivility = Bad Advocacy*. The Litigator, Dec. 2017, pp. 31-33

Jennifer Breheny Wallace, *The Costs of Workplace Rudeness*. WSJ, Aug. 18, 2017

Robert Sutton, *How to Survive a Jerk at Work*. WSJ, Aug. 10, 2017

Elizabeth Bernstein, *Find Compassion for Difficult People*. WSJ, July 17, 2017

Steven Benmore, *Opposing Counsel versus My Friend*. Benmor Family Law Group, June 2017 Newsletter

Christine Porath, *Civility at Work Helps Everyone Get Ahead*. WSJ, Nov. 23, 2016

Peter S. Poland, *King Arthur, Rambo, and the Origins of Civility at the Bar*. ABA Litigation, Winter 2016

Maureen Killoran K.C. & Anne Kirker K.C., *Aspiring to the Highest Standards of Civility*. CBA Alberta, Law Matters, Spring 2016

David Layton, *Fighting Fair*. The Advocates' Journal, Spring 2016 (book review, *Fighting Fair: Legal Ethics for an Adversarial Age*, by Allan C. Hutchinson, 2015)

David Bilinsky, *How to Deal with Difficult People*. SLAW, Dec. 3, 2015

Ross McCammon, *How to Deal with Assholes*. Esquire, Nov. 2015, p. 42

Harvey Schachter, *How to fend off those toxic people*. Globe and Mail, Jan. 11, 2015

Janice Tibbetts, *Keeping a civil tongue: How to win cases and impress people*. CBA Practice Link Bulletin, Oct. 2014

Vivian Rachlis, *Dealing with Difficult People*. The Legal Foundations, CBA Legal Conference, Aug. 15, 2014

How to deal with bullies (no author indicated), CBA National Magazine, Jan./Feb. 2014

Amy Salyzyn, *A Tale of Two Regulators: When Courts and Law Societies Collide*. SLAW, Oct. 8, 2013

Chris Hannay, *Civility: It's the glue that holds society together*. Globe and Mail, July 12, 2013

Omar Ha-Redeye, *Civility Is an Innate Part of Our Biology*. SLAW, July 7, 2013

Jacquie Miller, *A New App Allows You to Send that Message to all the Inconsiderate Boors in your Life*, Ottawa Citizen, June 20, 2013

Yamri Taddese, *LSUC Expanding Civility Protocol to Tribunals,* Law Times, May 6, 2013

Erin Walkinshaw, *Chic Critique: Dressing Up Professional Criticism*. SLAW, April 11, 2013

Dan Pinnington, *Incivility: Practical Consequences for You and Your Client*. SLAW, Mar. 4, 2013

Hon. Sean Dunnigan, *Top 10 Tips on Courtroom Civility*. Manitoba Bar Association 2013 Mid-Winter Conference

Christine Porath & Christine Pearson, *The Price of Incivility,* Harvard Business Review, The Magazine, January-February 2013

G.M. Filisko, *You're Out of Order! Dealing with the costs of incivility in the legal profession*. ABA Journal, Jan. 2013, pp. 33-40

Andra Barmash Greene, *No Good Deed Goes Unrewarded: Why Professional Courtesy Advances your Client's Cause*. ABA Litigation, Winter 2013, pp. 28-33

Yamri Taddese, *Trial judges better suited to regulating civility: panel*. Law Times News, Dec. 17, 2012

Justice Francois Rolland, *Quebec Superior Court, Manners May Count More in Ottawa, Where Diplomacy Rules*. Lawyers Weekly, December 14, 2012

Lindsay Scott, *Dealing with incivility from senior counsel*. Canadian Lawyer Magazine, Nov. 19, 2012

Robert P. Sokalski, *Always Play Nice in the Sandbox.* Excerpts from The Lawyers Weekly, Oct. 19, 2012

Geoff Kirbyson, *Always play nice in the sandbox*. The Lawyer's Weekly, October 19, 2012.

Omar Ha-Redeye, *Dealing With the High Conflict Personality in Practice*. SLAW, July 22, 2012

Clint Bolick, *Confronting the Courthouse Bullies*. Arizona Attorney, June 2012, p. 60

Leslie W. Smith, *Civility in Practice; Exercising the Fruit of the Spirit*. Christian Legal Journal, Summer 2012, pp. 14-16

Gail Cohen, *Be the better person*. Editorial, Canadian Lawyer Magazine, Mar. 5, 2012

Becky Beaupre Gillespie, *No Jerks*. ABA Journal, March 2012, pp. 25-26

Daniel Naymark & Jennifer Ip, *Judicial Sanction of Uncivil and Unprofessional Conduct*. The Advocates' Society 2012 Symposium

Nora Rock, *The Claims Consequences of Lawyer Incivility*. SLAW, Oct. 3, 2011

Dealing with Jerks – What Goes Around Comes Around; and Ten Tips For Dealing With Jerks. ABA Section of Litigation, Fall 2011, pp. 19-20, and back page

Edward Greenspan & L. David Roebuck, *The horrible crime of incivility*. Globe and Mail, Aug. 2, 2011

Charles Gillis, *The benefits of not being a smug lawyer*. Canadian Lawyer, April 8, 2011

Law Society of Upper Canada, *Civility*, Ontario Reports, Nov. 19, 2010 (4 pp.)

(Justice) Carole Curtis, *How to Handle Difficult Clients,* Law Practice, July/Aug. 2010 pp. 40-42.

Mark Hunter, *Ever Notice That People Do Business With People They Like?* SLAW, July 19, 2010

Thomas Claridge, *Incivility Report tabled.* Lawyers Weekly, June 11, 2010

Thomas Claridge, *Treasurer's Incivility Report.* Lawyers Weekly, June 11, 2010

Jeff Gray, *Will making lawyers civil make them soft?* Globe and Mail, June 8, 2010

Jennifer Baic, *The Difficult Client,* OTLA The Litigator, June 2010, pp. 77-78

Dan Pinnington & Norman J. MacInnes, *What Goes Around Comes Around: The Importance of Being Civil*. The Litigator, June 2010, pp. 63-65

Philip Slayton, *There can be too much civility*. Canadian Lawyer, May, 2010, pp. 18-19

Leo Singer, *Civil Unrest? Drawing the line between vigorous advocacy and just plain rudeness*. CBA, National Magazine, April–May 2010, pp. 27-31

Hon. Stephen Goudge, *The Judicial Role in Lifelong Learning of Professionalism*. Arctic Obiter, May 2009, pp. 16-17

Robert W. Thompson, *Barristers' Etiquette and Ethical Duties*. Arctic Obiter, May 2009, pp. 9-15

Alice Woolley, *Does Civility Matter?* (2008) 48 Osgoode Hall L.J. 175

Frederick Alimonti, *Dealing with the Difficult Adversary*. ABA Litigation, Fall 2008, pp. 37-42

Judge Richard Mills, *Surviving Litigation with Civility*. The Bencher (Magazine of the American Inns of Court), Sept./Oct. 2008

Anne Marie Owens, *Loss of Civility*, National Post, Mar. 24, 2007.

Wendy Matheson, *Civility: Ten litigators to watch out for*. The Advocates Society Journal, June 2006, pp. 17-18

Douglas Mah, *Choose Civility*. CBA National Magazine, April – May, 2006, p. 58

Justice Colin Campbell, *"Civility" Revisited – A Matter of Expectations*, O.T.L.A. The Litigator, Fall 2004 pg. 27.

John Simonett, *Keep Justice Civil*, Trial, pg. 48 (July 2003)

LawPro Special Report, *Aggressive Behaviour, Poor Communication Prompt Claims*, *Speak out and I May Eat Your Words*" (June, 2003)

David Gambrill, *Lawyer dinged with costs for uncivil conduct*, Law Times February 3, 2003 (page 1-2)

David W. Scott Q.C., *Relations between Trial Lawyers: A Code of Civility*, County of Carleton Law Association, Chateau Montebello, Quebec, November 3-4, 2000 (Civil Litigation Updated 2000)

Michael Eizenga, *Citizenship in the Legal Profession: Civility as an Instrumental Value in Self-Governance*, Civility in the Legal Profession Conference, Advocates Society October 31, 2000

Robert P. Sokalski, *Civility in Practice* Manitoba Bar Association Headnotes & Footnotes August/September 2000 edition Volume XXXII No. 7.

Ronald G. Slaght, Q.C., *Whatever Happened to Civility*, The Advocates' Brief, Vol. 11, No. 10, July/August 2000

R. Terri Mandel, *Beyond Zealous Advocacy: Harassment and its Remedies*, Bench & Bar of Minnesota, April/May 1999 (http://www2.mnbar.org/benchandbar/1999/apr99/harassment.html)

Robert W. Ritchie, *Civility in the Practice of Law: Must We Be "Rambos" to Be Effective?* Bencher's Advisory, August 1998

Stephen L. Carter, *Just Be Nice*, Yale Alumni Magazine May 1998. (http://www.yalealumnimagazine.com/issues/98_05/Stephen_Carter.html).

Sandra Day O'Connor, *Professionalism*, 76 Washington University Law Quarterly Spring 1998 (wysiwyg://63/http://www.wulaw.wustl.edu/WULQ/76-1/761-02.html)

Gerry Spence*, How to Argue and Win Every Time: At Home, at Work, in Court, Everywhere, Every Day,* St. Martin's Press, (May, 1996)

The Advocates' Society, *Principles of Civility for Advocates*, (www.advsoc.on.ca)

Standards of Civility, New York Law Journal.
(http://www6.law.com/ny/links/standard.html).

Hon. Carole Curtis, *Dealing With Difficult Judges*. Have copy of paper, unable so far to source citation (not marked thereon)

Heidi K. Brown, *Defusing Bullies*. ABA Advocacy, Practice Matters (date unavailable)

Gail Cohen, *The murkiness of judging civility*. Canadian Lawyer, Editorial

INUVIALUIT
REGIONAL CORPORATION

Inuvialuit Qitunrariit Inuuniarnikkun Maligaksat

November 1st 2024

Meghan Etter-Cockney

NWT Law Society, Yellowknife

The Law

- Exercises the **inherent right** of Inuvialuit to govern Inuvialuit children, youth, and families, as recognized in UNDRIP and in the Federal *Act respecting First Nations, Inuit and Metis children, youth and families* (known as C-92).

- Built using specific feedback heard during **consultation with IRC communities**.

- Title developed by Elders representing all dialects. ***Inuvialuit Qitunrariit Inuuniarnikkun Maligaksat*** means Inuvialuit family way of living law.

- Creates a new Inuvialuit organization, **Maligaksat** (in context, this means Inuvialuit family way of living program).

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Development of the Law

18-19	• IRC participated in co-development of **C-92**; it came into force January 2020
Apr 2020	• **IRC mandated staff** to begin work, and obtained federal funding for law development
Jan-Mar 2021	• **Initial work on scoping and policy options,** followed by **1st Community Consultation Tour**
2021	• **Drafting** and iterative review with IRC staff and legal team
Aug-Oct 2021	• **Board Review,** followed by **2nd Community Consultation Tour**, final edits
Nov	• **Law and initial regulations passed by IRC Board of Directors; portions came into force Nov. 25, 2021**

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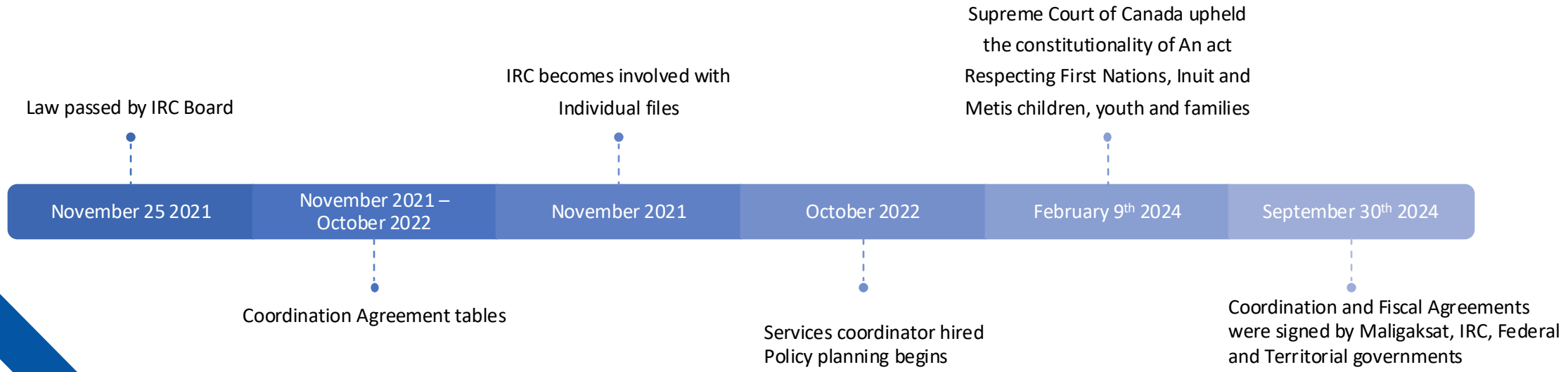
Evolution of Maligaksat



INUVIALUIT REGIONAL CORPORATION

Principles: s. 1

a. To **ensure cultural continuity** for each Inuvialuit child and youth, which includes serving each child and youth in their home community to the greatest extent possible;

b. To **enhance the supports** available to enable Inuvialuit families to thrive, reducing the need for intervention;

c. To **improve information sharing** for fully informed service provision, advocacy, and decision-making; and

d. To **grow the exercise of Inuvialuit jurisdiction** in child and family services at our own pace, in our own way.

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Growing Inuvialuit Jurisdiction

- **Responsible, flexible approach**
  - Inuvialuit role in this sector will grow over time.
  - The IRC law has a role for both the ***growth*** of Inuvialuit services, and the ***improvement*** of external services.
  - Regulations can cover all topics and will increase Inuvialuit legal role over time.
  - Law reaches Inuvialuit in all locations, but does not assume that Inuvialuit services will be first responders in all locations as that would not be realistic.

Inuvialuit services

Maligaksat services will grow over time, especially in ISR.

Prioritizing *Prevention/Wellness* files.

Advocating on *Protection* files.

External services

Will have new obligations, to improve accountability and cultural connections.

Law and regulations will apply to them (similar to application of minimum federal standards in C-92).

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Maligaksat Services

- Primarily responsible for implementing the law
  - Advocacy on individual cases
  - Family Wellness Planning
  - Cultural Connections (for children in care)
  - Educating communities and families

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What's next?

- Transitioning NWT Wellness (VSA) files to Maligaksat
- Increase capacity (immediate future, minimum 4 additional staff)
- Grow team and infrastructure throughout ISR first, then in Urban centers where large Inuvialuit population resides
- Fully implement Wellness and Advocacy services
- Educate jurisdictions on Maligaksat and implementation
- Build toward Protection Services

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Thank you

Quyanainni!

Koana!

Quyanaqpak!

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WAHKOHTOWIN
LAW & GOVERNANCE LODGE

Child and Family Services and Bill C-92

Bench and Bar "Into the Future"

Koren Lightning KC

November 1, 2024

This slide deck is provided for participant reference.

Wahkohtowin Lodge Purpose:

WAHKOHTOWIN

LAW & GOVERNANCE LODGE

Upholding Indigenous laws and governance

- Support Indigenous communities' goals to identify, articulate, and implement their own laws.
- Develop, gather, amplify, and transfer wise practices, promising methods and research tools.
- Produce useful and accessible practical legal resources and public legal education.

The Wahkohtowin Law and Governance Lodge responds to the expressed needs of Indigenous communities and organizations and specifically answers the TRC Call to Action #50, which calls for the creation of Indigenous Law Institutes for the “development, use and understanding of Indigenous laws.”

Grounding Principles

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- Indigenous laws need to be treated seriously, as *laws*.
- Indigenous legal research must be conducted with the highest standards of rigor and transparency.
- Indigenous laws are one aspect of Indigenous governance, and part of comprehensive whole societies.
- Revitalizing Indigenous laws and governance processes are essential for re-building healthy communities and for reconciliation in Canada.

Indigenous Law & Aboriginal Law

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Aboriginal Law

- Judge made law
- Aboriginal peoples and the Crown

Indigenous Law

- Rooted in Indigenous societies
- Indigenous legal orders
- Indigenous law doesn't have to look like western law.

Indigenous laws derives from them having been practiced and passed down through "elders, families, clans, and bodies within Indigenous societies." Indigenous laws continued to be recorded and promulgated in various forms, including in stories, songs, practices and customs. - Borrows

Bill C92-Purposes

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Purposes of this Act are:

- To affirm Indigenous inherent CFS jurisdiction,
- set national standards for CFS provision &
- contribute to implementation of UNDRIP: s. 8 (a)-(c)
- Preamble refers to Canada's international human rights commitments, legacy of residential schools, CFS impact on MMIWG, importance of reuniting Indigenous children with families, the TRC Final Report, Indigenous right to self-determination, Canada's commitment to work cooperatively toward reconciliation and reform and recognition of calls for funding consistent with substantive equality.
- Does not displace provincial CFS Acts, but where *different*, **this Act prevails, *and* Indigenous legislation prevails**: s. 4

The SCC Resets

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***Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5:**

"Even though the Act is expected to accelerate certain aspects of the process of reconciliation, it is still important to realize that **reconciliation is a long term project**. **It will not be accomplished in a single sacred moment, but rather through a continuous transformation of relationships and a braiding together of distinct legal traditions and the sources of power that exist**": para. 90.

FROM JURISDICTIONAL BICKERING TO A "SINGLE STRONG ROPE"

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***Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5:**

- C92 as a "framework for reconciliation" with 3 types of legal norms interwoven to "ensure the the well-being of Indigenous children."
  1. Law-making authority of Indigenous Peoples in relation to child and family services [CFS];
  2. National Standards; and
  3. International standards referred to in UNDRIP.
- The "**metaphor of "braiding" together** these 3 types of norms has been helpfully proposed to explain how the [UNDRIP] should be implemented in Canada, so as to "**work out how state law and Indigenous law could be interwoven, with guidance from international law, to form a single, strong rope**"" (citing Christie)": para. 7.

What the SCC Finds: Federalism

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- SCC REFRAMES these issue as whether the entire Act, read as a whole, is within the federal power of 91(24).
- Defines s. 91(24) as matters relating to “Indigenous peoples as Indigenous peoples”: para. 2
- Finds the “**essential matter addressed by the Act involves protecting the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in doing so, advancing the process of reconciliation with Indigenous peoples**.”: para. 9
- All part of the Act [national standards, affirmation of self-government over CFS, implementation of the UNDRIP, concrete implementation measures] are ”integrated parts of a unified whole”: para. 9

“Of Course”: Division of Powers

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Even though the SCC approaches the Act as a unified whole, points out:

1. National Standards fall within the federal powers under s. 91(24), binds provinces through paramountcy.

1. Affirmation of the right to self government falls within s. 91(24) powers (but doesn’t define s. 35, or bind the provinces or courts to that definition). Still, has real legal and practical effects.

1. SS. 21 & 22(3) of the Act – Indigenous laws have the force of federal law if process followed, is simply “incorporation by reference”, well within the federal government’s power, binds provinces through paramountcy.

What the SCC Finds: S. 35

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- Does not decide on s. 35 basis. Says this is not necessary to decide the question before it: para. 111.
- BUT doesn't overturn QCCA analysis on self-government over CFS as a s. 35 right,
- However, this does not mean that C92's affirmation of self-government over CFS as a S. 35 right doesn't do any work. The Court stresses that this affirmation still has practical and legal effects.
- Because the federal government affirmed self-government over CFS as a s. 35 right, they have bound themselves, and provincial governments, **to act as if this right is enshrined** in the Constitution, as long as C92 is in force.
- The Court says the s. 35 affirmation in C92 **binds the federal government** so it "can no longer assert, in any proceedings or discussions, that there is no Indigenous right to self-government in relation to CFS."
- This also engages the "**Honour of the Crown**" – both the federal and provincial governments are the Crown. This means they have duties to act honestly and diligently to respect and implement Indigenous rights.

CHILDREN ARE CORE TO SELF DETERMINATION, CULTURE AND PEOPLEHOOD

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The SCC finds:

- Responsibilities for raising children are core aspects of the right to self government, as recognized in several provisions and the preamble of the UNDRIP: para. 3.
- “Relationships within families and control exercised by Indigenous communities over Indigenous children relates to Indigenous peoples as Indigenous peoples.”: para. 2
- CFS is “fundamental to the culture and identity of Indigenous peoples”: para. 112.
- This is also obvious based on how the Crown attempted to destroy Indigenous families through assimilation policies.

CENTERING INDIGENOUS CHILDREN'S WELLBEING

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What does the SCC say is interwoven in a "framework of reconciliation to ensure the **wellbeing of Indigenous children**"?

- **First**, within C92, (a) Indigenous Legal Authority, (b) National Standards & (c) International Standards: s. 8.
- **Second**, within and beyond C92, Indigenous, federal and provincial laws & powers.
- **Third**, within and beyond C92, Indigenous laws, state laws, and international law.

The braid metaphor reframes the existence of multiple legal orders & jurisdictions (federalism) from a source of conflict or risk, to a source of strength, *if focused on a common goal*.

UNDERSTANDING INHERENT JURISDICTION

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- The SCC stresses that one of the goals of C92 is educational, to promote a cultural change in Canada toward “respect for and reconciliation with” Indigenous peoples: para. 81
- The existence of Indigenous and state laws in Canada is referred to matter-a-factly: e.g. paras. 7; 90.
- However, C92 does not *give* jurisdiction, it recognizes and affirms it.
- Indigenous peoples’ laws and jurisdiction for child and family wellbeing exist now, and always have existed.
- The roots of Indigenous laws today are Indigenous inherent jurisdiction, Indigenous legal traditions, and thousands of years of successful social ordering, as part of whole functioning societies.
- The “wrongly employed” assimilation polices of state law makers have caused harm and damage, that still requires amelioration and rebuilding.

Ways to exercise & respect Laws, Rights and Jurisdiction

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Indigenous Legislation	National Standards	Duty to Consult & Accommodate
Starting Point: Always ask: What does the Child's IGB say? What are the applicable laws? Does the child's IGB have their own legislation? Check Canada website If **yes**, start with the requirements from the Indigenous legislation.	**Starting Point: Always ask: What does Child's IGB say?** In addition to the **s. 12(1) requirement of notice and representation**, inquiry into the child's IGB's views as to what is in the child's best interests in the particular circumstances of each case may offer the best evidence of compliance with many **National Standards**	**Starting Point: Always ask: What does the Child's IGB say?** SCC says Crown must act *as if* constitutional right exists, and act with **Honour of the Crown**.

Judicial Guide to C-92 - WHY & What?

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Why?

- Judges in BC and Ontario requested it.
- Cases interpreting the Act in radically different ways.
- Judicial Care & Courage - i.e. The Honourable Justice Dave Hancock: “How do we do our work in a way that we are not complicit?”

What?

- Purposive approach to interpretation and application of the Act
- Focus on National Standards with room for encountering Indigenous legislation.
- Definitions, Jurisdiction and Applicability, Considerations, Encouraging Compliance, Remedies, Additional Resources.
- C-92 Summary Checklist (when ordering an apprehension or placement order).

Judicial Guide to C-92 - Highlights

- **Definitions:**
  - Significant Measures
  - Indigenous Governing Body
- **Indigenous Identity:**
  - Self-identification, status and non-status, on-reserve and off-reserve
- **Jurisdiction and Applicability:**
  - “related to Child and Family Services” - entering, exiting care,
  - PGO & beyond: consider s. 11 (impacts), s. 16(3) (reassessments) & s. 17 (attachment & emotional ties)
  - What IGBs & check for IGB legislation (ss.10-15 still apply)
  - Overlapping jurisdictions, double aspect
- **Notice and Representation (ss.12&13):**
  - IGBs, parents, care providers - inquiry into notice, representation
  - IGB best evidence for adequate information for child’s wellbeing (sections listed).

Judicial Guide to C-92 - Highlights

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Guiding Principles:

- **NEW Best Interests Analysis: s. 9(1) & s. 10**
  - BIOC primary consideration BUT requires new analysis (not adding factors to provincial or applying past precedents)
  - “super-weights” child’s relationships & cultural connectedness
  - read with cultural continuity & substantive equality, not contrary to purposes of Act (ss.8(a)-(c)).
  - compare primary consideration & factors with BIOC in DA amendments
- **Cultural Continuity:** s. 9(2)
  - “essential to a child’s wellbeing,” support to understand this
- **Substantive Equality**: s. 9(3)
  - definitions, Jordan’s Principle provision: s. 9(3)(e)

Judicial Guide to C-92 - Highlights

- **Priority to Preventative Care:** s. 14(1)
- **Prenatal Care:** s. 14(2)
- **Socio-economic Conditions:** s. 15
- **Reasonable Efforts:** s. 15.1

For each section, explanation and then:

- Other sections of the Act to connect/apply to interpretation and application of these provisions, resources for better understanding new or unfamiliar concepts
- Questions Judges can ask in court applications to encourage compliance by CFS
- Considerations when making an order

Judicial Guide to C-92 - Highlights

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- **Placement Priorities:** s. 15.1 & ss. 16(1), (2), (2.1)
- **Reassessment for Family Unity:** s. 16(3)
- **Promoting Attachment and Emotional Ties:** s. 17

For each section, explanation and then:

- Other sections of the Act to remember/connect to interpretation and application of these provisions
- Questions to encourage compliance by CFS
- Considerations when making an order
- Possibilities to include in orders, or in additional orders (e.g. regular reassessment dates, hyphenate Child's name rather than 'erase & replace', include access or contact order, cultural connection plan compliance).

Judicial Guide to C-92 - Highlights

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- **Remedies:**
  - Act is silent as to remedies
  - BUT based on double aspect, so all provincial substantive, procedural and remedial laws apply.
- **Resources:** links to further resources to learn more about relevant topics, such as:
  - The Act (National Standards and Indigenous Jurisdiction)
  - Human Rights and Jurisdiction (Caring Society case, Jordan's Principle)
  - Attachment Theory and Cultural Connectedness
  - Best Practices to address Common Biases (Justice Walkem)

C92 Summary Checklist

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Prior to Granting an Apprehension or Placement Order

Jurisdiction and Applicable Law

- ☐ Is the child Indigenous (First Nations, Inuit, Métis, status or non-status, on reserve or off-reserve, self-identified or identified through other means)?
- ☐ Is the matter related to CFS delivery (apprehension, entering care, leaving care etc.)
- ☐ Does the child's IGB have their own CFS legislation?

Notice and Representation

- ☐ Do you have evidence of meaningful notice and do you have information about the views of the best interests of the child from parents and/or care providers?
- ☐ Do you have evidence of meaningful notice and do you have information about the views of the best interests of the child from their IGB?

C92 Summary Checklist

WAHKOHTOWIN

Best Interests

Is your analysis of the child's best interests:

- □ A different analysis from an analysis under provincial legislation, considering the primary considerations, which super-weight the child's relationships with family and cultural connectedness?
- □ Taking into account the factors in s. 10(3).
- □ Congruent with principles of **cultural continuity**: 9(2) & **substantive equality**: 9(3)?
- □ Not contrary to the Act's purposes: s. 8(a)-(c)?

Prioritization of Preventative Care

- □ Do you have evidence that preventative care has been prioritized prior to granting an apprehension order?
  - □ Has CFS actively provided support and made reasonable efforts for the child to stay in the home of a parent or family member?
  - □ Do the grounds for apprehension include socio-economic conditions, including poverty, lack of adequate housing or infrastructure, or parent or care provider's health? If so, can an order to address these be made instead?

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C92 Summary Checklist

Placement Priorities

□ Do you have evidence that CFS has investigated all priority placements and the child is being placed in the highest priority placement possible?

Promoting Attachment and Emotional Ties

□ Has there been adequate time and consultation for promoting attachments and emotional ties, regardless of placement, until the age of majority?

Promoting Attachments and Emotional Ties included in Order.

□ A way to promote attachment and emotional ties (e.g. access or contact order; order to incorporate cultural preservation plan)? s. 16(3)

Reassessment for Family Unity taken into account in Order

□ Regular ongoing reassessment dates for family unity s. 17 and evaluating the impacts of delivery of services: s. 11 to the age of majority.

CHILDREN AS THE HEART OF LAW AND JUSTICE

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- A common goal of Indigenous children's wellbeing
- Promoting a culture of respect for and reconciliation with Indigenous peoples
- Continuous transformation of relationships
- Braided legal orders= a single strong rope
- Abundance and hope

Thank you

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Check out our wahkohtowin website (https://www.ualberta.ca/wahkohtowin/index.html) for more resources.

UNIVERSITY OF ALBERTA
FACULTY OF LAW

Judicial Workbook

Bill C-92 - An Act Respecting First Nations, Inuit and Métis Children, Youth and Families

WAHKOHTOWIN

LAW & GOVERNANCE LODGE

JUDICIAL WORKBOOK

Bill C-92 - *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*

Objective: Based on the purpose, history, textual wording and relevant interpretative principles, these are the approaches to the provisions of the *Act* that we believe will best achieve its purpose, which Canada has identified as "to protect and ensure the well-being of Indigenous children, families and communities by promoting culturally sensitive child welfare services, with the goal of putting an end to the overrepresentation of Indigenous children in child and family services systems."[1]

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The authors have significant academic and practice experience in areas of Indigenous child welfare, human rights, family, Indigenous, Aboriginal and Constitutional law. They would like to thank Alex Strang for her research assistance.

Check out our wahkohtowin website for more resources.

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[1] Attorney General of Canada's Brief in *Reference to the Court of Appeal of Quebec in Relation to An Act Respecting First Nations, Inuit and Métis Children, Youth and Families* (500-09-0287151-196), dated April 1, 2021 at para 4.

DEFINITIONS

Significant Measures

Wahkohtowin Law and Governance Lodge defines **"Significant measures"** in a broad inclusive way, in keeping with the purposes of the *Act* – not just legal changes but changes in placements, service provider awareness or responses to issues such as suicidal ideation or behaviour, sexual identity, etc. –anything that could significantly change the day to day life of the child, parent and/or care provider, or can impact the likelihood or timeline of apprehension, permanency or reunification.

While this is an interpretation of an undefined term, significant measures must cover more than court proceedings or else parliament could simply say court proceedings.

Indigenous Governing Body [IGB]

The *Act* defines "**Indigenous Governing Bodies**" as "a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982":* s. 1. This:

- Includes band councils and other current governing organizations (e.g. Métis Nation, NTI)[2]
- May include tribal organizations or other bodies granted authority over this area by multiple band councils etc.
- May include non-profit societies or corporations incorporated as representative governing bodies for Métis, Inuit or non-status groups.[3]

An Act Respecting First Nation, Inuit and Métis Children, Youth and Families
JURISDICTION AND APPLICABLE LAW
Indigenous Identity Is the child Indigenous (First Nation, Inuit or Métis)? Is this confirmed? Is there a possibility the child is Indigenous but not connected? Is this investigated? Self-identification is sufficient for the purposes of applying the Act. If a child is Indigenous, the Act applies.

[2] In *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, the Supreme Court took for granted that Indian Act First Nations bands are appropriate representatives of s 35 rights holders.

[3] Courts have recognized these as proper representative bodies. See, for example: *Labrador Métis Nation v Newfoundland and Labrador* (Minister of Transportation and Works), 2007 NLCA 75 at 36-47; *Martin v Province of New Brunswick and Chaleur Terminals Inc*, 2016 NBQB 138 at para 48-51.

The Act applies whether the child is status or non-status.
The Act applies whether the child resides on or off reserve.

Related to Child and Family Services
Is the matter "related to child and family services"?

In order for this Act to be meaningfully applied:
The Act applies at every stage of a child protection hearing. This includes:

- applications which may result in an Indigenous child *entering* into the care of CFS, by agreement, temporarily, or permanently, and
- applications that may result in *removing* the child from CFS care such as private guardianship or adoption.

Taking a purposive approach, the protections provided to Indigenous children, families and communities in the minimum national standards should be applied in any private guardianship, tutelage and adoption applications.[4]

The Act, and particularly:

- S. 11 (impacts),
- S. 16(3) (re-assessment) and
- S. 17 (promoting emotional ties)

Continue to apply until the child reaches age of majority so all Guardianship, Tutelage and Adoption orders should reflect these protections.

Indigenous Governing Body/ies
What is the child's Nation(s) or Communities?

In order for this Act to be meaningfully applied:
First Nations (Status) Bands are presumed to be IGBs, as the appropriate representative of s. 35 rights holders (Behn).
If a First Nation (Band) has not designated an IGB, and there is no other group claiming to represent the Indigenous group, assume Band is the IGB.

If an Indigenous representative government (i.e. Inuit, Métis or non-status) has not designated an IGB, and there is no other group claiming to represent the Indigenous group, assume the representative governing organization is the IGB.

Notice must be given to an IGB in matters affecting an Indigenous child, regardless of whether the IGB has given notice of intention to act on behalf of a group, community, or

[4] An issue to be aware of, for example, is the authors have heard of multiple anecdotal reports of private adoption agencies urging parents to place a child for adoption or not name an Indigenous parent to avoid the protections CFS provides. Without legislated protections, post-adoption, or guardianship, Indigenous youth often find themselves back in the system and "radically isolated" in adolescence and young adulthood after permanency placements break down. See Friedland, Re Racine v Woods.

people (s. 12).

If an Indigenous child is connected to more than one IGB, or the appropriate IGB is contested between 2 or more Indigenous bodies, notice should be given to all IGBs.

Applicable Legislation
Does the child's IGB have their own legislation? Check Canada website
If **yes**, start with the requirements from the Indigenous legislation.

- ss. 10-15 of the National Standards still apply.

If **no**, start with the requirements of National Standards in the Act .
Next, any requirements of the relevant provincial legislation the Indigenous legislation or the Act does not address, if they do not conflict or contradict them, may be applied (s. 4).

Overlapping Jurisdictions
The Act assumes overlapping jurisdiction (double aspect) and so, potential conflicts, would be addressed as follows:

If there **is no** Indigenous law (IL):

- If province has lower or no similar standard, C-92 prevails
- If province and federal standards are equal - either applies
- If provincial law provides more robust protection - provincial applies

If there **is** an IL:

- If conflict between IL and ss 10-15 of C-92, C-92 prevails
- If conflict between *Canadian Human Rights Act* (CHRA) and IL, *CHRA* prevails (s. 22(1))
- If conflict between 2 or more ILs, the "stronger ties" provision applies (s. 24(1))

In both cases, equal or more robust Indigenous laws will not be in conflict

- If conflict between IL and any other federal law, IL prevails (s. 22(1))
- If conflict between IL and a provincial law, IL prevails (s. 22(3))

Has a significant measure occurred to the child, or could it occur as a result of this hearing? If so:

Notice (s. 12)

Did CFS give prior notice of the significant measure to:

(1) the child's parents?
(2) anyone else who is a care provider(s)[5]?
(3) the child's IGB? Who is being served the notice and how? Notice must be served to a Director or actual Band Administrator (this requires effort, i.e. not just leaving at security office)
(4) If notice was not given prior to a significant measure due to emergency

[5] Care providers could include private guardians but don't include foster parents or group care providers.

circumstances, was notice given as soon as possible to all parents, care providers and IGBs?

Representation (s. 13)
Are the parents present, as a party, to make representations?

Are any care providers, as parties, present to make representations?

Is a representative of the child's IGB present to make representations?

If not, did CFS inform them they have party status (parents and care providers) and have a right to make representations in this hearing?
If not, has there been an inquiry into whether they have capacity and resources to do so?[6]

Representation by and Consultation with IGBs[7]
In addition to the s. 12(1) requirement of notice and representation from the child's IGB(s), inquiry into the child's IGB's views as to what is in the child's best interests in the particular circumstances of each case may offer the best evidence of:

Adequate local information to consider the child's wellbeing relating to:

- CFS providers' prior compliance with notice and representation requirements: s. 12(1),
- A child's "languages, cultures, practices, customs, traditions, ceremonies and knowledge": s. 9(2)(b) and "cultural, linguistic, religious and spiritual upbringing and heritage": s. 10(3)(a),
- The "characteristics and challenges of the region": s. 9(2)(d),
- In cases of disability, what is needed for a child to be able to participate "in the activities of his or her family or the Indigenous group, community or people to which he or she belongs": s. 9(3)(a),
- Ensuring a jurisdictional dispute is not "resulting in a gap in... services provided": s. 9(3)(e),
- The importance to the child of the child's cultural identity and connections to the language and the territory of the Indigenous group, community or people to which the child belongs": s. 10(3)(d),
- Any plans for the child's care in "accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs": s. 10(3)(f),

[6] See the Principle of Substantive Equality that sets out that S.10(3)(c) family members and (d)IGBs must be able to exercise their rights under this Act without discrimination, which arguably requires state funding in these circumstances.

[7] It is helpful to be aware of and consider applying best practices for addressing a common bias of "Assuming a Conflict between Indigenous children and Communities" at 125-127 in Justice Ardith Walkem's "Addressing Biases Against Indigenous Parents and Indigenous Parenting" in *Wrapping Our Ways Around Them: Indigenous Communities and Child Welfare Guidebook* 2nd ed. 2021.

- Ensuring the effect of services are provided in a manner that takes into account a child's needs, their culture, allows them to know their family origins, and promotes substantive equality: s. 11(a)-(d),
- Socio-economic conditions, including information on the availability or lack of adequate housing and infrastructure in a land based community, such as a village, reserve or settlement: s. 15,
- What reasonable efforts and support services have or could be realistically taken to promote preventative care and have a child continue or return to reside with a family member: s. 14(1); s. 15.1 and s. 16(3),
- In regard to placement, what possibilities may exist and what is needed in support for priority placements within the child's family or community: s. 16(1)(a)-(e) & (2), as well as placements in accordance with the "customs and traditions' of Indigenous peoples, such as custom adoption: s. 16(2.1).

The child's wellbeing in relation to their Indigenous group, community or people's inherent jurisdiction, including:

- Upholding Indigenous governing body's right to have "exercise, without discrimination" their rights under this Act, including the right to have "the views and preferences of the Indigenous group, community or people considered in decisions that affect that Indigenous group, community or people": s. 9(3) (d).
- How services can be provided in a manner that does not "contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people": s. 9(2)(e),
- Determining congruence with the Indigenous governing body's laws: s. 10(4)
- Fulfilling Bill C-92's purpose of recognizing inherent CFS jurisdiction: s. 8 (a) & s. 18(1).

Guiding Principles (s. 9)

The Act is to be interpreted and administered in accordance with the guiding principles of **best interests of the Indigenous child** (s. 9(1)), **cultural continuity** (s. 9(2)), and **substantive equality** (s. 9(3)) and ss. 10 (1)-(3), which requires decision-makers to go beyond principles in most provincial statutes.

Best Interests of the Indigenous Child Analysis (s. 9(1), s. 10)

Best Interests of the Child [Best Interests] remains the primary consideration: **s. 10(1). Determining Best Interests under the Act requires a new analysis.** It is not a matter of just adding additional factors to factors in provincial statutes or applying past precedents.

Starting point is that Indigenous children's need for ongoing relationships with their family members and community, as well as their cultural connectedness, are of at least equal

importance to other indicators of emotional and psychological safety, security and wellbeing. **This super-weights Indigenous children's need for ongoing relationships with family and cultural connectedness**.

The full primary consideration clause reads:

> **Primary Consideration:** When the factors referred to in subsection (3) are being considered, primary consideration must be given to t**he child's physical, emotional and psychological safety, security and well-being**, as well as to the importance, for that child, of **having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs** and of **preserving the child's connections to his or her culture**: s. 10(2) (emphasis added)

Compare with the Primary Consideration clause in the amended Divorce Act, s. 16(2), which only includes the first clause (safety, security and well-being).

Best Interests is paramount and

- should be read *with* principles of **cultural continuity**: s.9(2) & **substantive equality**: s. 9(3),
- not in a way contrary to the Act's purposes: s. 8(a)-(c), and
- considering the primary considerations as well as the factors in s. 10(3).
- When considering a child's wellbeing, remember cultural continuity is now *essential* to an Indigenous child's wellbeing: s. 9(2)(a).

Best Interests Factors (s. 10(3))

Many of the best interests factors are familiar, and are the same or similar to the best interests factors in the amended *Divorce Act*.

Distinct factors include:

> (d) the importance to the child of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs;
>
> (f) any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs;

Common factors include:

> (a) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
>
> (b) the child's needs, given the child's age and stage of development, such as the

child's need for stability;

(c) the nature and strength of the child's relationship with his or her parent, the care provider and any member of his or her family who plays an important role in his or her life;

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(g) family violence and its impact on the child and

(h) any relevant civil or criminal proceeding, order, condition or measure.

Cultural Continuity (s. 9(2))

Cultural continuity may be a new, or less familiar principle to Canadian judges than best interests or substantive equality. The Act sets out concepts to assist understanding it and for applying it.[8]

The Act explains:

- "**cultural continuity is essential to the well-being** of a child, a family and an Indigenous group, community or people" (a) and
- "the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is **integral to cultural continuity** (b).

Other concepts refer to administration of the Act, including that residing with family often promotes an Indigenous child's best interests (see the placement provisions. (s. 16(1)(a)-(e)).

There are two directives for CFS provision:

(d) child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people; and

(e) the characteristics and challenges of the region in which a child, a family or an Indigenous group, community or people is located are to be considered.

Substantive Equality (s. 9(3))

Substantive equality is prioritized as one of the three principles that ought to inform the interpretation of the Act as a whole. In the context of First Nations child welfare, the Canadian Human Rights Tribunal has defined substantive equality as First Nations children

[8] To learn more about the importance of cultural connection or 'groundedness' for Indigenous children and youth's well being, see NICWA Contemporary Attachment and Bonding, as well as other resources listed below under "Attachment Theory and Cultural Connectedness", below.

and families having access to services that "consider the[ir] distinct needs and circumstances … including their cultural, historical and geographical needs and circumstances," as well as conforms to Jordan's Principle.[9]

Jordan's Principle is a child-first principle and provides that where a government service is available to all other children and a jurisdictional dispute arises between Canada and a province/territory, or between departments in the same government regarding services to a First Nations child, the government department of first contact pays for the service and can seek reimbursement from the other government/department after the child has received the service. It is meant to prevent First Nations children from being denied essential public services or experiencing delays in receiving them.[10]

The Act directs that substantive equality reflects that:

- Children with a disability should participate in the activities of their family or community to which he or she belongs, to the same extent as other children: s. 9(3)(a);
- A child, the child's family member, and the child's IGB should be able to meaningfully participate in decisions affecting them, without discrimination: s. 9(3)(b)-(d);
- Discrimination can include systemic underfunding of services based on ethnic/Indigenous origin.[11]
- Jurisdictional disputes must not result in a gap in child and family services that are provided in relation to Indigenous children (e.g., Jordan's Principle): s. 9(3)(e).

Priority to Preventative Care (s. 14 (1)):

To the extent that providing a service that promotes preventive care to support the child's family is consistent with the best interests of the child, the provision of that service is to be given priority over other services.

Remember:

- The new best interest analysis super-weights ongoing relationships to family and cultural connectedness: s. 10(2)
- A child's best interests are often promoted when the child resides with members of his or her family and the culture of the Indigenous group, community or people to which he or she belongs is respected 9(2)(c)

Courts can encourage compliance by asking:

- Has preventative care to support the child's family been provided?
- If so, what services?
- Has preventative care been prioritized over other services?

[9] *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 465 and 481.

[10] *Ibid* at para 351.

[11] *Ibid*.

- Has the child's family and IGB been asked for information regarding realistic or useful support services for the family?
- If support has not been provided, has CFS provided a reason, with evidence, that such support is not congruent with the child's best interests?

Consider:

- If CFS has provided a reason, with evidence, that supports are not consistent with the best interests of the child, does the IGB agree with CFS? If not, where is there a difference of opinion?
- What other supports could be provided?

Prenatal Care (s. 14(2)):

To the extent likely to be consistent with best interests after birth, the provision of prenatal services to promote preventative care should be provided and given priority over other services in order to prevent the apprehension of the child at the time of birth. Prenatal services likely to be in a child's best interests after birth may include:

- Basic necessities of life for the pregnant parent (food, shelter, safety),
- Access to culturally safe basic prenatal health services
- Access to culturally safe specialized prenatal health services, including addiction and mental health services,
- Planning and preparation for mitigating socio-economic conditions and putting family support services for the family in place at the time of birth,
- Planning and preparation for placement (including notice and representation and following placement priorities) at the time of birth.

This provision means that CFS providers can no longer justify *not* helping parents in the prenatal period by saying they cannot respond to requests for help until the child is actually born.

Consider:

- If a parent is pregnant, should an order be made for CFS to provide prenatal services?
- If a child is apprehended at birth, or there is an application to apprehend at birth, what evidence has CFS provided of offering or providing prenatal services prior to birth?
- If no prenatal services have been offered or provided, can the child's immediate safety be maintained (e.g. remain in hospital, 24/7 in-home family support) until family support or placement planning can be implemented?

Socio-Economic Conditions (s. 15):

The child **must not** be apprehended solely based on their socio-economic conditions,

including poverty, lack of adequate housing or infrastructure, or the state of health of either their parent or care provider

Remember:

- S. 10(3)(e) - substantive equality and s. 15.1 - reasonable efforts.

Courts can encourage compliance by asking:

- Were the grounds on which CFS apprehended the child based on or including any of these factors?
- If grounds include more than socio-economic conditions, would those grounds be sufficient to apprehend absent these factors?
- Did CFS assess whether safety, security and wellbeing concerns could be mitigated or resolved by provision of housing, services or financial supports? If so, did CFS provide these?
- If not, why not?

Consider:

- Can an order be made to provide the necessaries to maintain the child safely in their family home?

Reasonable Efforts (s. 15.1)

Before apprehending a child who resides with their parent(s) or other family member, the CFS provider *must* demonstrate they made reasonable efforts to have the child continue to reside with that person (unless immediate apprehension is necessary for best interests).

- Reasonable efforts require *active* and *ongoing* measures by CFS providers, including problem-solving with parents and family members when necessary, not just providing a list of conditions and a list of resources.[12]
- What evidence has CFS provided to demonstrate they have actively made reasonable efforts to have the child continue to reside with their parent or care provider?
- Have reasonable efforts been actively made on an ongoing basis?

Consider:

- If the child is not in immediate physical danger, and there is no evidence of CFS making reasonable efforts, CFS is not in compliance with the Act and an apprehension order should not be granted.

Placement Priorities (s. 15.1 and s. 16(1)(a)-(e), (2) and (2.1))

The Act's placement priorities mean that Courts now oversee placements.

[12] For more detailed information and case studies on what reasonable efforts should and can entail, see "Best Practices for Reasonable Efforts" in Justice Ardith Walkem's *Wrapping Our Ways Around Them: Indigenous Communities and Child Welfare Guidebook* 2nd ed. 2021 at 60-63.

- This may be a change in provinces where in the past this was left to the discretion of the Director.
- It is the duty of CFS providers to look for placements and identify what efforts were taken to find placement priorities and why these efforts weren't successful. This needs to be documented, with evidence, in every case.
- The onus is not on the parent, family members, care providers or the IGB to identify placement options.

The CFS provider has the duty under the Act to make reasonable efforts to identify priority placements.

When making placement decisions, remember:

- The new best interest analysis super-weights ongoing relationships to family and cultural connectedness: s. 10(2)
- A child's best interests are often promoted when the child resides with members of his or her family and the culture of the Indigenous group, community or people to which he or she belongs is respected: s. 9(2)(c)

Courts can encourage compliance by asking:

- Is there documentation for each step in the Placement process?
- Has CFS provided reasons with evidence of why the steps didn't work out?
- Does the IGB agree with these reasons? Do they have any other suggestions or avenues to explore?
- Could these reasons be addressed through reasonable efforts?

Consider:

- Are reasons for not placing an Indigenous child with family members or community members only or primarily socio-economic or infrastructure related ones?
- Can an order for family support and/or socio-economic support mean a child can stay or return to their family or community? See s. 10, s.14(1), s. 15, s.15.1.

Reassessment for Family Unity (s. 16(3))

Every order relating to an Indigenous child **must now include ongoing reassessment for family unity**. This is mandatory. It is the *only* clause in the Act that does *not* say this requirement is subject to best interests.

- There is no end date in the Act for reassessments for family unity.
- There is nothing in the Act that suggests it does not apply in permanency orders.

The outcome of the reassessment itself is subject to appropriateness. Even where residing with family may not be deemed appropriate, ongoing reassessments can benefit the child as an opportunity to assess:

- Whether there are ways to promote their attachment and emotional ties to a family member (s. 17),

- Whether, in effect, the original order is still taking into account:
  - the child's needs and their culture (s. 11(a)-(b)),
  - allowing the child to know their family of origin (s. 11(c) and
  - promoting substantive equality (s. 11(d)),
- Whether, in effect, the original order is still not contributing to assimilation and cultural destruction contrary to s. 9(2)(d), and
- Whether the original order is still in the best interests of the Indigenous child or if an additional order (i.e. access order) may be: s. 10 (1)- (3).

Consider:

- All orders should include regular reassessment dates, however the frequency of these re-assessments will vary case to case.
- All orders should continue ongoing reassessments for family unity until an Indigenous child reaches the age of majority, regardless of the permanency type (i.e. adoption, guardianship, tutelage).
- Where statutory permanency options exist that do not require erasing and replacing a child's birth relationships to achieve permanence, such as "custom adoption" statutes, private guardianship or tutelage, ask IGB for their preference for their children and ask CFS and prospective guardians for reasons to *not* use these in each case: s. 11(c).[13]

Promoting Attachment and Emotional Ties (s. 17)

In the context of providing CFS, the child's attachment and emotional ties to each such member of his or her family are to be promoted, as consistent with the child's best interests.

- There is no end date in the Act for promoting attachments and emotional ties to family members.
- There is nothing in the Act that suggests this provision does not apply in permanency orders.
- Promoting attachments and emotional ties is relevant until an Indigenous child reaches the age of majority.

Some Courts have found ways to promote an Indigenous child's attachments and emotional ties over their lifetime, even in permanency orders.

Some ways Courts have promoted this prior to granting any order, include:

- Considering a prospective private guardian or adoptive parent's willingness to promote the child's attachments and emotional ties to family members through an order as part of the best interests analysis (s. 10(2) and (3)),
- Asking for and requiring adequate time for the child's IGB and family members' input and advice regarding promoting the child's attachments and emotional ties,

[13] See Friedland, "Re Racine v Woods" for a trans-systemic discussion regarding the "addition" adoption model for forming a new parent-child relationship in many Indigenous legal traditions in comparison with the "erase and replace" model in English and Canadian statutes.

or requiring CFS to provide evidence of the results of this consultation with results,
- Asking CFS and IGB to identify any family members or community members who are willing and able to maintain regular contact with the child, even if there are none who can currently provide full-time care, including providing support where needed (e.g. phones, apps, travel and accommodation expenses).

Consider including in Orders or as an additional related Order:
- Access or contact orders with family members or community members whenever possible,
- More defined and specific cultural connection requirements or compliance with a cultural connection plan or cultural preservation plan co-developed by an IGB and family.
- Hyphenate last names instead of erasing the child's birth name: s. 11(c)
- Include the names of community and birth parents in order so the child can find the connection if it is not already created: s. 11(c).

Remedies:
The Act is silent insofar as remedies.

In order for this Act to be meaningfully applied:
The Act provides minimum standards and is not intended to cover the field. In fact it is premised on double aspect. Therefore where the Act is silent, all provincial substantive, procedural and remedial laws apply.

C92 Summary Checklist

Prior to Granting an Apprehension or Placement Order
Jurisdiction and Applicable Law ☐ Is the child Indigenous (First Nations, Inuit, Métis, status or non-status, on-reserve or off-reserve, self-identified or identified through other means)? ☐ Is the matter related to CFS delivery (apprehension, entering care, leaving care etc.) ☐ Does the child's IGB have their own CFS legislation?
Notice and Representation ☐ Do you have evidence of meaningful notice and do you have information about the views of the best interests of the child from parents and/or care providers? ☐ Do you have evidence of meaningful notice and do you have information about the views of the best interests of the child from their IGB?
Best Interests Is your analysis of the child's best interests: ☐ A different analysis from an analysis under provincial legislation, considering the primary considerations, which super-weight the child's relationships with family and cultural connectedness? ☐ Taking into account the factors in s. 10(3). ☐ Congruent with principles of **cultural continuity**: 9(2) & **substantive equality**: 9(3)? ☐ Not contrary to the Act's purposes: s. 8(a)-(c)?
Prioritization of Preventative Care ☐ Do you have evidence that preventative care has been prioritized prior to granting an apprehension order? ☐ Has CFS actively provided support and made reasonable efforts for the child to stay in the home of a parent or family member? ☐ Do the grounds for apprehension include socio-economic conditions, including poverty, lack of adequate housing or infrastructure, or parent or care provider's health? If so, can an order to address these be made instead?

Placement Priorities

- ☐ Do you have evidence that CFS has investigated all priority placements and the child is being placed in the highest priority placement possible?

Promoting Attachment and Emotional Ties

- ☐ Has there been adequate time and consultation for promoting attachments and emotional ties, regardless of placement, until the age of majority?

Promoting Attachments and Emotional Ties included in Order.

- ☐ A way to promote attachment and emotional ties (e.g. access or contact order; order to incorporate cultural preservation plan)? s. 16(3)

Reassessment for Family Unity taken into account in Order

- ☐ Regular ongoing reassessment dates for family unity s. 17 and evaluating the impacts of delivery of services: s. 11 to the age of majority.

APPENDIX
Helpful Resources:

Overview of the Act:

- The Statute: *An Act Respecting First Nations, Inuit, Métis Children, Youth and Families*
- Webinar Overview the Act: Bill C-92 An Act respecting First Nations, Inuit and Métis children, youth and families, From Compliance to Connection
- Canada Technical Information Package: Technical Information Package: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families
- Indigenous groups who have given notice to create their own laws: https://www.sac-isc.gc.ca/eng/1608565826510/1608565862367

Legal Professionals Applying the National Standards:

- Provincial Courts' Jurisdiction to apply the Act: Who Hears Bill C92?
- For Courts and Lawyers applying the National Standards: Bill C92 National Standards Guide for Legal Professionals

National Standards: Practice Changes and Best Practices for Other Professionals:

- How Social Workers and Service Providers can comply with National Standards: Bill C92 Compliance Guide for Social Workers and Service Providers
- Applying the Preventative Prenatal Care Provisions: Bill C92 Prenatal Provision Guide for Health Care Professionals
- Primer on Practice Shifts: Primer on Practice Shifts required with Canada's *An Act Respecting First Nations, Inuit, Métis Children, Youth and Families*

Parent Information:

- Parent's Rights Guide (plain language): Bill C92 Rights Guide for Parents

Indigenous Governing Bodies' Exercising Jurisdiction through National Standards and Law-Making Authority:

- First Steps for Indigenous Groups: What to do with C92: Day 1 Guide for First Nations and Other Indigenous Governing Bodies
- Implementation Strategies: Bill C92 Implementation Strategies
- Canada Technical Information Package: Technical Information Package: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families
- Bill C-92 Community Guide (45 minutes): YouTube presentation by Wahkowtowin lodge

Scholarly blogs and articles on Bill C-92 and related issues (*Caring Society* case, Jordan's Principle, Attachment Theory)

Bill C-92:

- Naiomi Metallic, Hadley Friedland and Sarah Morales, "The Promise and Pitfalls of C-92: An Act Respecting First Nations, Inuit and Métis Children, Youth and Families," Special Feature for Yellowhead Institute, July 4, 2019.
- Christiane Guay, Naiomi Metallic and Hadley Friedland, "Quebec's Misguided Challenge to Federal Indigenous Child Welfare Law," Dalhousie Law Journal Blog, January 23, 2020.
- Justice Ardith Walkem, *Wrapping Our Ways Around Them: Indigenous Communities and Child Welfare Guidebook* 2nd ed. 2021.

Human Rights and Jurisdiction (Caring Society Case, Jordan's Principle):

- Naiomi Metallic, "A Human Right to Self-Government over First Nation Child and Family Services and Beyond: Implications of the Caring Society Case," (2019) Journal of Law and Social Policy, Volume 28:2, article 4.
- Vandna Sinha, Colleen Sheppard, Maya Gunnarsson and Gabriella Jamieson, "Substantive Equality and Jordan's Principle: Challenges and Complexities," (January 2021).

Attachment Theory and Cultural Connectedness:

- Hadley Friedland, "Reference Re: Racine v Woods" in Systems Disruption: Reimagining Canada's Aboriginal Rights Jurisprudence Collection (special issue of the Canadian Native Law Reporter, Native Law Center, Saskatchewan, 2020).
- Yazan Materieh, "Weighing Indigeneity: Culture and the Indigenous Child's Best Interests under Bill C-92" (2020).
- Peter W. Choate et al., "Rethinking Racine v Woods from a Decolonizing Perspective: Challenging the Applicability of Attachment Theory to Indigenous Families Involved with Child Protection," (2019) 34(1) Can J Law & Society at 55.
- Justice Ardith Walkem, Chapter 6: "Best Interests of the Indigenous Child" in *Wrapping Our Ways Around Them: Indigenous Communities and Child Welfare Guidebook* 2nd ed. 2021 at 75-95.
- NICWA, "Contemporary Attachment and Bonding Research: Implications for American Indian/ Alaska Native Children and their Service Providers" (Feb. 2020).

Best Practices for Addressing Common Biases:

- Justice Ardith Walkem, "Addressing Biases Against Indigenous Parents and Indigenous Parenting" in *Wrapping Our Ways Around Them: Indigenous Communities and Child Welfare Guidebook* 2nd ed. 2021 at 109 to 134.

Applications in Sexual Offence Cases:

Third Party Records
Section 276
Records in the Possession of the Accused

NWT Bench and Bar Education Event
November 1, 2024
Mona Duckett, K.C.
Lesley Ruzicka, K.C.

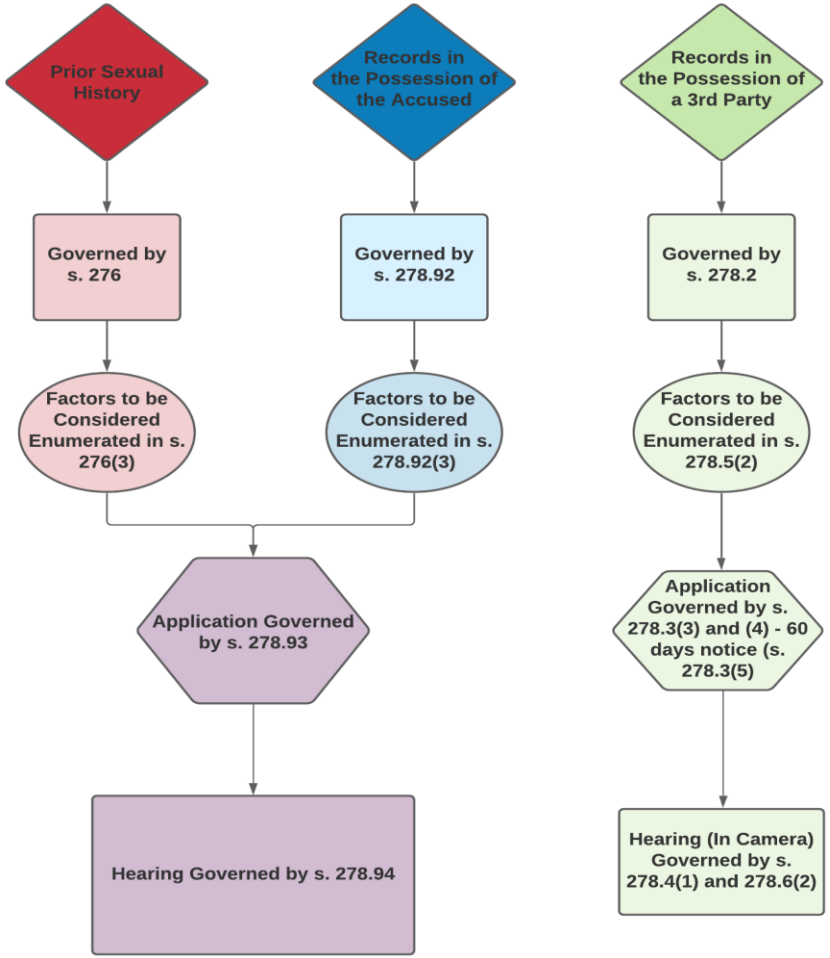
Overview

Part I: Third Party Records (Production/Disclosure)
- overview of scheme
- procedure
- what's new

Part II: Section 276 Applications (Admissibility/Use)
- overview of scheme
- Crown led other sexual history
- what is 'other sexual history'

Part III: Records in the Possession of the Accused (Admissibility/Use)
- overview of scheme & procedure post *J.J.*
- case management – questions to ask?
- what is a "record"?
- evolving issues and practical considerations

Overview of Related Schemes



Third Party Records

Two different schemes govern production/disclosure of third party records

- for non-sexual offences, production of third party records is governed by the common law procedure outlined in *R. v. O'Connor*, [1995] 4 S.C.R. 411

- where trial is in respect of a sexual offence enumerated in s. 278.2(1) of the *Code*, the third party records scheme in ss. 278.1-278.91 apply; constitutionality upheld in *R. v. Mills*, [1999] 3 S.C.R. 668.

- difference in schemes discussed in *R. v. McNeil*, 2009 SCC 9, para. 32

Production of third party records to an accused

- no “record” relating to a complainant (COM) or a witness shall be produced to an accused in except in accordance with the procedure set out in ss. 278.3 to 278.91

What is a "record"?

- "record" is defined in s. 278.1
- "any form of record that contains personal information for which there is a reasonable expectation of privacy" (REP)
- definition includes a list of enumerated records with a presumed REP: "includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature"
- definition does "not include records made by persons responsible for the investigation or prosecution of the offence"

Examples of "records" beyond those enumerated

- for non-enumerated records, the court must engage in a fact-specific analysis to determine if there is a "reasonable expectation of privacy" in personal information
- police occurrence reports relating to a COM or witness made during other, unrelated investigations are "records": *R. v. Quesnelle*, 2014 SCC 46, paras. 49, 66
- materials gathered, and interviews conducted, by professional investigator for internal Athletics Canada investigation: *R. v. Porter*, 2023 ABKB 197
- records of community support workers: *R. v. Sutherland* (2001), 156 C.C.C. (3d) 264 (Ont. C.A.), para. 13

What about "records" in the possession of the Crown?

- definition of "record" does "not include records made by persons responsible for the investigation or prosecution of the offence" (s. 278.1)
- where a "record" is in "the possession or control of any person, including the prosecutor", the scheme applies unless the COM "has expressly waived the application of those sections" (s. 278.2(2); *Mills*, para. 114)
- however, there is a duty on the Crown to give notice when a "record" is in the possession of the Crown (s. 278.2(3)) so defence may bring an application
  - "the prosecutor shall notify the accused that the record is in prosecutor's possession but, in doing so, the prosecutor shall not disclose the record's contents"

What constitutes a waiver?

- waiver should not be read in technical sense
- occurs when the COM or witness indicates by words or conduct that they are relinquishing their privacy right
- turning records over to the police or Crown, with knowledge of the law's protections and the consequences of waiving those protections, will constitute an express waiver pursuant to s. 278.2(2)

Mills, para. 114

Procedure

- **Written application** outlining:

  (a) particulars identifying the record sought and the identity of the record holder; and
  (b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or the competence of a witness to testify - s. 278.3

- **Stage One** (judge determines if records should be produced to the court) – ss. 278.4 to 278.5

- **Stage Two** (judge determines if record or part of record should be produced to the accused) – ss. 278.6 to 278.7

- Note: the accused is entitled to be present: *R. v M.C.*, 2023 ONCA 611

Procedure: Notice

- accused shall serve the application on the prosecutor, the record holder, the COM/witness, and on any other person to whom, to the knowledge of the accused, the record relates, at least 60 days before the hearing (or any shorter interval the judge may allow in the interests of justice) (s. 278.3(5))

- accused must also serve a Form 16.1 *subpoena duces tecum*, issued under Part XXII of the *Code*, on the record holder

- the return date of the *subpoena* should be scheduled well in advance of the third party records application to ensure everyone has been served and to allow the COM/ witness time to review the records in advance of hearing

Procedure: Stage One (s. 278.5)

- judge may order the record holder to produce the record *to the court* [for review at Stage Two] if the judge is satisfied:

  (a) the application was made in accordance with ss. 278.3(2) to (6);

  (b) the accused has established that the record is *likely relevant* to an issue at trial or the competence of a witness to testify; and

  (c) the production of the record is *necessary in the interests of justice*.

Procedure: Stage One (cont.)

- application can only be brought before the trial judge (s. 278.3(1)); commonly heard by a case management judge appointed pursuant to s. 551.1
- hearing must be held *in camera* (s. 278.4(1))
- record holder, COM/witness, and any other person to whom the record relates may appear, be represented by counsel and make submissions, but they are not compellable witnesses at the hearing (ss. 278.4(2) and (2.1))
- mandatory publication ban (s. 278.9(1))
- judge shall provide reasons for ordering or refusing to order the production of a record or part of a record (s. 278.8)

Procedure: Stage One
What is "likely relevant"?

- higher threshold than the *Stinchcombe* test for first-party Crown disclosure
- standard is "significant but not onerous": *R. v. McNeil*, 2009 SCC 3, para. 29; *R. v. Porter*, 2023 ABQB 197, para. 26
- under s. 278.3(3), there must be "a *reasonable possibility* that the information is *logically probative* to an issue at trial or the competence of a witness to testify": *O'Connor*, para. 22; *Mills*, para. 45
- the evidentiary foundation might include Crown disclosure, witnesses or expert evidence: *O'Connor*, para. 146
- s. 278.3(4) contains a list of 11 assertions that are *not* sufficient to establish that the record is *likely relevant*

Procedure: Stage One "Likely relevant" cont.

- s. 278.3(4) only prevents reliance on a **bare** assertion – accused must be able to point to case specific evidence or information to show likely relevance
  R. v. K.C., 2021 ONCA 401, paras. 29, 32
  R. v. Porter, 2023 ABQB 197, paras. 29-32

- mere fact that a COM has spoken a counsellor about the alleged assault does not automatically make a record likely relevant
  R. v. Batte, (2000) 145 C.C.C. (3d) 449 (ONCA) paras. 71-72
  R. v. Sheppard, 2023 ABCA 10 at para. 35

- "the notion that consultation with a psychiatrist is, by itself, an indication of untrustworthiness" is an example of a myth - "[t]he purpose of s. 278.3(4) is to prevent … [such] myths from forming the entire basis of an otherwise unsubstantiated order for production of private records": *Mills*, para. 119

Procedure: Stage One "Interests of Justice"

- accused must establish not only that the record is likely relevant, but also that the production of the record to the court is "*necessary in the interests of justice*": s. 278.5(1)(c); *R. v. Hanslip*, 2015 MBCA 114, paras. 21-36

- pursuant to s. 278.5(2), in determining whether to order production of a record, the judge must consider the "salutary and deleterious effects" of the determination on:
  (1) the right of the accused to make "full answer and defence;" and
  (2) the "right to privacy, personal security and equality" of the complainant, witness, or other person to whom the record relates; and

- judge shall also take into account the eight statutory factors listed in s. 278.5(1)

Procedure: Stage One Full Answer and Defence

- accused's right to make full answer and defence is a principle of fundamental justice, which provides protection against wrongful convictions
- however, the right to make full answer and defence does not entitle the accused to receive irrelevant evidence, and is not automatically breached whenever the accused is deprived of relevant information
- where there is a danger that the accused's right to make full answer and defence will be violated, the judge should err on the side of production to the court: *Mills*, para. 137
- trial judge is entitled to consider whether the information sought from the record may be available from other sources that would not involve an invasion of a therapeutic or other private relationship

Mills, paras. 69-75
R. v. Clifford (2002), 163 C.C.C. (3d) 3 (Ont. C.A.), at paras. 64-65

Procedure: Stage One Privacy

- privacy is not an “all or nothing” concept
- a COM’s privacy interest is very high where the records concern personal identity or where confidentiality is crucial to the relationship: *Mills*, para. 89, 94
- however, even an order for production of the records to the court for review at Stage Two is an invasion of privacy: *O’Connor*, para. 151

Procedure: Stage Two
Review of Record by the Judge

- if records are ordered produced to the court, judge shall review the records in the absence of the parties to determine whether records should be produced to the accused (s. 278.6(1))

- judge may hold a hearing *in camera* if the judge considers that it will assist in making the determination (s. 278.6(2))

- if a hearing is held at Stage Two, the record holder, COM witness, and any other person to whom the record relates may again appear, be represented by counsel and make submissions (s. 278.6(3))

Procedure: Stage Two
Test for Production to an Accused

- judge may order record or part of record be produced to accused if satisfied that record is *likely relevant* to an issue at trial or the competence of a witness to testify and its production is *necessary in the interests of justice* (s. 278.7(1))

- similar to Stage One, consider salutary and deleterious effects and eight statutory factors listed in ss. 278.5(2)(a) to (h)

- if judge orders production, judge may impose conditions on production to protect interests of justice and privacy, personal security and equality interests of the COM or witness (s. 278.7(3))

What's new with third party records?

- **records held by the media** (i.e. interviews of and correspondence with complainant) – application of journalist source privilege: see, for example, *R. v. Virtanen*, 2022 BCCA 246, leave to appeal denied, [2022] S.C.C.A. No. 249

  However see also *R. v. Lim #4*, 2021 ONSC 45 where Molloy J found that the JSPA didn't apply, but fused the *O'Connor* and *Vice Media* regimes

- **Crown redactions** of private information in COM's police statement: live BC issue *R. v. Hawco*, 2024 BCSC 122 – before disclosing statement Crown redacted (1) events involving COM in another province years before; and (2) medicine she'd been prescribed at time of alleged assault

  Disclosure issue or third party records issue, given definition of 'record'?

Section 276: Other Sexual History Evidence

s. 276

- s. 276(1): prohibits admissibility/use of OSA to support twin-myth reasoning (i.e. led to support an inference that complainant, because of the OSA, was more likely to have consented to the sexual activity that is the subject matter of the charge or is less worthy of belief).

- s. 276(2): TJ may only admit evidence of OSA if it:
  - is evidence of a specific instance of sexual activity;
  - is relevant to an issue at trial;
  - is not used to support twin-myth reasoning; and
  - has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice

- s. 276(3): factors judge shall consider when determining admissibility

Section 276 regime applies:

- to "any communication made for a sexual purpose or whose content is of a sexual nature" (s. 276(4))
- to any proceeding in which a listed offence is implicated: *R. v. Barton*, 2019 SCC 33
  - but see also *R. v. A.M.*, 2024 ONCA 661: case-by-case analysis required for non-enumerated offences
- to all 'proceedings' including bail hearings, preliminary inquiries, trials and sentencings: *R. v. Kuzmich*, 2020 ONCA 359, para. 34

Procedure: defence application

- **Application:** defence application for a s. 276 admissibility hearing (s. 278.93(1) and (2))
  - must be made in writing
  - must set out detailed particulars of the evidence accused seeks to adduce and relevance of evidence to issue at trial
  - served at least 7 days in advance, although TJ may abridge notice (s. 278.93(4))
- **Stage 1 (screening hearing):** before TJ may grant application for admissibility hearing, TJ must be satisfied that the application "sets out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial" (s. 278.93(2))

Procedure: defence application (cont.)

- **Stage 2 (evidentiary hearing)**
  - *in camera*
  - COM is not compellable witness but may appear and make submissions
  - TJ shall inform COM of right to be represented by counsel
  - based on evidence presented, does the proposed evidence meet statutory criteria in s. 276(2)?
  - TJ shall consider factors in s. 276(3)
  - TJ shall provide reasons

Should Stage 1 and Stage 2 be blended?

- in *R. v. Reimer,* 2024 ONCA 519, at para. 34, application for leave to appeal pending, Paciocco J.A. for the Court said:
  - while blended s. 276 hearings are not uncommon, this practice should be discouraged
  - Stage 1 is "meant to winnow out applications that, on their face, have no realistic prospect of succeeding, not only to avoid wasteful hearings but to spare complainants from the unnecessary embarrassment and indignity of a s. 276 hearing. The stages of the two-stage process should be kept distinct".

Relevance

- accused must identify specific evidence sought and how it is relevant to a legitimate defence, does not invoke twin myth reasoning, and is integral to making full answer and defence: *R. v. Goldfinch*, 2019 SCC 38, paras. 14, 95, 131
- bare assertions that OSA relates to context, narrative or credibility are not sufficient: *R. v. Goldfinch,* paras. 51, 65
- OSA rarely relevant to establish consent or denial that sexual activity occurred: *Goldfinch,* para. 26
- prior sexual history between the accused and the complainant may be relevant where it illustrates how the complainant previously communicated consent: *R. v. Kennedy*, 2020 NLCA 25, para. 62, citing *Goldfinch*, thus relevant to the defence of honest but mistaken belief in communicated consent

Practice Point

- need enough detail to establish sufficient factual and evidentiary basis for TJ to properly consider and weigh s. 276 factors (but not so many details that witness' privacy is unnecessarily violated): *R. v. T.W.W.*, 2024 SCC 19, para. 36
- defence must identify, in a detailed manner, a specific use for the OSA evidence that does not invoke twin-myth reasoning and establish how the evidence is fundamental to the accused's specific defence: *T.W.W.*, paras. 5, 26
- need for precision is especially important when the proposed uses are credibility and narrative: *T.W.W.*, para. 26
- OSA "must respond to a specific issue at trial that could not be addressed or resolved in the absence of that evidence": *T.W.W.*, paras. 27-28

Case study:
R. v. Reimer, 2024 ONCA 519, application for leave to appeal pending

- COM and ACC exchanged sexualized test messages, including shortly before incident that formed the subject matter of the charge, in which they described the sexual activity they wanted to engage in
- texts fall within the definition of sexual communication in s. 276(4)
- admissibility of sexualized messages must be vetted under s. 276 if they do not form part "of the subject matter of the charge" (para. 44)
- however, ONCA ordered a new trial because TJ erred in s. 276 analysis re: relevance of sexualized text messages to issue of consent
- may be rare cases where OSA will be relevant to consent without engaging twin myth reasoning
- BUT ONCA was "unable to conclusively determine whether any of the sexualized text messages should have been admitted" so new trial ordered

Crown-led other sexual history

- applications by Crown governed by principles in s. 276(1) and principles from *R. v. Seaboyer,* [1991] 2 S.C.R. 577 common law scheme: *R. v. Barton*, 2019 SCC 33, para. 80
- Crown must provide a sufficient evidentiary basis on which the court may assess the relevance of proposed evidence
- may be done through affidavit, *viva voce* testimony, or other admissible evidence (including transcript of COM's police interview): *R. v. Morris*, 2024 ONSC 4155
- there are conflicting decisions on whether Crown must file an affidavit from the COM
  - CAUTION: some Crown applications have been dismissed, incl. for lack of particulars: see *R. v. G.L.*, 2021 ONSC 271; *R. v. A.K.*, 2022 ABKB 651; *R. v. Bethune*, 2022 NSSC 246
- live issue as to whether ss. 276(2) and (3) or procedural requirements in ss. 278.93 and 278.94 (stage two) should apply to common law applications by Crown
- procedure may be addressed by SCC in appeal from *R. v. Kinamore*, 2023 BCCA 337 (scheduled for hearing on Dec. 5/24)

What constitutes OSA?

- consensual and non-consensual activity, including conduct occurring before, at the time of, and after alleged sexual assault, including with the accused: *R. v. D.K.*, 2020 ONCA 79, para. 52
- prior discussions about the specific activity that is the subject matter of the charge are generally admissible as revealing expectations about the incident in question: *R. v. Barton*, 2019 SCC 33, para. 93

Proximate Sexual Activity: what "forms the subject matter of the charge"?

- depending on the circumstances, s. 276 may or may not include sexual activity occurring on the same day/night of the alleged offence ("proximate sexual activity")
- there are no bright line rules - it's a fact-driven, contextual exercise
- underlying purpose of the regime should be kept in mind, and where there is doubt, the evidence should be screened.
- consider whether it is part of the same transaction (i.e. integrally connected, intertwined or directly linked) and whether it is closely connected by time and circumstances

R. v. McKnight, 2022 ABCA 251; *R. v. Ravelo-Corvo*, 2022 BCCA 19; *R. v. Choudhary*, 2023 ONCA 467; *R. v. Hoffman*, 2024 BCCA 98; *R. v. Reimer*, 2024 ONCA 519, application for leave to appeal pending

Does virginity or evidence of sexual inactivity fall within OSA?

- SCC has not conclusively determined whether virginity or a statement about a lack of interest to engage in sexual activity is OSA: *R. v. R.V.*, 2019 SCC 41, para. 81

- however, in *R.V.* majority agreed "that it would be incongruous to hold that the statement 'I am a virgin' does not engage s. 276 while an answer to the contrary would clearly be a reference to sexual activity": *R.V.*, para. 81

- do conversations about sexual activity or sexual disinterest fall within s. 276(4) definition?

- post *R.V.* appellate cases:
  - *R. v. Czechowski*, 2020 BCCA 277 (Crown question about prior anal sex; no s. 276; issue not resolved)
  - *R. v. Diakite*, 2023 MBCA 42 (Crown led evidence of virginity; no s. 276; issue not resolved)
  - *R. v. Kinamore*, 2023 BCCA 337 (Crown led text msgs that COM did not intend to have sexual relationship with ACC, no s. 276), leave to appeal to SCC granted (hearing Dec. 5/24)

Is evidence that someone is married or in a relationship OSA?

- evidence of a relationship that implies sexual activity engages s. 276(1) and is not admissible as 'narrative' or 'context' unless the requirements of s. 276 are met: *Goldfinch,* paras. 5, 51, 65

- there is no need to bring a s. 276 application "where the parties only seek to establish that a relationship existed between the accused and the complainant, unless the very nature of that relationship is sexual, as was the case in *Goldfinch*": *R. v. T.W.W.*, 2024 SCC 19 para. 24

- in *Goldfinch*, the relationship was one of "friends with benefits"

- some courts have held that "married with a child" requires a s. 276 application: *R. v. K.M.L.*, 2022 ABKB 710, para. 34; *R. v. H.P.M.*, 2023 ABCA 292, paras. 41-45

Role of trial judge

- TJ is gatekeeper
- counsel may agree that the evidence is admissible but the decision to admit the evidence must be made by the court
- only properly admissible OSA may be admitted at trial

Re-opening a s. 276 ruling

- while s. 276 applications are generally heard pre-trial, the relevance and probative value of OSA evidence may not crystalize until witnesses have begun their testimony and the evidence, or the inconsistency or materiality, becomes apparent

- if there has been a material change in circumstances, the trial judge may, on their own initiative OR on request by a party, revisit an earlier s. 276 ruling in light of the new evidence or information

- in vast majority of cases, it will be the defence who must request a reconsideration and articulate the permissible purposes of the evidence in light of the changed circumstances

- COM has standing on application to revisit/reconsider

R. v. T.W.W., 2024 SCC 19, paras. 51-52; *R.V.*, paras. 72-75

Records in the possession of the accused

Overview of amendments

- Bill C-51 (December 2018) made three primary changes:

(1) s. 278.92(1) makes "records" in the possession of the accused presumptively inadmissible in proceedings in respect of sexual offences if they contain personal information in which the COM has a reasonable expectation of privacy

(2) added a two-step procedure at ss. 278.92(2) to 278.94 which allows the accused to apply to have the records admitted

(3) the bill repealed ss. 276.1 to 276.5, the prior procedure by which an accused could apply to have evidence of other sexual activity evidence admitted at trial
   - this application is now made under ss. 278.92 to 278.95
   - this effectively creates a single admissibility procedure for s. 276 material and s. 278.1 records in the possession of the accused

What is a "record"?

- s. 278.1 definition applies to ss. 278.92 to 278.94
- BUT the "privacy interests in a record being *produced* to the accused are different from the privacy interests at play when the accused seeks to have the record *admitted* as evidence in court": *J.J.*, para. 50
- in this context, records could conceivably include:
  - text messages
  - social media messages
  - photos
  - letters
  - videos
  - and any items that contain personal information in which the COM has a reasonable expectation of privacy.

Questions to ask

1. Is it a “record” within the meaning of s. 278.1? If it is not a “record”, then the scheme is not engaged.

2. If it is a “record”, does it contain evidence of other sexual history, including sexual communications (s. 276(4))? If yes, then the s. 276 scheme applies: *J.J.*, para. 34

3. If a “record” and not other sexual history, has appropriate notice been provided?

- s. 278.93(4) requires notice be provided “seven days previously”
- “previously” refers to the Stage One hearing where the presiding judge determines whether a Stage Two hearing is necessary
- Crown and the clerk must have at least seven days’ notice of the application before it is reviewed by the judge at Stage One: *J.J.*, para. 84

- a judge can exercise their discretion to truncate the notice period in the “interests of justice”: *J.J.*, paras. 86, para. 190

- however, notwithstanding that discretion, as a general rule, these applications should generally be conducted pre-trial. Mid-trial applications should not be the norm: *J.J.*, paras. 85-86

Procedure: Overview

Scheme engaged when:
(1) "record" in the possession of the accused; and
(2) accused intends to "adduce" the record
Note: Crown is not bound by the scheme when adducing COM's private records: *J.J.*, paras 73-75

STAGES:
Motions for Directions (optional) – Are the communications "records"?

Stage 1 Inquiry – s. 278.93 – is the evidence "capable of being admissible"?

Stage 2 Inquiry – s. 278.94 – apply test under s. 278.92(2)(b):

- is the evidence relevant to an issue at trial?
- does the evidence have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice?

What does it mean to "adduce" in s. 278.92(1)

- the scheme is engaged when defence counsel makes reference to the content of the record in defence submissions or during the examination or cross-examination of witnesses.

- that is, the scheme is engaged even if defence counsel does not seek to tender the record itself: *J.J.*, paras. 76-81.

- however, if an accused has independent knowledge of the information, gathered from sources that do not rely on the COM's private records, they may use this information without invoking the record screening regime (subject to other applicable evidentiary rules and trial procedures): *J.J.*, para. 76.

Procedure (Optional): Motions for Directions

- application filed by defence in advance of formal s. 278.92 application asking trial judge to determine if documents are "records"
- purely a discretionary exercise of the presiding judge's trial management power
- where document is clearly a "record", judge should deal with matter summarily and order accused to proceed with application: *J.J.*, para. 104
- where judge is uncertain, judge should instruct accused to bring application: *J.J.*, para. 104
- only if judge is clearly satisfied that evidence does not constitute a "record" should they direct that accused does not need to bring application: *J.J.*, para. 104
- in deciding motion, presiding judge retains discretion to provide notice to COM and allow them to participate: *J.J.*, para. 104

Procedure: Stage One Inquiry

- *Code* does not specify how Stage One inquiry is to be conducted: *J.J.*, para. 27
- within the discretion of presiding judge, in accordance with their trial management powers: *J.J.*, para. 27
- application may proceed as an application in writing, oral hearing, or both as judge sees fit
- jury and public are excluded, regardless of how it proceeds: s. 278.93(3); *J.J.*, para. 27
- COM does NOT have participatory rights at Stage One hearing and is not entitled to provide written submissions: *J.J.*, para. 89
- however, Crown should provide general description of record and its relevance to an issue at trial to COM and/or COM's counsel – this will allow COM time to decide if they want to retain counsel: *J.J.*, para. 92
- if judge decides that evidence is a "record" and is "capable of being admissible", proceed to Stage Two

Procedure: Stage Two Inquiry

- if application proceeds to Stage Two, Crown should disclose contents of application to enable COM or COM's counsel to prepare for Stage Two: *J.J.*, para. 93
- COM and/or their counsel can attend entire Stage Two hearing and make oral and written submissions: *J.J.*, para. 99
- COM does not have right to cross-examine the accused at the Stage Two hearing and cannot lead evidence: *J.J.*, paras. 100-102
- judge retains discretion to direct that the application not be disclosed to the COM or that portions of it be redacted based on concerns about the impact of disclosure on trial fairness: *J.J.*, para. 96
- judge also retains discretion to exclude the COM as required where "a complainant's attendance would compromise trial fairness": *J.J.*, para. 97

Procedure: Stage Two Inquiry (cont.)

- trial judge must apply test in s. 278.92(2)(b), which provides that the records are only admissible if "the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice": *J.J.*, para. 127.
    - list of statutory factors in s. 278.92(3) that a judge shall take into account
- where the balance tips in favour of admitting the evidence because of its significance to the defence, it will be admitted for that purpose: *J.J.*, para. 126
- however, "the record screening regime prohibits the accused from using the evidence for impermissible, myth-based purposes – just like the s. 276 regime": *J.J.*, para. 126.
- there may be a number of problematic myths and stereotypes at play beyond the twin myths: see, for example, *J.J.*, para. 132.

Procedure:
Stage Two Inquiry (cont.)

- when assessing the prejudicial effect of the evidence under s. 278.92(2)(b), "trial judges should consider its effect on all aspects of trial fairness, including 'the practicalities of its presentation, the fairness to the parties and to witnesses, and the potentially distorting effect the evidence can have on the outcome of the case'": *J.J.*, para. 130 (emphasis in original).

- trial judges "must consider the 'prejudicial effect' of admitting a record as evidence at trial, which includes the effect on complainants whose private information is implicated": *J.J.*, para. 130.

Need for continued vigilance during cross-examination

- if records can be adduced, there is a need for continued vigilance during cross-examination to ensure that the scope of cross-examination is consistent with the admissibility ruling and to ensure that cross does not stray intentionally or inadvertently into impermissible areas (i.e. twin myths or other rape myths and stereotypes)

- objections should be clearly articulated on the record and the admissibility ruling re-visited, as necessary

- there may be situations that require a trial judge to either revisit a prior admissibility ruling or to allow a new application mid-trial: *J.J.*, para. 86; see also para. 190

Importance of case management

- it will be important to:

  (1) canvas the possibility/timing of any application at the earliest opportunity;

  (2) in appropriate cases, consider fixing staggered application dates with time in between for reasons; and

  (3) inquire at an early stage of the process whether the complainant has been advised about the process for retaining counsel.

Procedure: Publication Ban

- s. 278.95 provides for a mandatory publication ban of all hearings held under ss. 278.93 and 278.94

- publication ban is indefinite, but ban can be lifted in certain circumstances and in relation to certain aspects of the Stage 1 and Stage 2 hearings

- a person shall not publish, broadcast or transmit:
  - the contents of an application under s. 278.93;
  - any evidence taken, the information given, and the representations made under ss. 278.93 or 278.94;
  - the decision under s. 278.93(4) unless the judge, taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published;
  - the determination made and the reasons provided under s. 278.94(4) unless
    - that determination is that evidence is admissible, or
    - the judge, after taking into account the complainant's right of privacy and the interests of justice, orders that determination and reasons may be published

- see *R. v. A.I.*, 2021 BCSC 434 re application to lift s. 278.95 publication ban
- see *R. v. T.W.W.*, 2024 SCC 19 and *R. v. Reimer*, 2024 ONCA 588, application for leave pending, re publication bans on appeal

Funding for COM's counsel in the NWT

- costs related to independent counsel for complainants in ss. 276/278 applications are covered through the Independent Legal Advice and Representation Program (ILAR) operated by the YWCA.

- the Crown can refer the complainant or complainant can contact the program directly to complete an intake form. Counsel will be appointed or can be chosen from a panel.

- the court application need not be filed before advice is available at no cost to the complainant for both independent advice and representation if requested.

- ILA also available for advice with respect to waiver.

What is a “record”?

What is a "record"? ss. 278.92 to 278.94

▪ if a "record" falls within an enumerated category, accused must proceed with application, regardless of the specific content of the record: *J.J.*, para. 39

▪ for all other non-enumerated records, court must engage in a fact-specific analysis to determine whether the record "contains personal information for which there is a reasonable expectation of privacy"

▪ in this context, records could conceivably include:
- text messages
- social media messages
- photos
- letters
- videos
- and any items that contain personal information in which the COM has a reasonable expectation of privacy.

What is a "record"? (cont.)

- definition of "record" does not focus on the medium by which the information was shared - the more important consideration is the sensitivity of the information contained in the record: *J.J.*, para. 49

- analysis should focus on both the content and context of the record

- unlike under s. 8 of the *Charter*, the analysis is not content-neutral: *J.J.*, paras. 48-49, 54

- if the information in a non-enumerated record is similar to what would be contained in an enumerated record, this is a useful indicator that it raises significant privacy interests and should be subject to the record screening scheme: *J.J.*, para. 55

- type of information that impacts dignity could include but is not limited to: discussions regarding mental health diagnoses, suicidal ideation, prior physical or sexual abuse, substance abuse, or involvement in the child welfare system: *J.J.*, para. 55

What is a "record"? (cont.)

- in *J.J.*, the majority identified three relevant contextual factors

(1) the reason(s) why the complainant shared the private information in question. Reasonable expectations of privacy will vary depending on the purpose for which the information is collected or shared: *J.J.*, para. 58.

(2) the relationship between the complainant and the person with whom the information was shared informs the context. A relationship of trust is not necessary. A reasonable expectation of privacy is not limited to trust-like, confidential or therapeutic relationships: *J.J.*, para. 59.

(3) the court may consider where the record was shared and how it was created or obtained: *J.J.*, para. 60

Is there an REP in text messages?

- it depends
- fact-specific, rather than categorical approach
- there may be an REP in some text messages, but not others
- post-*J.J.*, see: *R. v. Niemiec,* 2022 ONSC 5549; *R. v. K.D.,* 2022 ONSC 6105; *R. v. K.M.L.*, 2022 ABKB, 710; *R. v. J.D.*, 2022 ONCJ 544; R. *v. C.T.*, 2023 ONCJ 124; *R. v. G.G.*, 2023 PESC 16; *R. v. Amin*, 2023 YKSC 23
- although decided pre-*J.J.*, the non-exhaustive list of factors developed in the following cases may also assist in determining whether a text message is a "record": see, for example, *R. v. M.S.* 2019 ONCJ 670; *R. v. H.J.M.*, 2020 BCPC 275; *R. v. R.W.*, 2021 BCSC 1672.

Evolving issues

Does the scheme apply to records provided by COM to Crown or police and included in disclosure?

- *R. v. Martiuk*, 2022 ONSC 5577 says "no"; *R. v. P.R.*, 2024 ONCJ 120 and *R. v. A.H.*, 2023 ONCJ 99 say "yes"

- a s. 278.1 "record" in the Crown's possession can only be disclosed by the Crown if the complainant expressly waives the protection provided by s. 278.2(2)

- see however *R. v. McKnight*, 2019 ABQB 755, paras 41-42: the trial judge is the gatekeeper and absent COM's waiver, the Crown's decision to disclose does not bind the court

- considering this, *R. v. J.K.*, 2021 ONSC 7604 at para 15 noted it can be presumed Crown fulfilled its duty to obtain an express waiver absent some indication to the contrary

Does the scheme apply to records obtained from an *O'Connor* or s. 278.1 third party records application?

- short answer: YES

- the "privacy interests in a record being *produced* to the accused are different from the privacy interests at play when the accused seeks to have the record *admitted* as evidence in court": *J.J.*, para. 50

- an *O'Connor* or s. 278.1/*Mills* third party records application is about *disclosure/production*

- in contrast, the ss. 278.92 to 278.94 scheme is about *admissibility* and *use*

R. v. Wickware, 2023 BCSC 393 and 2023 BCSC 396
R. v. Burtch, 2022 BCSC 1140
R. v. S.L., 2020 ONSC 497
R. v. J.P., 2019 ONCJ 871
R. v. Amin, 2023 YKSC 7

For a contrary approach see*: R. v. McFarlane,* 2020 ONSC 5194, para. 26 (in *obiter*)

Practice Points – Defence Perspective

Talk to the Crown about whether the information is a “record”

- Crown counsel may take different approaches to the scope of “records”
- Defence counsel do not need to automatically accept that the information is a “record”
- Early discussions can be helpful
- More jurisprudence needed

Procedural Points

▪ s. 278.93(4): seven days notice is required but more time might make strategic sense

▪ consider whether to disclose the records, how much detail to provide, and whether you have concerns about the provision of information to the COM/counsel

- a detailed notice may facilitate resolution that avoids the need to go to trial?
- some detail may be withheld/sealed in the application or provided to the Crown on undertakings
- if defence has concern about the provision of information to the COM/counsel make that clear before it is disclosed or seek a direction; see *R. v. Fairy*, 2024 NBCA 92, paras. 53-67 re timing of disclosure of the s. 276 record

▪ the two-stage process is often blended and heard at the same time

Practice Points – Crown Perspective

Importance of consultation/communication between Crown and defence counsel

- contrast approach of counsel in *R. v. J.D.*, 2022 ONCJ 544 vs. *R. v. Niemic*, 2022 ONSC 5549

- see also Code J.'s suggested approach to video evidence in *R. v. Hwang*, 2022 ONSC 4323 (reproduced in *Niemic*, para. 31)

Practice Points – Complainant's Counsel Perspective

Standing for Complainant's Counsel

- Complainants (and their counsel) are not parties
- Standing is limited to the issue of admissibility
- Pre-trial applications for which COM's counsel does not have standing may impact position on records applications

Consider whether to oppose or not

- Don't assume that you need to oppose every application
- You might consent to an application for the purposes of production but not for the purposes of admission
- Providing an express waiver for one purpose does not mean it is waived for all purposes
- Even with respect to admissibility, the complainant's interests may be best served by admission of the records

Discussions with your COM client

- Trauma-informed approach: go slow; take breaks; schedule enough time; take time to explain your role and the judicial process

- Consider how much information to provide to the COM to get proper instructions; providing the application itself might open the COM up to an allegation of fabrication

Resources

- L. Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials", (2019) 44 Queen's L.J. 316
- D. Brown and J. Witkin, *Prosecuting and Defending Sexual Offence Cases,* 2nd Ed.
- West Coast LEAF, "A toolkit for navigating section 276 and 278 *Criminal Code* matters as complainant counsel in criminal proceedings" [available on West Coast LEAF website]

Comments from the Bench

Questions?

Reflections on Mental Health

The Honourable George R. Strathy

Chief Justice of Ontario

A Reflection on Mental Health

Delivered at the Law Society of Ontario Mental Health for Legal Professionals Summit. May 17, 2021

I want to tell you a story. It is a private story; one I have never shared publicly. It is about my mother.

My mother's family name was Russell, which is how I got my middle name, George Russell Strathy. Her given name was Lucille, but everyone called her "Sue" or "Susie". She was born in the little town of Wetaskawin, Alberta, where her father worked in a bank. When she was about two years old, her mother died, a victim of the so-called "Spanish flu" pandemic, which tore through that province and the rest of Canada after World War I, killing some 4,400 Albertans and 55,000 Canadians. She was raised by her father and by my great-grandmother, and they moved to Niagara Falls and later Toronto.

She married my father during World War II, just before he went overseas. I only recently learned that during the war, my mother pinned a map of Europe on her

bedroom wall and tracked the progress of his unit up through Italy, France and Belgium and into the Netherlands, where he was when the war ended.

I was a “baby-boomer”, born in 1948, after the war. My sister, Pat, was born just sixteen months later, in 1949.

When I was 11 years old, my father came home from work one day, sat my sister and me down in the kitchen, and told us that our mother was in hospital because she had had what he called a “nervous breakdown”. Sixty years later, I can still remember our confusion – tinged, perhaps, with a little fright. We understood what “nervous” meant – people get nervous when they do something that scares them. And we understood what a breakdown was, because cars had breakdowns. But we could not really process a “nervous breakdown”. How do your nerves “break down”? It was hard to understand. I don’t think my father fully comprehended what had happened and he certainly did not have the language to explain it to us.

What most surprised us, I think, was that it came out of nowhere. Our mother was a good, kind and loving mother. She was beautiful, energetic, and fun. We had a good home life. I wonder now whether my 11-year-old self should have noticed signs of her impending illness. But if there were signs, I sure didn’t notice them. One day she was driving us to school in her convertible and the next day she was in hospital with a “nervous breakdown”.

A few days later, my father told us that our mother would be staying in the hospital for a while because she was having something called “shock treatment”. Again, this scared us. What was shock treatment and how would it make our mother better? The images conjured up by our imaginations did not explain how this was a good thing. I think we both hoped that this treatment would quickly “shock” this stranger out of what was affecting her and return our mother to us.

A couple of weeks later, she came home. She seemed better. She was a little shaky and exhausted, but seemed to be happy to be home with us again. And as the days passed, she got better and better. We were relieved to see her return to doing the things she usually did. She managed the household, cooked meals, played with us, socialized with her friends and went out with our dad. It seemed like life was back to normal.

That lasted for a couple of weeks. One morning, she did not get out of bed, She stayed in the bedroom, with the lights off, for two weeks. I honestly don’t

remember that she ever came out or ate anything during this time. We went into the bedroom a couple of times at first, but it was pretty clear that our presence was not making her feel better. We tiptoed around the house, stayed away from our parent's bedroom and wondered what was going on.

On some level we wondered whether we were somehow responsible for what was happening. Had our incessant childish fighting with each other got on her "nerves" and caused her to "break down"?

Then, miraculously, one morning, she emerged from the bedroom and seemed to be happy to be with us. She was "better", being a mother again. Once again, it seemed that she had been miraculously cured and our mother had become fun and exuberant. She organized activities for us. She and my father picked up their social life. She took my sister on shopping trips.

But, as you all probably expect, it did not last. About two weeks later, just as if someone had thrown a light switch, the cycle began again and she didn't – couldn't – get out of bed one morning. She slipped back into a period of darkness.

At some point, our father told us that she had been diagnosed with "manic depression". The expression was really hard to understand for an eleven-year-old and his nine-year-old sister. "Manic" sounded to us like "maniac".

I don't remember anyone, not my father, not my grandparents, not a family friend or doctor ever explaining our mother's illness to me and my sister. As a family, we talked about how our mother was doing, whether she was "up" or "down", we wondered privately about how it happened, but no one made any effort to explain mental illness to us, possibly because they themselves were mystified and perhaps a little frightened or even embarrassed by it. I suspect that stigma, ignorance and outdated conceptions about child raising prevented our father and other relatives from discussing these things with us, but it certainly added to our confusion and fear.

Looking back, my mother became almost invisible during the depressive phases of her condition – she did not want company, sought refuge in her bedroom and although she was present in the house, she could not participate in the life of the family.

The cycle of depressed moods, followed by elevated moods, followed by depressed moods continued, with occasional interruptions, for the next 35 years, until our mother's death in 1995. For long periods, the cycle recurred with a high degree of regularity. Today, her condition would be described as "bipolarity" or bipolar disorder type I. It might have been described as bipolar disorder with rapid cycling, a term applied when manic and depressive cycles appear at least four times a year.

She spent some of those 35 years at home, some of it in hospitals and other institutions and some living more or less independently. She was treated by compassionate and expert medical professionals at respected institutions and received all manner of treatments, psychotherapy, electro-convulsive therapy, mood stabilizers, and what seemed like a fistful of other psycho-pharmaceuticals.

Unfortunately, although my mother loved my father until the day she died, their marriage did not survive her illness. My father was a product of his times. He grew up in the depression and went to war for his country. After the war, he went into banking. He was of the "stiff-upper-lip", "suck-it-up-and-stop-feeling-sorry-for-yourself" generation and he applied those standards to his wife and his children. While I am sure that he was as puzzled, troubled, and concerned as my sister and I were, I suspect that some part of him believed that my mother was responsible – if not for her illness, then responsible for failing to pull herself together and soldier through it. I am also certain that he experienced both stigma and self-stigma as a result of my mother's condition – something he could not discuss, even with close friends and family.

Both the depressive and the manic phases of my mother's illness took their toll on my father. When she was in a depressed cycle, our mother did not want to have contact with anyone. And she had some supercharged manic stages, including uncontrolled spending, and other reckless behaviour. Incidents like inviting friends to a party, but forgetting to cook the food were not uncommon and made home life challenging at times. For me and my sister, bringing friends into the house was always a little nerve-racking, because of the unpredictability of our mother's behaviour.

My mother's friends gradually fell away from her. They had good memories of her, but the person they saw did not reflect those memories. She did not want to

see them when she was depressed and they were cautious around her when her mood was elevated. They did not do well with unpredictable behaviour.

The language of mental illness, at the time, in the 1960s and 70s, and my mother's own language, referred to the depressive episodes as being "down" or "low" and the manic episodes as being "high" or, in our words, "well". We could not understand how there were times when she was "high" – happy and fun to be with – "well", from our perspective – yet she did not stay that way. Her way of managing her condition – which was completely understandable – was to plan important events around her manic phases. So, she would say, "we can't have your birthday party at the end of June (say a month away) because I will be down then". It seemed to us that if she could predict it, she could prevent it. It seemed like she was surrendering. In other words, we failed to fully appreciate, or empathize with the fact that she had an illness. Something that she could not control. I am deeply ashamed to admit to you today that at some level my sister and I blamed our mother for her own illness. An illness she could no more have controlled than she could have controlled any other severe illness.

I know that my experience is not unique. Statistically, most of us will experience some form of mental illness at some point in our lives, either personally or through a family member or close friend. I also know that I am not alone in not sharing my experiences, whether due to shame, embarrassment, or fear. I also know that keeping it bottled up just made things worse, because it got in the way of sorting through our own emotions, not only for our family, but most of all for my mother.

In the final years of her life our mother lived in an institution, where she had friends amongst the staff and the residents and was treated by highly skilled and compassionate caregivers. She had regular visits from her children and grandchildren, whom she loved. She maintained her sense of humour, her faith and a sense of joy.

Even today, experts are not certain about the causes of bipolarity. What they have always known, is it that it is not caused by moral weakness or a fault in character. It is an illness and, thankfully, it is treatable, for people who are able to get professional help.

The medical profession, aided by great strides in psycho-pharmaceutical science, has made real progress in the diagnosis and treatment of bipolar

disorder, anxiety and other psychiatric conditions. We know today that while bipolarity may be a lifelong condition, inroads in understanding it and advances in pharmacology have enabled people with the condition to live healthy, satisfying and productive lives. We have the language to explain that, and we have the knowledge and resources to ensure that it happens.

So, let me turn to our own profession.

One of the greatest judges this province has produced is Justice Ted Ormston, who started the innovative Mental Health Court at Old City Hall in 1998. When he was introducing new judges to the Mental Health Court, he often said, “it’s time to close the book and open our hearts, because empathy is the key to dealing with mental illness”.

Empathy is putting yourself in someone else’s shoes – walking the path that they walk. And lawyers familiar with mental illness – including some of those speaking today and tomorrow – tell us that far too many people with mental illness delay seeking treatment, because of stigma – fear of what friends, family, peers and employers may think. And one of the most difficult aspects of stigma is self-stigma – internalized feelings of guilt, shame and inferiority. Studies have shown that stigma and self-stigma can sometimes be longer lasting and more life-limiting than a diagnosed mental illness itself.

Which brings me to why I decided to speak this morning about my mother, whose mental health challenges I have never discussed publicly, not even with my closest friends.

One of the great privileges of my job as Chief Justice, is meeting some extraordinary people. I want to mention two, both of whom are here today. The first I met was Orlando Da Silva, an extraordinary recipient of the Law Society Medal and a former president of the Ontario Bar Association. Orlando bravely and candidly used the disclosure of his own mental health challenges to promote a dialogue about mental health in our profession. The other is Beth Beattie, one of the Co-Chairs of this Summit. Beth is Senior Counsel at the Ministry of the Attorney General and her practice focuses on health issues. Since 2018, as a member of Bell’s “Let’s Talk” campaign, Beth has been on a remarkable mission to help end the isolation and stigma that surrounds mental illness. Their courage has inspired me – and inspires all of us – to speak openly about the impact of mental illness in our lives – sharing stories about struggles with mental health,

and about coping mechanisms and support systems that have helped, and have proven to effectively combat stigma and self-stigma.

I've been told that Orlando and Beth met a few years ago and thought it would be interesting to get together with others in the Ministry of the Attorney General who have lived mental health experience or who have cared for loved ones with mental health issues. The Voices of Mental Health was born and over 30 employees of the Ministry have shared their stories at educational events. My hat goes off to the Ministry of the Attorney General for fostering an environment in which this could happen and to Beth, Courtney Harris, Hayley Pitcher and Lauren Linton, who put together the programming for this Summit.

I am sure that you will be hearing about the incidence of mental illness in our profession. Law is a stressful profession. Many of us are type-A personalities, perfectionists, driven to succeed.

Paradoxically, there is a strong correlation between signs of depression and the traditional markers of career success in the legal profession. The bottom line is that the more successful a lawyer is, the more likely they are to experience mental health challenges. Equally striking is the fact that lawyers are much less likely than other professionals to seek assistance for mental health issues – about 50% less likely, in fact.

Depression, anxiety, alcoholism and addiction are widespread in our profession, including, and in some cases particularly, amongst younger members of the profession. Lawyers are motivated to cultivate a reputation as being "tough". Firms have encouraged and rewarded those who can boast that they have "no life". Working regular and reasonable hours or taking time off is regarded as a sign of weakness. Our profession has historically glorified those who "work hard and play hard" and playing hard usually means operating on little sleep and consuming excessive amounts of alcohol. Studies show that many lawyers who are aware of their mental health and addiction challenges do not seek assistance because of fear that others will find out that they needed help – in other words, fear of stigmatization.

Needless to say, the stresses of legal work in the pandemic and the isolation that has accompanied it has seen increases in the incidence of anxiety, depression and addiction.

Let’s face it, it has been hard for us to talk about mental health. I am 72 years old and even now I find it hard to discuss this topic with you.

In this environment, is it any surprise that lawyers with mental illness are reluctant to “out” themselves, or – even more damaging – fearful of seeking treatment or requesting accommodations, out of concern that they will be stigmatized?

It does not have to be like this. We now have the language and the knowledge to re-frame the conversation – asking for help is not a sign of weakness – it is a sign of a strong, self-aware and responsible member of our profession.

Law firms and other legal offices have an essential role to play in fostering an environment in which their employees – lawyers and staff – are encouraged to reach out for assistance and are appropriately supported when they do so. Membership in a profession obliges us to protect, mentor and sustain our colleagues when they experience difficulties. This is not only the right thing to do, it promotes collegiality, respect and ultimately a healthier workspace and a healthier work force.

Thankfully, there is support available – education about mental health, to enable self-management; substance abuse treatment; medication, psychotherapy; peer and self-help groups and support from family and friends. The Law Society’s member assistance program, the Canadian Bar Association’s partnership with the Mood Disorder Society of Canada and Bell’s Let’s Talk are just some examples of the resources available.

My story – which is really my mother’s story – has its roots in the late 1950s. In the past half century, we have learned so much more about the causes and treatment of mental illness. Isn’t it time to make empathy the priority, so that our colleagues can receive the support they deserve?

I am grateful for the opportunity to share my story with you. It has been a cathartic experience. I hope it encourages you to share your stories about mental health. When we speak openly about it, we combat stigma and encourage ourselves and those around us to seek support when it is needed. I am honoured to join with you in building this community of understanding and support.

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The Litigator and Mental Health

The Litigator and Mental Health[1]

George R. Strathy
Chief Justice of Ontario

Introduction

These past two years, in which our lives have been dominated by the global pandemic, have enhanced our awareness of the importance of mental health in our society and in our profession. Perhaps it can be attributed to the cloud of stress and anxiety that has hung over us during the pandemic. Perhaps it is isolation from family, friends, and colleagues – our usual sources of comfort and support. Perhaps it is because many of us have been working from home and there has been no divide between "work" and "life", making it almost impossible to balance the two. Perhaps many of us, having survived the past two dreadful years, are saying: "I have to make some changes in my life." The description of 2022 as the "Great Resignation" may well prove apt.

Thankfully, whatever the causes, there has also been an increased commitment to addressing mental health in our society, in our profession, and in our own lives. People have been talking about mental health in an unprecedented way: openly, compassionately, and practically.

My focus in this paper is to discuss mental health and the work of barristers, but what I have to say probably applies to all areas of practice. My message is that we need top-down change in our approach to mental health in the legal profession. And that change needs to be driven by leaders of law firms and by leaders of the bar.

I do not purport to be an expert when it comes to mental health or to have all the answers. But I have close to fifty years of experience in the law, and I offer these observations in the hope that they inspire reflection and much-needed change in the mental health of litigators.

I begin with a question: Why is it that we never talk about mental health and litigation in the same conversation? I think it's partly because mental health, like physical health, is common to everyone. We don't think of mental health as

something we all experience. Instead, we think mental health means mental illness or poor mental health, and that both undermine one's ability to be a litigator.

Mental illness is stigmatized by our society and by our profession. Stereotypical thinking about mental health in the legal profession associates poor mental health or illness with an inability to control emotions or thoughts, a lack of judgment, the inability to work hard or withstand pressure, and unreliability.

By contrast, the stereotypical barrister is held in high esteem: a fearless gladiator, wielding a razor-sharp intellectual broadsword. Always in control of their emotions. Erudite and articulate. Powering through long hours of work with pride and not breaking a sweat under pressure. Sometimes wounded, but never defeated. Suffering in silence and quietly bandaging their own wounds, ready to fight another day. And able to "play hard" as well as "work hard".

The grip of these two myths on our profession – that mental health is something that affects others, not us, and the gladiator litigator myth – means that we rarely discuss mental health in the same conversation as litigation because we believe one precludes the other. For too long, members of our profession have been beholden to the idea that our experiences in navigating mental health challenges, whatever they may be, are incongruous with a successful career in litigation. We have internalized the myth that only the invincible are successful. We need to call out these myths – not only because they are false, but also because they send the wrong message about who "belongs" in litigation. And because they cause terrible suffering for those who believe that they cannot or do not measure up to the gladiator ideal.

Let me digress for a moment and provide some context.

Some Facts About Mental Health

The Canadian Mental Health Association – a world leader in mental health research and advocacy – has helped to challenge some myths about mental health. It tells us that the presence or absence of a mental illness is not a predictor of mental health; someone without a mental illness can have poor mental health, and a person with a mental illness can have excellent mental health.[2]

It's important to understand the difference between the terms "mental illness" and "mental health". Mental illnesses are health problems that affect the way we think about ourselves, relate to others, and interact with the world around us. Depression and anxiety disorders are the most common mental illnesses. "Mental health", on the other hand, "is a concept similar to 'physical health': it refers to a state of well-being [and] includes our emotions, feelings of connection to others, our thoughts and feelings, and being able to manage life's highs and lows."[3]

Society's imperfect understanding of mental illness tends to see it as static. Most mental illnesses are in fact episodic. People who live with mental illness can have long periods of being well and productive, and other periods when they are unwell and need time to recover. Mental illnesses are treatable. Just like physical illnesses, people who are ill require recovery time. Recovery from any illness is tiring and returning to work may need to be gradual. Early support means an earlier path to recovery.

One of the greatest barriers to treatment is the stigma associated with mental illness. This stigma casts blame on the person who is unwell and makes them fearful and ashamed to ask for help, out of concern that it will impact their career. As a result, people often hide mental health issues and suffer in silence. A culture of shame, blame, and criticism leads to isolation and harm to our colleagues and our clients.

Mental Health in Our Society and Our Profession

The statistics are probably familiar to all of us. One in five Canadians deals with mental illness such as depression, severe anxiety, or stress disorders.[4]

But the incidence of mental illness in the legal profession is considerably greater than in society as a whole. A study done by the American Bar Association found that almost one-third of practicing lawyers in the United States were dealing with some level of depression or anxiety and between 21-36% qualified as problem drinkers.[5] A 2021 survey conducted by the International Bar Association found that incidence of mental health concerns is greater among younger and mid-career lawyers than older lawyers.[6]

In the Canadian context, a study at the University of Toronto compared two studies of lawyers in Canada and the United States.[7] It found that there was a

strong correlation between signs of depression and the traditional markers of career success in the legal profession. In other words, the more successful they are in their field, the more likely lawyers are to experience mental health challenges.

A study by the Barreau du Québec, commenced in 2015, focused on psychological distress, burnout, and well-being among lawyers, found that 43% of the participants in the study reported "psychological distress" including a combination of symptoms similar to burnout and depression, ranging from fatigue to irritability to anxiety, difficulty sleeping and difficulty concentrating.[8] The proportion of psychological distress was marginally higher (about 5% higher) in women than in men, but a proportionately higher number of young men experienced severe distress. The stress level among lawyers practicing for ten years or less was higher (49.9%) than more senior lawyers (36.7%). The same study found 22.4% of lawyers with 10 years or less experience were affected by "burnout", described as a "state of fatigue and physical, emotional and mental exhaustion" in the personal, organizational, and relationship spheres.

The COVID-19 pandemic has unquestionably had a serious impact on most Canadians. An early survey referenced by CAMH (in "Mental Health in Canada: Covid-19 and Beyond") indicated that 50% of Canadians reported worsening mental health due to the pandemic, citing worry and anxiety.[9] One in ten said their mental health had deteriorated "a lot". Related studies found that 25% of Canadians in the 35–54-year age bracket and 21% of those 18-34 had increased their alcohol consumption during the pandemic.[10] More recent surveys reveal similar concerns.[11]

The Law Society's Mental Health Strategy Task Force reported an evidentiary basis for its conclusion that "legal professionals may be at an even higher risk than the general population of experiencing career and life challenges and struggles with mental illness and addictions."[12] Most concerning is its commentary on the negative impacts of stigma in our profession:

> The culture of and stressors on the legal professions raise barriers to openly addressing these issues for those who may be affected by them and those with whom they work and interact. The stigma surrounding mental illness and addictions, the too common confusion of diagnosis with impairment and the concerns that careers will be permanently and

negatively affected by disclosure have a particular impact on licensees' willingness to reveal such illness or addictions.[13]

Stigma associated with mental health is a major reason why people don't seek help for it. In a survey of working Canadians in 2019, 75% of the respondents said that they would be reluctant, or would refuse, to disclose a mental illness to an employer or a co-worker, largely because of the stigma associated with mental illness and being afraid of the consequences, including being treated differently or losing their job.[14]

Of particular concern is the fact that lawyers appear reluctant to take advantage of mental health resources, such as the Law Society's Member Assistance Program. Statistics published by LAWPRO Magazine suggest that legal professionals in Ontario seek mental health assistance at a rate that is approximately half that of other professions.[15]

The lesson from these numbers is that the mental health and well-being of the legal professions is a serious institutional issue.

Mental Health and Litigation

Let's face it: Law is a stressful profession. If you are reading this paper, you already know that. I am not sure that litigation is any more stressful than any other aspect of the practice. I know that my friends and former colleagues who practiced in areas like commercial law, taxation, securities law, and commercial real estate lived with enormous stress caused by the huge amounts of money that turned on their opinions and advice, the increasingly frenetic pace of the practice, and the demands of their highly sophisticated clients.

Litigation is a wonderful career but is unquestionably stressful.[16] It can have great highs and deep lows. You can have a great win at trial, only to lose on appeal. On the criminal side, losing may mean your client loses their liberty, sometimes for a very long time. On the family side, the stress is incredible – the lives of children and families changed by a signature on a judgment. In the civil realm, vast fortunes are won or lost as a result of the lawyer's work. And behind these wins and losses there are real people – our clients – who have trusted their counsel and whom counsel have come to like and respect.

Litigation is stressful because the financial and personal stakes for the parties are high, and the outcome is generally uncertain. The outcome depends a lot on the "performance" of counsel in a high-performance, win/lose, zero-sum environment. A premium is placed on confidence and excellence. The demands of the client, opposing counsel, and the court can be wearing. Long hours are required, particularly but by no means exclusively, during trials. The work takes place live and in real time: there is no opportunity for a re-do if things don't work out.

And, let's face it, your opponents sometimes come across as obstreperous, uncivil, and offensive jerks. Just getting an email or phone call from them can send your blood pressure and stress level rocketing. Believe me, I've been there.

It's Time for Law Firms to Do More About Mental Health

Some very talented lawyers – at all levels – are leaving their firms or even leaving law, because they see no purpose in their work, don't feel valued, and are realizing that their workplace is actually harmful to them. And those are the self-aware ones who have the ability or means to walk out the door. Many, many other lawyers, at all levels of the firm structure, are suffering in silence because they are afraid to ask for help, are fearful of being stigmatized, and feel that they have no personal or financial alternative. And none of this is good for the overall health of the law firm.

Much of the advice that has been given on mental health in the profession has focused on "self-help" for lawyers – learning and observing better work habits, eating and sleeping well, getting exercise, and developing hobbies. This is approaching the issue at the micro level. It is well-intentioned but is ultimately ineffective unless it is accompanied by change in the workplace. And this is where leadership is needed.

We need to approach mental health in the profession from the top down. Management committees and partners need to take a hard look at their workplace cultures, their leadership styles, and how they treat their partners and associates farther down the food chain. They need to ask themselves whether they are protecting and preserving their most important assets. And they need to develop strategies to do so and put senior people in charge of making those strategies work.

I think there is a great deal law firms can do to improve the mental health of their lawyers. And, frankly, it is just good business to do so.

So I suggest law firms can do the following.

1. Create an environment in which mental health can be discussed openly and safely

Law firms need to create an environment in which mental health is discussed in an open and safe way. To do that, law firm leaders need to lift the façade of invincibility and be open and candid about their own mental health experiences and challenges and about how they have learned to navigate those challenges. This openness will serve to de-stigmatize mental health issues and will help lawyers recognize the signs of a mental health crisis before it occurs. It will also encourage them to take measures to address their own challenges.

Those who live with a mental illness are natural leaders within a law firm and can draw from their own insights into mental illness and recovery. Their experience equips them to recognize the signs of mental health problems that can arise at times of personal and professional distress. They are often better prepared to manage them because they know how to access mental health services and support networks.

The resilience of people who live with adversity like mental illness can provide lessons to the profession on how to maintain good mental health to counter the stress, uncertainty, and pessimism that can accompany litigation. Doron Gold, a senior clinician with the LSO's Member Assistance Program, has noted that a job in law calls for pessimism to assess legal risk, which can lead to a pessimistic outlook on life. A person who has grappled with pervasive pessimistic thoughts common to depression and anxiety has often developed a healthy mental outlook and a degree of optimism that can be applied to the practice of law and equips them to maintain balance as legal professionals.

As a profession, we can only benefit from these lessons if we create an environment that welcomes candid conversations about mental health. Discussions in which we do not see someone's struggle with mental health as a liability, but as an experience that provides knowledge on brain health and an example of perseverance relevant to the profession. None of us is immune to the pressures of litigation. Talking about mental health candidly and learning from the

experience of others helps us all to face challenges and be better, more supportive colleagues.

Talking about mental health must be accompanied by action to improve workplace functioning and the well-being of legal professionals. We must recognize that yes, people do need rest, time away, and exercise, but they cannot get it unless the firm makes space for them. Institute a regular and confidential check-up by a more senior lawyer for each associate to ensure that they are getting a fair share of the work – not too much or too little. Be prepared to adjust or re-assign work to ensure that it is shared appropriately. Examine billable hour targets and count hours for non-billable work such as mentoring, business development, CPD, and committee work within the target. Have a mental health policy and a mental health committee and give it the authority it needs to change the workplace culture, fight stigma, and provide confidential peer support, as well as the resources to get the job done.

I will comment later in this piece about some of the advice typically given to young lawyers about maintaining good mental health – sufficient sleep, moderate exercise, a healthy diet, time with family and friends, mentorship, inclusion, engagement, civility, trust, and respect for colleagues. Accommodating these needs is not a tall order. If a law firm had a mental health committee, with real responsibility and accountability for making these things possible, what a culture change it could accomplish!

2. Get serious about mentoring

In my discussion of practice issues with lawyers – young and old – a common message is that “we are not getting enough mentoring”. My colleagues at the Court of Appeal and in the trial courts have observed this as well. Some newer lawyers with obvious intellectual and forensic capacities would clearly benefit from the wisdom and practical advice that only a mentor can give. Unfortunately, the economics of law and the increasingly frenetic pace at which lawyers operate has seen mentoring relegated to a low priority.

Mentoring, so vital to the nourishment of young litigators, has been in decline for years. It has been further diminished by a loss of connection and the inadequacies of “virtual teamwork” during the pandemic. You are more likely to feel part of a team if you are working together, meeting together, in offices, boardrooms, courthouses and cafeterias. It is unlikely that it will happen hopping

from one Zoom call to the next. The social aspect of litigation, which frankly makes it fun, has been replaced with TV screen transactions.[17]

Mentoring is not just about teaching. It is about creating an environment in which litigators feel they are learning, growing in the profession, and fulfilling their potential. They also need to know that their work is appreciated and respected. A lack of control over work combined with limited contact with the litigation team and clients contributes to low morale and a risk of depression.[18] In contrast, when junior litigators are brought into discussions with the client, discussions about strategy, conversations about the law or the facts, they begin to take ownership of the case. This simple step makes work more meaningful and leads to greater work satisfaction.

As barristers, members of a profession, we have a duty to mentor and train those who follow in our footsteps. And we have a duty to do that at every opportunity.

Mentoring is also about protecting those who work with us. One lawyer, who is a mother of a two-year-old and a four-year-old, recently told me about this experience. She and a more senior lawyer in her firm were involved in a piece of complex litigation. One of opposing counsel had a habit of sending substantive emails in the evening and at night. One evening, as she was busy overseeing a fairly boisterous supper, opposing counsel sent an email demanding to know her position on a motion he proposed to bring. Just before the children's bedtime, he emailed her again, saying that because she had not responded he would proceed to serve his motion record. At this point, her more senior colleague, who knew that she would be occupied with her children, intervened and advised the lawyer by email that she was getting her children ready for bed, and she would respond when she was able. The clear implication was that the email chain would be brought to the court's attention if there was a complaint about the timeliness of the response. It was enough to defuse the situation. While I lament a state of affairs in which lawyers are expected to have a spoon in one hand and a cell phone in the other, I use this as an example of the responsibility mentors have to protect their juniors from bullying and oppressive conduct.

Mentoring is also about sharing the work and giving junior partners and associates a piece of the file. The Court of Appeal's recent statement on the desirability of senior counsel sharing a portion of oral argument with junior counsel is intended to emphasize the importance of training and mentorship of new advocates. But it also strengthens the junior's sense of purpose and value.

While money is important to lawyers, doing satisfying and meaningful work, feeling part of a team, and feeling personally valued and respected is essential to retaining good people. In my experience, good barristers cared about and respected the mental and physical health of everyone they worked with. Unfortunately, the high-stakes, high-pressure nature of legal work today is making it increasingly common that the mental health and well-being of young lawyers is regarded as an expendable sacrifice for the good of the client or the firm.

3. Give lawyers an opportunity to disconnect

I apologize for reverting to the "good old days", because in many ways they were not so good. But when I started practice, from about 1976 until email became common in the early 1990s, you could generally go home at night and not expect to receive phone calls or messages from work, unless something was urgent, like the office was on fire or a client had a real emergency. The same was true on weekends. You could go home on Friday afternoon or evening and reasonably expect that no one would bother you – neither a lawyer nor a client, until Monday morning.

That did not mean we did not work evenings or weekends – we did, when necessary – but it did mean that except during trials, evenings and weekends could be times for R & R, family times, and "me" times. And holidays were actually holidays – you could go away for two or three or four weeks and colleagues would cover for you.

You know the situation today much better than I do. There is essentially no division between the workday and the personal or family day. Clients, bosses, and other lawyers think nothing about sending emails or making phone calls after hours (if there is such a thing), in the middle of the night or on weekends.

If firms had a mental health policy, could the policy include a moratorium on phone calls and emails and other communications after six p.m. and on weekends, except in emergencies?[19] Wouldn't this be a relief to everyone, including more senior lawyers? What it would require is planning ahead, realistically assessing what is urgent and setting practical deadlines. Respecting your staff's "downtime", their "right to disconnect", will go a long way to making them feel respected and appreciated and will improve their mental health.

The pandemic seems to have exacerbated intrusions on downtime. While the blurring of lines between home and work has allowed us to avoid long commutes or fulfill childcare and elder care responsibilities more easily, the time saved seems to have been swallowed up by work. Indeed, many litigation firms reported that 2021-2022 has been a record year. It seems that, for some, working from home meant working even longer hours. Any work from home policy must prioritize protecting downtime and promote understanding of its benefits to mental health.

And, while I am at it, make vacations mandatory and meaningful. For everyone.

I articled in 1974 with the firm of MacKinnon McTaggart, what would then be described as a “medium-sized” firm of about 25 lawyers, with a strong litigation department. When I returned as an associate in 1976, the first thing I was told by one of the more senior partners was, “Plan your summer vacation now – we all take four weeks in the summer.” The message was clear – you and your family are important to us, and you need a good break. We worked hard, without a doubt. Because the practice was litigation, we would sometimes work full-out for weeks at a time. But we knew, and our families knew, that when the job was over there would be time for rest and breaks. No one was expected to work at night or on the weekends, although we assuredly did at times. And we were able to manage unexpected demands and emergencies because our default pace was not to work 24/7. In my experience, weekends were the exception, not the rule, and our clients didn’t suffer for it.

Lawyers should be required to take vacations, guilt-free.

Everyone who does litigation knows that there are emergencies or times when everyone has to work full-out for days on end, particularly in trials. But in my view, people can get through that, and even enjoy it, if they know that when the crisis is over, their need to refresh and re-charge, and get back to their families and lives, will be respected.

If your litigation team seems to be running in crisis mode at all times, then take a hard look at it. Is the team too lean? Is the work being allocated fairly or are some lawyers overworked and some underutilized? Is there a system in place to regularly monitor work allocation and to re-assign files where appropriate? These are serious concerns for a law firm to address. The answer cannot be to regularly work evenings and weekends and skip vacation. Overworked lawyers

are less able to mentor others, contribute to a healthy work environment, prioritize their own mental health, or respond to urgent demands.

4. Let go of the Gladiator

It bears noting that many gladiators were slaves, prisoners of war or convicts – pressed into action for the amusement of the masses and to distract them from their misery. Maybe in 2022 we should get rid of the image and find a better role model for litigators.

Isn't it time to question our belief that the quintessential litigator is one who relishes the fight, is articulate and calm at all times, does not break a sweat under pressure, is proud of how little sleep they require to function, makes light of disturbing subject matter in the case, does not complain or admit that it bothers them to spend so much time away from family, friends and other social connections when in a long trial? We see these behaviours as inherent character traits and even boast about them. What we fail to do is talk honestly about these behaviours and the toll they can take. They may lead to success for a period of time, but they can also lead to burnout, disillusionment, and depression.

The myth of the gladiator litigator also leads to feelings of imposter syndrome. Imposter syndrome is doubting one's abilities and feeling like a fraud, a feeling like you do not belong in the profession or your workplace, or they made a mistake in hiring you. It can cause tremendous pressure to perform or work excessive hours to prove your worth. This feeling too can lead to burn out, disillusionment, anxiety, and depression. Put simply, the myth is harmful to mental health.

I will set out below some tips that individual lawyers can use to tackle the image of the gladiator litigator, but first, I want to look at some of the facts behind the myth.

First, the reality is that litigation has historically been done in Ontario by white men. The litigator was supported at home by a spouse who assumed the lion's share of household and child-rearing work and at work by a loyal secretary and support staff. This litigator saw himself reflected in the faces of the judiciary and the lawyers opposite. He was not immune to the hardships of living up to the gladiator myth but did not bear the psychological scars of acts of exclusion – sometimes subtle and sometimes not so – that women, Indigenous, Black and

racialized lawyers, and members of other marginalized groups experience in their day-to-day experiences as litigators, in the workplace, client meetings, and the courtroom.[20]

Feelings of isolation, uncertainty and stress experienced by Black, Indigenous, racialized, LGBTQ2S counsel, women, those with different accents and internationally trained lawyers are too frequently viewed as an individual issue rather than understood as the result of subtle acts of exclusion.[21] It is hard not to feel like an imposter where a person's feelings of not belonging are exacerbated by signals that they were never supposed to be there in the first place. Overcoming imposter syndrome requires an environment that fosters a variety of leadership styles in which diverse racial, ethnic, and gender identities are seen as just as professional as the current model.[22] There is not one litigation style that wins the case. We risk losing excellent advocates if we continue to hold up an unattainable and inaccessible model.

Second, we need to admit that everyone – even experienced barristers – get nervous going into court. And that our bodies react to the adrenaline rush that helps us to meet the challenge ahead. The reality is that litigation activates our stress response, and we might as well admit it. Many years ago – almost 40 to be exact – I was involved in a high-profile public inquiry, in which I worked closely with a very senior lawyer from another firm. I sat by his side as he rose to the podium to make submissions to the inquiry Commissioner. I looked up as he went through his notes and saw that his hands were trembling. He was having trouble turning the pages. This was someone at the top of the barrister's bar. He had pleaded in the Supreme Court of Canada and the Court of Appeal and had done some of the most complicated and demanding of criminal and civil cases. But there he was, his hands shaking and his knees probably knocking.

From that point on, I never worried about being nervous in court. I knew the nerves were at least partly due to nervous energy, excitement, and anticipation.

The truth is that many litigators – perhaps most – experience increased heart rate, rapid breathing, trembling hands, knees, lips or voice, sweating, or an uneasy stomach. I remember sweating so badly during one trial that I had to go into the washroom at a break, take off my shirt and run cold water over my wrists to cool myself down and stop the sweating. It worked, by the way. And I have never told that story, by the way.

Because we as lawyers seldom talk candidly about these physiological responses or acknowledge they are a normal response to the stress of performing, we perpetuate the myth of the gladiator litigator.

Third, I firmly believe that professional success as a litigator is grounded in learning and practice, not innate ability. There are very few "gifted" barristers – most of the rest have acquired their skills through practice, observation, and hard work.

One of the benefits of litigation and lawyering in general is a career that is full of challenge and learning. A good mental health approach to this career is to view it as a work in progress or adopt a growth mindset.[23] A growth mindset views intelligence and talent as abilities to be cultivated through effort and practice, learning from mistakes, and sticking to it when it is not going well. By contrast, the gladiator litigator sees every success or failure in litigation as a measure of self-worth. It is easy to chalk up wins, but it is how we respond and learn from losses that will determine our level of stress and success in a litigation career.

What Can Litigators Do About Their Own Mental Health?

The stress of litigation can turn into mental distress, but it does not have to. The secret is not that the successful litigator has an unusual combination of invulnerability and confidence, but that they have developed mechanisms over time to enable them to navigate inherently stressful activity.

The more obvious strategies for dealing with stress, as mentioned earlier, include the following: manage your workload through short-term goals, get enough sleep, eat properly, exercise (even a brisk walk each day will assist), get fresh air, practice mindfulness, listen to music, avoid using alcohol or other substances to cope with stress, connect with family, friends and colleagues, and take vacation.[24]

I do not suggest these somewhat obvious strategies to put the onus on individual lawyers to "fix" their own mental health. On the contrary, I have tried to emphasize that mental health is a societal issue and a professional issue. We have to create an environment in which lawyers are able to take the time to look after themselves and the people they care about.

Moreover, although these strategies may appear to be within an individual's control, it must not be seen as a personal failing when mental wellness does not always respond to them. A person who lives with mental illness can follow every one of these strategies and still end up with periods of mental unwellness. These strategies on their own are not enough and professional help and treatment should be sought.

Professional help such as counselling through the LSO Member Assistance Program is a good idea for anyone who is feeling mentally unwell. Get help by talking to someone. If you are experiencing persistent negative thoughts, doubting self-worth, feeling inadequate, struggling with workload, holding yourself to an impossibly high standard, ruminating over mistakes, or engaging in speculative, negative thinking, then reach out to someone you trust and seek help. A professional can teach you how to interrupt those thoughts and analyze them from an impartial standpoint so you can move beyond them.

A less obvious strategy, although perhaps less so at this point in my paper, is to reject the myth of the gladiator litigator. Instead, acknowledge the role experience plays over innate talent and avoid inapt comparisons between the inexperienced litigator and the experienced. Recognize that sleep deprivation has serious impacts on your health and avoid it. Protect your time away from work with family and friends as a natural buffer to stress.

Rejecting the gladiator litigator model is not only good for mental health, but also the conduct of the litigation. Allow empathy amid the logic of legal analysis. The most impactful litigators are empathetic to the parties and attuned to the facts of the dispute. Recognize that certain subject material can result in vicarious trauma. Strategize at the outset as to how to manage this work, including time to debrief, and schedule counseling. Encourage civility and collegiality; discourage intimidation tactics, abuse, and bullying in litigation or the work environment. Incivility weighs heavily on us all and does not work. It fosters a falsely competitive environment, protracts litigation, and leads to isolation, burnout, and attrition.

Conclusion

Individual measures to prioritize mental health are important, but without top-down change in the lawyers' and law firms' work, they are not enough. I propose that change can be implemented from the top down because I have confidence

that our profession accepts its historical responsibility for the education, well-being, and advancement of its more junior members. But if top-down change doesn't work, more drastic measures will be required.

A few years ago, I gave a speech to young advocates in which I exhorted them to "take control of your life, or others will take control of it for you." I was referring to bosses, family members, friends and others – many of them well-meaning and with the best of intentions – who were using the young lawyer to achieve their ends, not focused on what was important to the life and career of the young lawyer.

Some people might call this a "me first" attitude – putting yourself, your family and friends – those who care about you – first in your life. Looking after yourself and those whom you love.

Today, my message would be modified by adding: "Take control of and be responsible for your mental health too. And if those responsible for your work environment do not demonstrate that they care about you, care about your need to find purpose and value in your work, your growth and education as a barrister, your personal needs and the demands placed on your mental health, then get the hell out of there."

And my message to more senior members of the professions, and to those responsible for the management of law firms, is this: you must take mental health seriously – your lawyers and staff do, your clients are doing so, and you need to as well. If you lead by example, you will create an environment that is more collegial, more satisfying, and ultimately, more productive.

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[2] "Fast Facts about Mental Health and Mental Illness" (19 July 2021), online: *Canadian Mental Health Association* <www.cmha.ca/brochure/fast-facts-about-mental-illness/>.

[3] *Ibid*.

[4] “Understanding mental health in the legal profession”, *LAWPRO Magazine* 19:1 (1 January 2020) 5 at 6, online: <www.practicepro.ca/wp-content/uploads/2020/01/2020-01-understanding-mental-health.pdf>. See also “Mental Illness and Addiction: Facts and Statistics”, online: *Centre for Addiction and Mental Health (CAMH)* <www.camh.ca/en/driving-change/the-crisis-is-real/mental-health-statistics>.

[5] *LAWPRO Magazine, ibid*. See Patrick R. Krill, Ryan Johnson & Linda Albert, “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys” (2016) 10:1 Journal of Addiction Medicine 46, DOI: <10.1097/ADM.0000000000000182>.

[6] “Mental Wellbeing in the Legal Profession: A Global Study” (October 2021), 1 at 31, online: *International Bar Association* <www.ibanet.org/document?id=IBA-report-Mental-Wellbeing-in-the-Legal-Profession-A-Global-Study>.

[7] Jonathan Koltai, Scott Schieman & Ronit Dinovitzer, “The Status-Health Paradox: Organizational Context, Stress Exposure, and Well-being in the Legal Profession” (2018) 59:1 Journal of Health and Social Behavior 20, DOI: <10.1177/0022146517754091>.

[8] “Study of Factors Affecting the Mental Health of Québec Lawyers in the Workplace – Study Summary: Highlights”, online: *Barreau du Québec* <www.barreau.qc.ca/media/2416/sommaire-sante-psychologique-travail-avocats-anglais.pdf>. A national study into the well-being of legal professionals is ongoing, also with lead researcher Dr. Nathalie Cadieux: “Law Society participates in National Well-Being Study of legal professionals” (7 June 2021), online: *Law Society of Ontario* <www.lso.ca/news-events/news/latest-news-2021/law-society-participates-in-national-study-on-well>.

[9] “Mental Health in Canada: Covid-19 and Beyond” (July 2020), online: *Centre for Addiction and Mental Health (CAMH)* <www.camh.ca/-/media/files/pdfs—public-policy-submissions/covid-and-mh-policy-paper-pdf>.

[10] *Ibid.*

[11] See e.g., “COVID at Two: Vast majorities say the pandemic has pulled Canadians apart, brought out the worst in people” (10 March 2022), online:

Angus Reid Institute <www.angusreid.org/covid-19-two-year-anniversary>.

[12] "Mental Health Strategy Task Force – Final Report to Convocation" (28 April 2016), 335 at 336, 343, online: *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation-april-2016-mental-health.pdf>.

[13] *Ibid* at 343.

[14] "Mental Illnesses Increasingly Recognized as Disability, but Stigma Persists" (24 September 2019), online: *IPSOS* <www.ipsos.com/en-ca/news-polls/Mental-Illness-Increasingly-Recognized-as-Disability>.

[15] *LAWPRO Magazine*, *supra* note 4 at 7.

[16] The Barreau du Québec study, mentioned above, found that litigation was the practice area with the highest proportion of psychological distress: *supra* note 8 at 3.

[17] While there are undoubted benefits to collegiality, mentoring, and productivity to working in the office at least some of the time, there are also mental health benefits to working from home, which allows us to avoid the stress of long commutes, fulfill childcare and elder care responsibilities more easily, and look after our personal needs and obligations. A firm's mental health committee might consider how working from home would help address the needs of all lawyers, including those experiencing mental health challenges.

[18] See e.g., Megan Seto, "Killing Ourselves: Depression as an Institutional, Workplace and Professionalism Problem" (2012) 2:2 UWO J Leg Stud 5, online: <https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1053&context=uwojls>.

[19] 2021 amendments to the Ontario *Employment Standards Act* require certain businesses to have a "Right to Disconnect Policy". It appears that this legislation does not create a right to disconnect, but simply requires certain employers have a policy: *Employment Standards Act*, *2000*, S.O. 2000, c. 41, Part VII.0.1.

[20] On microaggressions generally, see e.g., Derald Wing Sue & Lisa Spanierman, *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation* (Hoboken. NJ: Wiley, 2020).

[21] See e.g., Lindsay Scott & Janani Shanmuganathan, “Virtual litigation through the eyes of racialized women advocates” (Spring 2022) 40:4 Adv J 18.

[22] See e.g., Ruchika Tulshyan & Jodi-Ann Burey, “Stop Telling Women They Have Imposter Syndrome”, *Harvard Business Review* (11 February 2021), online: <www.hbr.org/2021/02/stop-telling-women-they-have-imposter-syndrome>.

[23] See e.g., Carol S. Dweck, *Mindset: The New Psychology of Success* (New York: Random House, 2006).

[24] See e.g., Owen Kelly, “Coping with Stress and Avoiding Burnout: Techniques for Lawyers” (13 October 2009), online: *Canadian Bar Association* <www.cba.org/Publications-Resources/CBA-Practice-Link/Work-Life-Balance/Health-Wellness/Coping-with-Stress-and-Avoiding-Burnout-Techniques>. See also Erin H. Durant, *It Burned Me All Down: A self reflection on Big Law, burnout, mental health and how to build an environment to support a high performing and healthy workforce* (Durant Barristers, 2022).