the Verdict

ISSUE 178 / FALL 2023

APPEALS

Leaves to Appeal at the Supreme Court of Canada

Appealing Provincial Court Decisions

Arguing the Tough Appeals

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CEO CORNER ▸

BY **SHAWN MITCHELL MPA, C.DIR.**
TLABC CEO
PAC Contributor

Shawn is the CEO of TLABC. He has spent more than 20 years in senior management positions in the nonprofit and private sectors including the Vancouver Botanical Gardens Association, Edelman PR, charityvillage.com, WWF-Canada and the Huntington Society of Canada. A Chartered Director (C.Dir.), he is currently the Vice President and Governance Chair of the Three Links Care Society, and a three-term former director of MEC.

As most of the BC bar is now aware, the government announced some time ago its intention to create a single legal regulator in BC that would bring lawyers, notaries and paralegals under the same regulatory umbrella. The government issued an intentions paper, sought feedback to it and released a summary report outlining what they heard from various stakeholders.

Not surprisingly, lawyers and organizations like ours in the legal community raised many of the same concerns, with the importance of protecting the independence of the bar and the need for lawyers to be the largest presence in the governance of the new regulator being two of the most significant.

The more subtle concern is the manner in which the government will proceed to address the concerns and issues raised by ALL stakeholders. While the government does meet with representative organizations for lawyers, notaries and paralegals, these discussions are kept secret by virtue of an NDA signed by participants. And as we've seen in the past when the government seeks to roll out significant legislation, the detail is never in the publicly tabled and democratically debate enabling legislation. Rather, it is in the ensuing regulations passed by fiat via an order-in-council. This lack of transparency and meaningful dialogue is problematic to say the least.

I would encourage you, the reader, to review the position taken by the Trial Lawyers on page 40. These and other concerns are called out there. As always in matters such as these, we would encourage concerned lawyers to connect with their MLA and share their views. We will likely have more to say on this item in the next issue of *the Verdict*, assuming the government introduces its promised legislation later this Fall and assuming greater clarity is shared regarding some of these fundamental issues.

Changing topics, our theme for *the Verdict* right now is appeals and the appeal court. Our feature pieces on this topic:

Leaves to Appeal at the Supreme Court of Canada: Eugene Meehan KC gives a no-nonsense primer on the basics of leaves to appeal at the Supreme Court of Canada.

Finding the "Beam in the Eye": Arguing the Tough Appeals: Gavin Cameron, Tom Posyniak and Julia Kindrachuk discuss how to argue appeals: written advocacy, oral advocacy and factors to consider for both.

In addition, some of the columns included in this issue:

Family Law: Georgialee Lang discusses the unique challenges of appealing provincial court decisions in family law.

Medical Malpractice: Brenda Osmond details the importance of records in a medical malpractice lawsuit, with a focus on birth injury cases.

Class Action: Aden Klein's column examines situations when federal employees can file a lawsuit, focusing on workplace disputes involving the RCMP and the Correctional Service Canada.

Enjoy!

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PRESIDENT'S MESSAGE ▸

BY **ELISABETH SADOWSKI**
TLABC President
TLABC Member

Elisabeth Sadowski is a litigation lawyer at Collette Parsons Corrin LLP. Elisabeth has extensive experience representing plaintiffs in serious personal injury claims, who have been injured as a result of a car crash, assault (civil), slip and fall, and occupiers' negligence. She has appeared as an advocate before all levels of court in BC (the Provincial and Supreme Courts of BC, and the BC Court of Appeal).

It's been a busy time for our organization. Earlier this year, I attended a roundtable discussion regarding judicial applications for the BC Supreme Court ("BCSC") which was held by then-Justice Minister David Lametti. The discussion centered around how best to encourage qualified lawyers to apply to the bench with many asking for more transparency around the criteria to become a judge. The Law Society of BC graciously offered, as a first step, to spearhead efforts on developing video content to address many of the concerns that were raised. I strongly encourage our members to apply to the BCSC, even if you were not selected in the past — that doesn't disqualify you from being appointed on a renewed attempt.

TLABC has had some recent success in the courtroom! Thanks to our counsel Gib van Ert, Aubin Calvert, and Neil Abraham in May of this year, the BC Court of Appeal upheld Justice Smith's view that the disbursement cap in s. 5 of the Regulation was unreasonable. Our counsel highlighted:

> **As Justices Harris and Voith observed, the Regulation imposes an inflexible ceiling on the recovery of disbursements by litigants without regard to the nature of the plaintiff's case, the complexity of issues, or the evidence required to advance reasonable claims... Though a majority of the court did not find s. 5 of the Regulation to be unconstitutional, Justice Newbury would have also dismissed the appeal on the basis that Justice Smith was correct to find that the law offends s. 96.**

Lastly, the TLABC Board held its annual retreat in Whistler, BC in May. It was purported to be a success (regrettably, I could not attend as I was preparing for my client's 5-week trial — fortunately, my fellow trial lawyer board members understood!). Our board, a wonderful cross-section of trial lawyers from different practice areas, came together to discuss some of our organization's priorities for the year ahead. Topics included the no-fault legal challenge, our new branding strategy, and regulations for legal services. Dana-Lyn Mackenzie, a lawyer and member of the Hwlitsum First Nation led the board in a workshop on land acknowledgments, which we are now implementing at the start of every board and executive meeting. Land acknowledgment training is only the beginning of our commitment to Indigenous education, and we remind members to complete the required Law Society of BC Indigenous Intercultural Course by the end of the year.

FAMILY LAW ▸

BY **GEORGIALEE LANG**
TLABC Sustaining Member
PAC Contributor

TLABC COMMITTEE
· Family Law Committee

Georgialee Lang has practised family law for 34 years, focusing on arbitration and appellate litigation, including four legal cases in the Supreme Court of Canada. She earned her FCIArb from the Chartered Institute of Arbitrators, United Kingdom and was an adjunct professor at UBC Law School. She is a prolific writer, speaker, and media commentator, whose publications range from the Huffington Post to the National Post, The Advocate and The Lawyers Weekly. She has been named as leading counsel in Best Lawyers in Canada and Lexpert. For fun, she pens a blog, plays golf, but not well, and sings.

Appealing Provincial Court Decisions: Final and Interim Orders

How many times have you heard a client say, "If I don't like the judge's decision, I'll just appeal it"?

If only it were that easy!

Family appellate litigation is far more complex than trial or chambers practice because to succeed on an appeal an error in law must be identified on a standard of "correctness," or even more challenging, you must point to the judge's misapprehension of the evidence or a factual mistake that renders the judgment unsound. If there is no "palpable and overriding error"[1] or an error that is plainly seen, with respect to the underlying facts, then it is only when the inference-drawing process itself is flawed that an appellate court can intervene. The standard of review on an appeal of final order from the Provincial Court in respect of an error in law is "correctness" and to overturn a factual error the test is a "palpable and overriding error", per *Hickey v. Hickey* 1999 SCC 691.

Illustrating the challenge of appellate litigation, the *British Columbia Court of Appeal's Report for 2022*[2] indicates that slightly more than 50% of civil appeals were dismissed that year. These statistics are in line with anecdotal commentary from appellate lawyers[3] that only a third of family law appeals from the Supreme Court are successful. There is no reason to believe that the success rate of appeals from the Provincial Court is any different. However, the process and rules governing appeals from the Provincial Court are markedly different than the rules that apply to an appeal to the British Columbia Court of Appeal.

A. Appealing a Final Provincial Court Order

An appeal from a Provincial Court final order under the *Family Law Act* is heard by the British Columbia Supreme Court. Sections 233 and 234 of the Act, describe the orders the Supreme Court can make on an appeal.

233 (1) A party may appeal to the Supreme Court an order of the Provincial Court made under this Act, except an interim order.

...

(3) After hearing the appeal, the Supreme Court may do one or more of the following:

(a) confirm or set aside the order of the Provincial Court;

(b) make any order that the Provincial Court could have made;

(c) direct the Provincial Court to conduct a new hearing.

234 Despite any other enactment, if an order made under this Act is appealed, the order remains in effect until the determination of the appeal unless the court that made it orders otherwise.

It is important to note that an interim order of the Provincial Court cannot be appealed to the Supreme Court pursuant to the *Family Law Act*, however, the *Judicial Review Procedure Act* can be used to appeal an interim order. As well, the filing of an appeal does not stay the Provincial Court order. A stay application must be brought if counsel seek to put a hold on the order being appealed. The leading authority for a stay application is *RJR-MacDonald Inc. v. Canada* (Attorney General) 1994 CanLII 117 SCC.

The appeal process is governed by Rule 18-3 of the Supreme Court Family Rules which provides in Rule 18-3 (3) that a notice of appeal must include the "standard set of directions in the form directed by the Chief Justice, governing the conduct of the appeal or an application for directions as to the conduct of the appeal."

Practice Direction FPD-10, which can be found on the British Columbia Supreme Court website, addresses the following procedure:

a) An appeal must be brought in Form F80 within 40 days after the order is pronounced by the Provincial Court with a copy of the standard practice directions appended to it.

b) After the appeal has been filed the appellant must personally serve a copy of the Notice of Appeal to all parties in the proceeding in the Provincial Court.

c) The appellant must order a transcript of the Reasons and the evidence and file a copy of the Notice of Appeal in the Provincial Court registry where the order was made.

d) If a party to the proceeding wishes to oppose the appeal and receive notice of the hearing date, he or she must file a Notice of Interest in Form 77 within 7 days of receiving the Notice of Appeal and by ordinary service deliver the Form 77 to the appellant.

e) Within 30 days after filing the Notice of Appeal the appellant must file an affidavit of service indicating that the Notice of Appeal has been served on the respondent(s); the required transcript has been ordered; a hearing date has been requested from the registry; and a filed Notice of Hearing of Appeal in Form F81 has been delivered by ordinary service to the respondent(s).

f) If the appellant fails to file the material referred to in paragraph e), he or she must bring an application to extend the time to file the required material and no steps may be taken in the appeal until the application has been granted.

g) Within 45 days of filing the Notice of Appeal or such date as may be ordered by the court, the appellant must file the original transcript with the court and serve the transcript on the respondent by ordinary service. The appellant must

also file a written outline setting out the grounds of appeal, the relief sought, the factual and legal basis on which the relief is sought, and a list of authorities.

h) The written outline must be delivered by ordinary service to the respondent within 21 clear days of the date of hearing of the appeal.

i) The respondent must file and deliver by ordinary service a response setting out the factual and legal basis for opposing the appeal not less than 14 clear days before the appeal hearing date.

j) The appellant may file and deliver by ordinary service a reply, at least three days prior to the hearing date.

k) No new evidence will be admitted at the appeal hearing without leave of the court. The leading case on the admission of new or fresh evidence is *Barendregt v. Grebliunas 2021 SCC*.

B. Appealing an Interim Provincial Court Order

To appeal an interim order of the Provincial Court a petition must be filed in the Supreme Court under the *Judicial Review Procedure Act*. Section 2 provides that the court may grant any relief the applicant would be entitled to in the nature of mandamus, prohibition, certiorari, declaration, or injunction.

Section 3 of the *Act* provides:

"Error of law

3 The court's power to set aside a decision because of error of law on the face of the record on an application for relief in the nature of certiorari is extended so that it applies to an application for judicial review in relation to a decision made in the exercise of a statutory power of decision to the extent it is not limited or precluded by the enactment conferring the power of decision."

The remedies available to an applicant include an order directing the Provincial Court to reconsider and determine any issue arising from the review, obliging the Provincial Court to have regard to the superior court's reasons.

The reviewing court may set aside a decision of the Provincial Court or refuse relief if the sole ground is a defect in form, a technical irregularity, or the court finds that no substantial wrong or miscarriage of justice has occurred.

The Supreme Court can make an interim order until the final determination of the review petition. There is no time limit to bring an appeal under the Act unless an enactment provides, or the court considers that substantial prejudice will result to any person affected by reason of delay.

The application itself is sufficient if it sets out the ground on which relief is sought and the nature of the relief sought. It is not necessary to specify whether the remedy sought is mandamus, certiorari or any of the other remedies referred to in section 2 of the Act. The Act stipulates that the review petition must be served on the Provincial Court and the Attorney-General.

C. S.G. v. G.M. and Provincial Court of British Columbia

A recent example of a Provincial Court case that was the subject of a judicial review proceeding is *S.G. v. G.M. and Provincial Court of British Columbia* 2020 BCSC 975, where the Provincial Court made an interim order requiring the mother of the child, A.G., born on June 20, 2019, to return the child to Kamloops where she and the child's father had lived prior to her recent move to Powell River. S.G. and G.M. had dated for about five months in 2018, lived together briefly, but broke up in October 2018. The parties did not live together after the child's birth.

Prior to the mother's move to Powell River in September 2019, the parties had attended mediation where the mother advised the child's father that she was experiencing post-partum depression and wished to spend some time with A.G. and her family in Powell River. She assured G.M. that she was not relocating permanently, and that G.M. and his parents would continue to have parenting time with A.G. The mediator prepared an agreement in the terms agreed to during the mediation but once the agreement was presented to S.G. she refused to sign it. Unbeknownst to GM, S.G. had already provided notice to her landlord in Kamloops and had decided to remain in Powell River. G.M. visited A.G. in Powell River in late October 2019 and had facetime with A.G. almost daily.

It was not until late November 2019 when G.M. began pressing S.G. for her return date that she advised him that she planned to stay in Powell River, almost six weeks after she had notified her landlord that she was giving up her rental unit in Kamloops.

The day after S.G. informed G.M. that she was not returning he brought an application to the Provincial Court seeking an order that A.G. be returned to Kamloops. He pled that he was:

> **"...seeking guardianship, shared allocation of all parental responsibilities, and secured parenting time as [S.G.], to date, has controlled when I can and cannot see my son. I have paid child support since [A.G.'s] birth. We mediated an MOU where I agreed for her to visit her mother in Powell River and NOT relocate. She has now recanted, will not return home to Kamloops, BC with our son. No 60-day relocation notice."**

In December 2019 a consent order provided that G.M. would have regular seven-day parenting time with A.G. in either Powell River or Kamloops. A trial to deal with the issue of relocation was scheduled for June 2020 and an interim application was brought in February 2020 to determine if A.G. should be returned to Kamloops pending the June trial.

The court ordered the return of A.G. to Kamloops saying:

> **"It is my view that the best interests of the child can only be met by having [the Child] return to Kamloops where [the Child] will have the benefit of both parents. This will allow the child to see G.M. on a consistent basis leading up to the June hearing. It is not fair or feasible to think that this can be done on the current access schedule and the time required to travel between Powell River and Kamloops.**
>
> **The status quo which was in place before S.G. relocated without notice to Powell River in late September must be restored."**

In March 2020 S.G. appealed the interim order citing sections 3 and 7 of the Judicial Review Procedure Act. She also sought additional orders, that she conceded were beyond the scope of judicial review, invoking the Supreme Court's parens patriae jurisdiction to stay the Provincial Court order and allow the admission of new evidence.

The appeal was heard in April 2020 where the court held that it was not the role of the Supreme Court to assume jurisdiction of a Provincial Court matter, thus denying the application for a stay or entertaining new evidence. The court said:

"The judicial review forum is not the place to argue for a variation or stay of the order being reviewed based on a change of circumstances. On judicial review, a court is not undertaking a hearing de novo or a fresh look at one or more of the substantive issues. The function of the court is supervisory. For these reasons, a reviewing court generally does not admit evidence that was not part of the record before the tribunal."

With respect to the standard of review under the Judicial Review Procedure Act, the court engaged in a fulsome discussion of the law pre-*Vavilov* and confirmed that it was no longer applicable, referencing cases that held that a review was in the nature of an appeal.

The court found that *Vavilov* has "recalibrated and made a holistic revision of the standard of review." Because the Provincial Court is a statutory court and derives its power from legislation, in the absence of a right of appeal of an interim order, the mechanism for oversight is judicial review and the principles of administrative law apply which is the standard of reasonableness.

S.G. sought to persuade the court that the Provincial Court misapprehended the evidence with respect to her post-partum depression and failed to take a "blended approach" when considering the issue of mobility and custody. She also argued that the court erred by addressing the issue of joint guardianship and parenting time.

The court held that the onus was on S.G. to show that the court's order was "unreasonable", which could include a decision that was irrational, illogical, or the conclusion reached could not flow from the analysis or the reasons read, in conjunction with the record, or if the decision was not justified based on the underlying facts or law.

The court dismissed the appeal and awarded costs to G.M.

D. Conclusion

While an appeal is available from both a final and interim Provincial Court order, counsel must exercise restraint and sound judgment in respect of pursuing appellate avenues. For several years I vetted pro bono appeal applications made to Access Pro Bono for funding of potential appeals in the Court of Appeal. Many of those appeal applications were from self-represented parties. In 90% of the cases I reviewed, grounds for appeal did not exist and in my view, the appeals were bound to fail. In my private practice I often provide appeal opinions and again, for the most part, I discourage appeals unless there is a clear error in law or a miscarriage of justice that requires appellate intervention.

Appeals are expensive, not just the legal fees to complete an appeal, but the cost of preparing transcripts, exhibits, argument and reply. I tell my clients that their best shot at achieving the remedy they desire is to win the first time and put their best efforts into that endeavor.

1 *Housen v. Nikolaisen* 2002 SCC 33
2 2022 Annual Report British Columbia Court of Appeal bccourts.ca
3 Appeals Vancouver, ylaw.ca; Family Law Appeals, macleanfamilylaw.ca

ARTICLE ▸

BY **EUGENE MEEHAN KC**

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Leaves to Appeal at the Supreme Court of Canada

(10 basic ways to develop an appealing personality)*

Introduction

This is a brief practical non-academic, no-nonsense primer on some basics of Leaves to Appeal at the Supreme Court of Canada.

1. **The Basic Process**
   - leaves to appeal are done in writing, and "heard" in writing.
   - oral hearings are rare (perhaps 1 or 2 a year).
2. **Some Recent Statistics**
   - numbers of leave applications are slightly down as a general trend (i.e. good time to apply if you just lost at a Court of Appeal), though that varies from year to year: 2022: 478; 2021: 490; 2020: 481; 2019: 533; 2018: 531; 2017: 526; 2016: 577; 2015: 542; 2014: 561; 2013: 490.
   - applications for leave to appeal by area of law (2022):
     - Public Law (51%)
     - Criminal Law (27%)
     - Private Law (22%)

   (Of all applications for leave, generally 75% were civil and 25% criminal.)

3. **The Standard for Granting Leave**

   The standard – even though it's circular – is set out in s. 40 (1) of the *Supreme Court* Act:

   > "by reason of its *public importance* or the importance of any law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to *warrant* decision by it" (emphasis added).

Probably a more realistic and practical standard is that set out by Madam Justice Wilson in a 1989 decision:

> "it is important to look not only at the impugned legislation … but also to the larger social, political and legal context."

And Chief Justice McLachlin has written:

> "When considering whether to grant leave to appeal, the Court looks at whether the issue in some way extends *beyond the interest of the immediate litigants*.
>
> *Contradictory decisions* on the same point of law among two or more provincial courts of appeal is *often indicative* of the issues suitable for hearing by the Court. The entrenchment of the Charter has greatly increased the number of constitutional cases where

> leave to appeal is granted. A right of appeal may also be accorded on a *novel point of law,* where a *conflict of doctrine* exists or where a *pervasive provincial statute* is called into question. The Court today is also making a concerted effort to hear *private law cases* that raise important issues, to ensure the continued development of a healthy Canadian jurisprudence in private law."

Another standard which may be realistic is the following:

> "Does this sound like an interesting case we'd like to hear argued before us?"

4. **Whether to Apply for Leave in the First Place**

Some practical considerations include:

- you have 60 days (in most cases) to file your leave to appeal. Wait until you (or your client) have cooled off from losing at the Court of Appeal: make the decision carefully and objectively. Ask the question, will your case satisfy (or be made to satisfy) the standard for leave?
- do the chances of success warrant the cost and trouble?
- even if there is an error of law below, is it so substantial as to have affected the outcome of the trial or the Court of Appeal decision?
- are there Court of Appeal decisions in opposition to each other that require settling by the S.C.C.?
- if there is a Charter issue, was it squarely raised at trial and was there a sufficient factual context put forward at trial to sustain it?
- if a particular provincial / territorial statute / regulation (or provision thereof) is in issue, are there similar provisions in other provinces / territories / federally which one could argue would be directly affected by a S.C.C. decision?

5. **Your Opening**

Your factum should create anticipation immediately. A strong focused opening paragraph emphasizing the public importance (or lack of public importance if you are the respondent) can be effective. Don't do the usual and simply give a oneparagraph procedural history of what happened below.

6. **The Closing**

Likewise, can be very effective. It can pull the whole factum together into one whole, or rephrase and redevelop the opening, to give the factum a feeling of logic.

7. **When Acting for the Applicant**

- if legislation is involved, look at other provinces / territories / federally to see if they have similar provisions, and list excerpts in a pullout chart. Thereby suggest all of that legislation is also "on trial."
- if legislation is in conflict, emphasize the problem this conflict produces, and the appropriate role of the S.C.C. in giving a national solution.
- in criminal cases, emphasize a question of law impacting on the administration of justice, or the *Charter* itself.
- something very important for every Applicant is that the facts are their Achilles' heel. The S.C.C. presumably wants cases with clean settled facts, not cases with highly disputed facts when they're being called upon to be a trial court. A good way to deal with it is to do a strong first paragraph which sets out what the case is really all about ("This case is about..." is good), followed by a second paragraph giving only the necessary facts the S.C.C. needs to know to understand the legal issues and understand the issue of public importance (commencing for example "A brief factual chronology is as follows: ...").
- a Table of Contents may be read first also. Here headings and subheadings which make a positive statement, and develop a logical flow, should be used.
- do *not* be tempted to argue the whole appeal or do a redraft of your Court of Appeal factum. It's all different now, there's only one theme: public importance.
- likewise do *not* focus on all the merits of the appeal or why you should win the appeal or worse, focus in on the factual detail of your case.
- it can be very useful (for the Court) to set out both the jurisprudential and social context of your case, and tie it to practical reality.
- because practically no leaves to appeal are actually heard orally, the written memorandum of argument "should be a selfcontained and comprehensive explication of the reasons why the case deserves the attention of the Supreme Court."
- you should not have more than two or three points in issue – some have 10 or more, which dilutes effectiveness – few Courts of Appeal make 10 major errors in one judgment.

8. **When Acting for the Respondent**

- If you can argue the case is only important locally, or to the parties themselves, say so, and say *why*.
- If the trial judge was upheld by a unanimous Court of Appeal, say so – in the first (or second) paragraph.
- Only argue law if you really have to – there's only really one issue: public importance, and should the S.C.C. want to hear the case. The actual legal merits of the case are of secondary importance for now (of primary importance at the appeal itself).
- Can the case at trial or at the Court of Appeal below be developed by you as Respondent in such a way as to en-

courage the reader to legitimately think "This has all been fully dealt with below. Why should we get into this?"

- As a Respondent, the best way to win at the Supreme Court of Canada is never to go there at all: put the necessary time and resources into your response factum, to avoid the risk and expense of a full appeal.

9. **After the First Draft & Prior to Filing: Technical Compliance**

The Court is strict on technical compliance with the Rules.

But it is more important than mere technical compliance: the closer your factum is to the standard format in which the judges and their clerks generally read factums, the more persuasive and professional your factum will be.

In other words, hire an agent. Their name will be on the front cover beside yours. If you do not, and it is your name only, might an S.C.C. judge be tempted to think, "If this case is of national importance, as alleged, why do they not go to the trouble of hiring an S.C.C. Agent?"

10. **Conclusion**

In conclusion, leaves to appeal are the most common filing at the Supreme Court of Canada, ranging annually from approximately 550 to 650 the last number of years. To get leave, practical written advocacy is important. It's not difficult. It only takes time. And a brutal editor. But as everyone's mother has probably told every child, "If it's worth doing, it's worth doing well."

---

1 All statistics from "Statistics 2006 – 2016" Supreme Court of Canada.
2 *R. v. Turpin* [1989] 1 S.C.R. 1292 at 1331.
3 Appeals to the Supreme Court of Canada, Law Matters, CBA Alberta, April 2005, p.4. Emphasis added.
4 Sopinka & Gelowitz, *Conduct of an Appeal* (Lexis Nexis Canada, 2012, 3rd Edition), p. 239.
5 The Celtic corollary, oft quoted by my grandfather if it's *not* worth doing: "Save yeer breath tae blaw on yeer porridge"...

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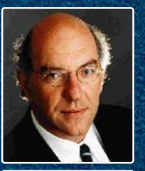
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STENOGRAPHY: THE GOLD STANDARD

by Liz Royal
RPR, OR/AR, President BCSRA

BCSRA
British Columbia Shorthand Reporters Association

The art of stenography is a critical element of the legal profession, and it has a long and distinguished history dating back to ancient Rome. While stenography has undergone significant modernization, some people question the value of stenography and argue that alternative capture methods may be just as effective. However, there are many compelling reasons why stenography remains the gold standard for court reporting.

It's worth noting that the Supreme Court Civil Rules in British Columbia requires all discoveries to take place in front of an official court reporter, who must be a stenographer. This means that all parties involved in the discovery process must have an official reporter present to take down a verbatim record of the proceedings. This requirement underscores the importance of stenography in the legal system and the critical role that stenographers play in ensuring the integrity of the record. Even as technology advances, the need for a skilled, professional stenographer remains paramount, particularly in settings where accuracy and attention to detail are essential, such as in legal proceedings.

One of the most significant advantages of stenography is the speed and accuracy with which stenographers can capture spoken words. By using a shorthand language that can convey entire words or phrases with a single stroke, stenographers are able to keep up with even the fastest speakers. This speed is essential for capturing a complete and accurate record of legal proceedings, which is critical for ensuring that justice is served.

In addition to their speed and accuracy, stenographers are also highly trained professionals who understand the legal system and the importance of the record. They are able to provide realtime transcription and ensure that every word is accurately captured, which is essential for preserving the integrity of the legal process.

Alternative methods of capturing spoken words, such as digital reporting and voicewriting, have limitations that can impact their accuracy and reliability. Technical issues and glitches can affect digital recordings, while the ability to accurately capture multiple speakers or strong accents can present challenges. Voicewriters may also struggle with these issues, as well as limitations in their ability to transcribe in realtime. As a result, traditional human stenographers remain the preferred choice for many applications.

Moreover, stenographers are essential for virtual and hybrid proceedings, which have become more common in recent years. By allowing reporters to work remotely, these proceedings have made it easier to access reporting services and ensure that the record is accurately preserved. Stenographers are uniquely positioned to provide this service, thanks to their specialized training and equipment.

Finally, stenography remains an essential component of the legal system, and it is critical that we continue to support and invest in this important profession. By working with contemporary industry leaders who are committed to preserving the importance of the record, we can ensure that stenography remains the gold standard for court reporting for years to come.

In conclusion, stenography is a critical and time-tested profession that plays a vital role in the legal system. While alternative capture methods may have their place, there is no substitute for the speed, accuracy, and professionalism of a trained stenographer. By investing in this important profession and working with industry leaders who understand its importance, we can ensure that the record is preserved for future generations.

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WILLS & ESTATES ▸

BY **TREVOR TODD**
TLABC Past President
TLABC Sustaining Member
PAC Contributor

Trevor Todd is one of the province's most esteemed estate litigation lawyers. He has spent 50 years helping the disinherited contest wills and transfers – and win. From his Kerrisdale office, which looks more like an eclectic art gallery than a lawyer's office, Trevor empowers claimants and restores dignity to families across BC. Although his work is renowned, Trevor is not a suit n' tie stuffy lawyer type. He is, in fact, the very opposite. He is an outspoken advocate for the disinherited. He is a world traveller (141 countries and counting) who is approachable, creative, and a fan of pushing buttons, finding needles in haystacks, and doling out advice for free. He is a mentor to young entrepreneurs and an art buff who supports starving artists the world over. He has an eye for talent and a heart for giving back. Trevor is deeply committed to his clients and his craft. He is a Past President of TLABC, a regular contributor to legal publications, and a sought-after public speaker. He co-practices with his son Jackson Todd.

Severance of Joint Tenancies by Conduct

In its ordinary operation, the principal characteristic of joint tenancy is the right of survivorship.

When a joint tenant dies, his or her interest is extinguished and the surviving joint tenant(s) takes full ownership of the property: *McKendry v. McKendry*, 2017 BCCA 48 at para. 28.

However if the joint tenancy is "severed," it becomes a tenancy in common with no right of survivorship with each former joint tenant owning an equal share. Severance is the legal process of converting a joint tenancy into a tenancy in common.

There are historically three ways in which joint tenancies can be severed as per *Williams v. Hensman* (1861) 70 ER 862:

1. Unilaterally by acting on one's own account, such as selling or encumbering one's share;
2. By mutual agreement between the co-owners to sever the joint tenancy; or
3. Any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

There is an increasing trend in both estate and family litigation to carefully examine whether the joint tenants, who are often spouses, acted in a way that intimated that the interests of the joint owners were treated as constituting a tenancy in common.

There are several ways in which parties can unwittingly act in a manner that is inconsistent with joint tenancies, so that the property should be treated as a tenancy in common rather than a joint tenancy with a right of survivorship. The purpose of this article is to examine some of the ways which conduct can sever a joint tenancy.

Conduct That Has Severed a Joint Tenancy

Ontario Cases

1. In *Re Walters* (1977) 16 OR (2d) 702 affirmed 17 OR (2d) 592 (Ont. CA)

The court held that a severance of the joint tenancy had been affected through the couples' course of conduct where they had negotiated to buy each others' interests in the matrimonial home in the course of their separation.

2. *Hansen v. Hansen Estate* 2012 9 RFL (7th) 251 (Ont. CA)

Mr. and Mrs. Hansen separated with the wife moving out of the joint tenancy home. Mrs. Hansen retained a lawyer who wrote to the husband's lawyer, indicating a desire to negotiate a separation agreement, including a division of the joint property. The parties began to close their joint bank accounts and prepared financial statements for exchange in furtherance of their settlement negotiations but before settlement could be finalized, the husband suddenly died.

Mrs. Hansen asserted a right of survivorship in the home and took the position that as a surviving joint tenant, she was entitled to the entirety of the property. The executors opposed to this and lost at trial but won in the Court of Appeal.

The Ontario Court of Appeal stated that severance by course of dealing does not require that each owner knew of the other's position, and that both treated their interest in the property as no longer being held jointly. This could be inferred from communications and her conduct.

Severance by course of dealing does not require proof of an explicit intention to sever the joint tenancy – the mutual intention can be inferred from the course of dealing between the parties and does not require evidence of agreement.

The determination of a severance or not is an inherently fact specific assessment.

The purpose of severance by course of dealing is to ensure that one owner does not unfairly obtain the benefit of the right of survivorship, where the parties have shown a common intention to no longer treat their interest in the property as an indivisible and unified whole.

British Columbia Law

The law in BC was not as liberal as Ontario's in finding a severance by conduct until the 2023 decision of *Preksar Estate v. Wagner*, 2023 BCSC 80.

In the *Preskar* decision, the court found that a joint tenancy with a right of survivorship had been severed so as to become a tenancy in common by reason of the joint owners' acrimonious conduct to each other that was inconsistent with joint tenancy unity.

Preskar involved two spouses who had been in a marriage-like relationship, who owned property in joint tenancy and had acrimonious family litigation for many years, starting in 2007 that was never resolved. The joint tenancy was never severed, and when Mr. Preskar died, his interest in the joint tenancy property initially immediately went to his partner by right of survivorship.

The estate, however successfully sued arguing that their acrimonious course of conduct showed that their "notional" unity of ownership under a joint tenancy had been abandoned, and thus the joint tenancy had been severed and a tenancy in common created many years before his death in 2020.

This meant that the half interest of the deceased would go to his estate rather than to the former joint tenant by right of survivorship.

The BC court adopted the reasoning of the Ontario Court of Appeal in *Hansen Estate v. Hansen*, 2012 ONCA 112.

Other Situations that May Sever a Joint Tenancy

1. Bank Account Withdrawls

In ***Zeligs v. Estate of Zeligs*, 2016 BCCA 280**, a joint tenancy bank account was severed when a co-holder of the chequing account with an enduring power of attorney transferred sale proceeds to herself and her husband when the other joint owner (her mother) was still alive.

As such, she destroyed the unity of title, which automatically severed the joint tenancy fund, and converted it into a tenancy-in-common, and distinguished the right of survivorship.

The defendants' unilateral action affected severance of the bank account and the court decided that she held one half of the sale proceeds in trust for her mother's (the co-owner) estate.

A jointly held legal right to withdraw funds from a joint bank account does not enable an account holder to assume beneficial ownership of the funds on deposit by the mere act of withdrawal.

On the contrary, where jointly owned funds are diverted from an account by one co-owner, the other may well be entitled to pursue an equitable remedy.

In *Zeligs*, the joint tenancy of the bank account was severed when the co-owner transferred the sale proceeds to herself and her husband, while the other co-owner of the account was still alive.

2. A Declaration of Trust or Secret Trust

The BC Court of Appeal in *Bergler v. Odenthal,* 2020 BCCA 175, confirmed that both a declaration of trust and a secret trust would have the effect of severing a joint tenancy.

The court referred to its previous appeal decision in *Re Mee* (1971) 23 DLR (3d) 491 where the court stated:

> **"There is no doubt — that a valid declaration of trust, although not registered in the Land Registry office, could effectively sever a joint tenancy to the same extent as a transfer made to a trustee would do. The principle that a declaration of trust has the same binding effect as a transfer to a trustee has long been the law and is set out in the often cited case of *Milroy v. Lord* (1862) 45 ER 1185."**

The court further discussed the seminal case of *Stonehouse v. AGBC,* (1962) SCR 103 in which it was held that the *Land Registry Act* did not change the common-law principle that the joint tenancy is destroyed by the alienation (even though not registered) by a joint tenant of his or her interest, thus ending the unity of title.

The court stated that they saw no distinction in a case where a joint tenant alienated his or her interest in the property directly to the person he or she wishes to benefit, to one where he or she alienated to a trustee to hold, and deal with it for the benefit or interest of that person.

Both situations would affect the severance of the tenancy, so long as the owner of the interest binds himself or herself by his or her dealings and therein — this is the main factor as to whether a severance of a joint tenancy is affected.

The *Bergler* case ended with the courts stating that it saw no difference in principle between an ordinary declaration of trust (like discussed in the Mee decision) and the acceptance by a trustee of an obligation of a secret trust. Both have the effect of severing a joint tenancy.

3. Paying Joint Property Proceeds Into Separate Accounts

***Tessier v. Tessier,* 2001 SKQB 399**, is a cautionary tale that even the simple fact of parties signing an agreement to sell their jointly owned property and pay the proceeds into separate accounts can by their conduct sever the joint tenancy into a tenancy in common.

The deceased and husband were joint tenants of a farm property on which they resided until retirement. In 1996 they decided to sell the property to the husband's nephew and his wife and an agreement for sale was executed in the presence of the parties' lawyer.

The Agreement set out a schedule of payments which were to be made equally to the deceased and her husband, who maintained separate bank accounts.

The deceased died in 1999 and by her will, left the residue of estate to be divided among her siblings in equal shares. The will made no specific reference to the land.

The Executors of the estate brought proceedings contending that the sale had severed the joint tenancy so that one-half balance owing under the agreement for sale was an asset of estate.

The Court held joint tenancy had been severed.

The onus of establishing that a joint tenancy has been severed is on person so contending.

A sale or lease by all of the joint owners does not itself result in severance because this arrangement is compatible with continuation of joint ownership in relation to proceeds of sale.

However, the deceased and husband had agreed that one-half of the purchase price would be paid to each of them and the proceeds were maintained by them in separate bank accounts.

These facts were sufficient indicia of the destruction of unities of interest and possession, both by agreement and course of conduct.

4. Partnership Between Non-Spouses

The BC Appeal Court in *Garland v. Newhouse,* 2022 BCCA 276 upheld the trial court decision (2021 BCSC 1291) that two non-spouses who owned a business property in joint tenancy was held to have been severed by reason of their partnership arrangement when one of the partners died.

The court found that the parties had a common intention to carry on business in a partnership but stated that the courts are less ready to infer a partnership from the conduct of the parties where the parties are spouses.

While the court stated that it might have come to a different result if the partners were spouses, the court found that the parties had no personal relationship, equally contributed to the purchase of the investment property, equally shared expenses and shared profits derived, and thus their relationship was one of partnership.

The court found that a partnership was inconsistent with a joint tenancy with right of survivorship and the joint tenancy had been severed. Under section 36 of the Partnership Act, RSBC the death of a partner in a two-person partnership dissolves the partnership.

The court was careful to state that the right of survivorship can never be applied to a partnership property. However, there must

be evidence of a contrary agreement between the parties that is sufficiently clear and compelling to overcome the presumption that beneficial interest in partnership property does not transfer through the right of survivorship.

5. *Family Law Act*

The *Estate of Eleanor Maureen Cook,* 2019 BCSC 417, and the most recent case of *Sushnyk v. Meyer,* 2023 BCSC 275, confirmed that pursuant to S. 81 of the *Family Law Act,* a joint tenancy asset owned by spouses is severed into a tenancy in common as of the date that they separate.

It is important to note that pursuant to s. 83 of the *Family Law Act,* spouses are not considered to have separated if within one year of separation they begin living together again, the primary purpose for doing so is to reconcile and they continue to live together for one or more periods totalling at least 90 days.

Equal entitlement and responsibility

81. Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6:

(a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

(b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

6. Murder/ Manslaughter

Perhaps the most egregious conduct that will sever a joint tenancy is where one joint tenant kills another. The doctrine of *ex turpi causa non oritur actio* prevents a party from benefiting from illegal or immoral conduct and applies to both contract and tort.

Where one joint tenant criminally causes the death of the other tenant, the court will then impose a constructive trust so that the survivor holds the property as to an undivided one-half interest for the benefit of the deceased joint tenancy's heirs. See *Re Papkowskf* (1956), 6 DLR (2d) 427 and *Schubert v. Barber* (1967), 1 OR 349 (Ont. HC).

Ontario Municipal Employees Retirement Board v. Young, 1985 Carswell Ont. 707 stands for the proposition that the unintentional killing by a wife of her husband severs a joint tenancy. The court applied the public policy rule that prevented a wrongdoer from benefiting regardless of intention. Intention to commit the crime was not necessary to find that the public policy rule applied.

CONCLUSION

The severance of a joint tenancy is a bit like "Humpty Dumpty" — it cannot be put back together again unless a new joint tenancy is created.

The continuing meld of estate, real property and family law principles have all come into fore when examining whether or not the course of dealings of parties to a joint tenancy ownership have or have not resulted in a severance of a joint tenancy by reason of their conduct.

It is quite common for spouses to separate and later reconcile outside of the one-year period allowed under the Family Law Act. The parties may well have entered into a course of dealings that might appear to treat jointly held properties as tenants-in-common, that may subsequently be forgotten about and result in an estate litigation dispute many years later as to the effect of their separation.

Many people do not appreciate the legal consequences that one or more of the actions stated in several of the aforesaid court cases may result in an unintended severance of a joint tenancy property.

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CLASS ACTION ▸

BY **ADEN KLEIN**
TLABC Member

Aden Klein is a class action lawyer in the Vancouver office of Klein Lawyers LLP. Aden acts for plaintiffs in a variety of class actions, including cases involving anti-competitive behavior, privacy breaches, government negligence and defective medical products. Aden has a Bachelor of Commerce with Honors from the University of British Columbia and Juris Doctor from the University of Toronto.

Federal Workplace Disputes: When Can I Bring a Lawsuit?

For the past 20 years, federal public service workers have been filing lawsuits regarding workplace disputes. Most of these federal public services employees are members of unions. These members benefit from free collective bargaining, which has been available to most federal public service members since the *Public Service Staff Relations Act*, RSC, 1985, c P-35 in 1967.

For federal public service workers to be successful, the court must first have jurisdiction to determine the claims. Jurisdiction is contentious when the plaintiff is a member of a union. In some cases the court assumes jurisdiction; in others, the court holds it has no jurisdiction. Typically, the court analyzes the efficacy of internal grievance and complaint processes provided by collective agreements.

Collective bargaining was intended to help employees bring grievances and complaints against their employer. Collective bargaining agents negotiate collective agreements which lay out the internal grievance and complaint processes. The internal processes are meant to be easier and faster than pursuing a lawsuit.

Typically, the availability of internal processes ousts a court's jurisdiction. However, in some circumstances a plaintiff may demonstrate the internal grievance and complaint processes are corrupt. The processes may silence victims and insulate wrongdoers. For example, several reports have highlighted problems with recourse processes available to Royal Canadian Mounted Police ("RCMP") members: that the processes are "dysfunctional" and the organization failed to prevent retaliation for speaking out against bullying and harassment.[1] When the process is corrupted in this way, it impedes access to justice and behaviour modification. Accordingly, in certain circumstances, courts maintain a residual jurisdiction to determine workplace disputes.

Rights of Action for Workplace Disputes

Federal public service employees are subject to section 236 of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 ("FPSLRA"):

> **No Right of Action**
>
> **Disputes relating to employment**
>
> 236 (1) The right of an employee to seek redress by way of grievance for any dispute relating to his or her terms or conditions of employment is in lieu of any right of action that the employee may have in relation to any act or omission giving rise to the dispute.
>
> **Application**
>
> (2) Subsection (1) applies whether or not the employee avails himself or herself of the right to present a grievance in any particular case and whether or not the grievance could be referred to adjudication.

The Federal Court recently noted: "[s]ubsection 236(1) of the FPSLRA has been recognized as an "explicit ouster" of the courts' jurisdiction. Once it is established that a matter must be the subject of a grievance, the grievance process cannot be circumvented, even for reasons of efficiency, by relying on a court's residual jurisdiction."[2]

However, this is not the end of the inquiry. In *Canada v. Greenwood,* 2021 FCA 186, the Federal Court of Appeal highlighted that "in a narrow range of cases, a court could exercise its discretion to hear such claims... [T]he harassment claim of a whistle-blower as an example of a case where a court might appropriately choose to hear a civil claim from a federal public servant as, in such circumstances, the grievance mechanism would not provide effective redress."[3] The court reiterated:

[I]n most instances, claims from employees subject to federal public sector labour legislation in respect of matters that are not adjudicable before the [Federal Public Sector Labour Relations and Employment Board] should not be heard by the courts, as this would constitute an impermissible incursion into the statutory scheme. However, an exception to this general rule allows courts to hear claims that may only be grieved under internal grievance mechanisms if the internal mechanisms are incapable of providing effective redress.[4]

This occurs where there is a gap in the internal procedures which cause a "real deprivation of ultimate remedy"[5] such as where "the grievance process is itself 'corrupt'".[6]

In this respect, "[e]vidence as to the nature and efficacy of the suggested alternate processes is necessary to provide a basis for the Court's determination of whether it ought to decline jurisdiction in favour of the alternate administrative remedies."[7]

Federal Workplaces: Are the Internal Processes Corrupt?

The Royal Canadian Mounted Police

In the last decade, there have been a number of class actions regarding workplace disputes in the RCMP. Some of the cases have been certified on consent and settled. These include two class actions regarding gender-based harassment in RCMP workplaces: *Merlo v. Canada,* 2017 FC 533; and *Tiller v. Canada,* 2019 FC 895. Canada did not raise jurisdictional challenges in these cases.

In other cases, Canada challenged the court's jurisdiction to address disputes in RCMP workplaces. Most recently, Canada raised a jurisdiction challenge in the case *Greenwood v. Canada,* Court File No. T-1201-18.

The *Greenwood* class action alleges systemic negligence in the form of bullying, intimidation and general harassment against RCMP members. The plaintiffs allege that RCMP management failed to provide a work environment free from bullying, intimidation and harassment. The class action was originally certified in the Federal Court (2020 FC 119) and mostly upheld by the Federal Court of Appeal (2021 FCA 186).

The Federal Court of Appeal noted that the RCMP has in place policies to prevent harassment and which "provide an internal redress mechanism."[8] However, the plaintiffs filed affidavits attaching government reports. These reports demonstrate that the internal process is dysfunctional:

> Some of the Reports document the existence of a workplace culture that permitted bullying and harassment to occur within the RCMP as well as a dysfunctional grievance process that failed to adequately respond to complaints of harassment filed by RCMP members and public service employees assigned to work with the RCMP. On the latter point, several reports document members' concerns about the negative impact speaking out against bullying and harassment might have on their careers.[9]

The Federal Court of Appeal agreed with the Federal Court that "the Reports supported the allegations that there are widespread and pervasive systemic issues with the internal dispute resolution processes within the RCMP." In other words, there was no reason to conclude "the internal options provide an effective remedy for the claims sought to be advanced through the class proceeding."[10]

Correctional Service of Canada

Another recent class action involved gender-based harassment and discrimination against female employees of Correctional Service Canada ("CSC"). In *Hudson v. Canada,* 2022 FC 694, the Federal Court held they do not have jurisdiction to hear the claims. The allegations included concerns with the inadequacy of CSC's grievance regime.

The plaintiffs provided evidence demonstrating problems with internal recourse processes:

> The 2012-2013 Annual Report of the Correctional Investigator noted that 31.8% of CSC employees who participated in a 2012 survey said they had been harassed in the workplace during the previous year, most commonly by their immediate supervisors or colleagues in the same work unit. The Plaintiffs note that these are the same people to whom CSC employees would be expected to present their grievances and complaints.
>
> ...
>
> [E]mployees in both organizations and found that they had serious or significant concerns about organizational culture and that they feared reprisal if they made complaints of harassment, discrimination, or workplace violence against fellow employees or supervisors.
>
> ...
>
> The March 2017 organizational assessment of Edmonton Institution described its workplace as a "toxic environment that runs on fear, intimidation and bullying [that] can only be described as a culture

> of fear, mistrust, intimidation, disorganization and inconsistency. Rarely is anyone held accountable for their actions."[11]

However, neither the pleadings nor the evidence addressed the full range of recourse mechanisms available to the class:[12]

> The pleadings and evidence of the Plaintiffs do not establish that the internal recourse procedures available to female employees of CSC are, in all circumstances, in every workplace and at all times, "corrupt" and incapable of providing effective redress.[13]

The Federal Court noted that "the role of the collective bargaining agents is key."[14] There was insufficient evidence regarding the adequacy of union representation:

> There is insufficient evidence before the Court to assess the adequacy of union representation for all proposed Class Members.
>
> ...
>
> Nor is there sufficient evidence demonstrating that these employees' collective bargaining units are institutionally incapable of assisting them with their grievances and complaints.
>
> ...
>
> The Plaintiffs make broad accusations against union representatives, claiming that they are among the worst offenders, they are complicit, or they are ineffective. But there is no evidence before the Court that these circumstances, to the extent they exist, prevail across all CSC institutions. Nor is there any evidence that concerted attempts have been made to advance grievances with the assistance of bargaining agents, or that there have been complaints of unfair representation when assistance has not been forthcoming.[15]

Ultimately, the plaintiffs were required, but failed, to demonstrate that the unions were incapable or unwilling to provide assistance for their claims. This evidence was missing from the motion record.

Unions Leaders Voice Support for Class Actions

After the decision *Hudson v. Canada,* 2022 FC 694, was released, several leaders of major federal public service unions have come out in support of class actions.

On March 27, 2023, various federal public service union leaders attended a press conference to voice support for the class action *Thompson et al v. His Majesty the King,* Court File No. T-1458-20. *Thompson* is filed on behalf of all Black individuals who work for, or have applied to work in, the public service of Canada. The claims are based on systemic racism against those Black individuals.

Attendees at the press conference included Larry Rousseau (Executive Vice President of Canadian Labour Congress), Jennifer Carr (National President of the Professional Institute of the Public Service of Canada), Chris Aylward (National President of the Public Service Alliance of Canada) and Alex Silas (Regional Executive Vice President for the National Capital Region of the Public Service Alliance of Canada).

The union leaders identified a number of systemic problems with internal grievance and complaint processes, including: [16]

- "[T]he government has decided that [workplace disputes are] a collective bargaining issue; that they want to take it to the Federal Public Sector Labour Relations Board. But I can tell you that Board is ineffective and inefficient. We talk about turning people's lives upside down, waiting five years to have your case before a judge. And what happens is you get personal justice, you don't get systematic justice. There's no way for the government to change its ways or manners when it relies on each individual person to come forward with their own story and ask for their own personal justice. And that's why we support this class action";
- "[W]hen you go through the individual grievance right through the PSR, those processes are 5 or 6 years and at the end most of the time they just want to give you individual remedy. They are not looking and they're not seeking to find out the root causes; they are not looking and seeking to say department you need to

do better. They are really just settling that individual grievance. And that's why the class action is important, is because it's going to force the government to systemic changes that we cannot get to with other means";

— Jennifer Carr (National President of the Professional Institute of the Public Service of Canada)

- "[T]he current system doesn't work... it is often extremely costly and we never get full satisfaction for our members."

— Larry Rousseau (Executive Vice President of Canadian Labour Congress)

- "[T]his is much bigger than an individual grievance or even bigger than a policy grievance, for that matter as well. As Nicholas has pointed to, this is so large and we have to make sure it encompasses everyone... the grievance process would not be able to encompass everything that we see that's going on here."

— Chris Aylward (National President of the Public Service Alliance of Canada)

The union leaders are suggesting that they are incapable of properly assisting federal public service employees due to systemic issues with the internal processes.

Going forward, it will be interesting to see whether these statements demonstrate the unions are incapable or otherwise unwilling to provide assistance. If so, the Federal Court may be more willing to assume jurisdiction to determine claims of workplace disputes.

1 *Canada v. Greenwood*, 2021 FCA 186, para 60
2 *Hudson v. Canada*, 2022 FC 694, para 74 (citations omitted)
3 *Canada v. Greenwood*, 2021 FCA 186, para 110
4 *Ibid*, para 130, emphasis added
5 *Weber v Ontario Hydro*, [1995] 2 SCR 929, para 57
6 *Attorney General of Canada v. Robichaud and MacKinnon*, 2013 NBCA 3, para 3
7 *Canada v. Greenwood*, 2021 FCA 186, para 95
8 *Ibid*, para 66
9 *Ibid*, para 60
10 *Ibid*, para 79
11 *Hudson v. Canada*, 2022 FC 694, paras 13-16
12 *Ibid*, para 87
13 *Ibid*, para 93
14 *Ibid*, para 101
15 *Ibid*, paras 87, 97, 101
16 Black Class Action, "Press Conference: Unions Call on Canada to Settle Black Class Action lawsuit", online: <https://www.youtube.com/watch?v=4bRVC3NUfJs>

ARTICLE ▸



BY **GAVIN CAMERON, TOM POSYNIAK,** and **JULIA KINDRACHUK**

Gavin Cameron is a litigator in Vancouver and appears as counsel in trials and appeals in all levels of court in British Columbia, as well as in the Supreme Court of Canada. He is frequently retained by trial counsel to take and defend their cases on appeal.

Tom Posyniak is a commercial litigator and Partner at Fasken. He has an active appellate practice and regularly appears before the British Columbia Court of Appeal. Tom has also been counsel at the Supreme Court of Canada and regularly prepares written submissions there. Prior to joining Fasken, Tom clerked for the Court of Appeal for British Columbia. Tom is a co-author of the *Civil Appeal Handbook* published by the Continuing Legal Education Society of British Columbia and the CanLII BC Civil Litigation Manual.

Julia Kindrachuk is a litigator in Vancouver with a focus on commercial disputes, white collar and regulatory defence matters and appeals. She has advocated for clients at all levels of court in British Columbia and Ontario. Julia has acted as counsel in appeals involving a broad variety of issues, including Charter, personal injury, class actions and criminal law appeals. She also has experience representing clients in appeals of administrative monetary penalties and in judicial reviews.

Finding the "Beam in the Eye": Arguing the Tough Appeals – Facts, Not Law

In a perfect world, one would only have to bring an appeal to the Court of Appeal armed with a crisp error of law, provoking a thoughtful Socratic exchange between you and the three justices of appeal about high principle and public policy, with the inevitable result of an appeal being allowed.

Unfortunately, we live in the real world; sometimes you have to argue the judge got the facts wrong.

The Courts of Appeal in Canada have, for good reasons, made this quite challenging. Facts are the province of trial judges and administrative decision-makers. They are the "merits-deciders",[1] and the courts of error do not intervene on a question of fact or mixed fact and law absent very serious and obvious mistakes. Even at the best of times, arguing the facts or their application to the law is a tough day at the Court of Appeal.

But on occasion, for one reason or another, you will need to argue a tough fact appeal. It is not verboten, but you need to be prepared, be honest with yourself and your client about the task ahead and be focused on putting your finger on the precise mistake made by the judge and showing why it matters to the result of the proceeding. The object of this paper is to provide some of the lessons and impressions we have obtained prosecuting the tough fact appeals.

Be Honest and Ask Yourself: Should We Appeal At All?

Whether you are trial counsel or are new counsel being brought into consider and prosecute an appeal, you must carefully consider the simple question of whether you recommend to your client to appeal it at all. Most decisions give you a right of appeal directly to the Court of Appeal in British Columbia. That does not mean you must use it upon an unsuccessful result at trial.

The time after defeat, whether a small one or world-ending one, is perfect for thoughtful reflection on the client's strategic situation. Good appellate counsel always takes that step back and considers whether more harm will come from doing what they want to do: fight and appeal. This is the time to test out your impressions and early theories on colleagues and associates, draft short elevator pitches, but also imagine how the appeal fits into the broader case and the client's strategic position.

Sometimes sheathing your appellate sword can be better for your client in the end for a number of reasons. First, and most obviously, your client's appeal may give rise to a cross-appeal, which, if successful, may mean your client will suffer an even worse defeat.

Second, arguing a tough fact appeal may simply result in the Court of Appeal reiterating and confirming bad and publicly embarrassing findings of fact, but with a louder judicial megaphone.

SEE PAGE 33

MEDIATION MOMENT ▸

BY **ROSE KEITH KC**
TLABC Past President
TLABC Member

TLABC COMMITTEE
- Women Lawyers Retreat Planning Committee

Rose Keith KC is Associate Counsel at Harper Grey. She graduated from the University of Saskatchewan Law School in 1992 and was called to the Bar of the Province of British Columbia in 1993. Ms. Keith's practice has focused on personal injury and employment law. She is a roster member of Mediate BC with extensive experience as both counsel and mediator in conducting and participating in mediations. She serves on TLABC's Women Lawyers Retreat Planning Committee and is an active member of the BC Branch of the Canadian Bar Association.

Tips to Increase the Value of Mediations

Mediations can be an effective tool in your advocacy toolbox. Not only do mediations greatly increase the chance of resolving your case without a trial, but mediation also presents a real opportunity to test the strength of your case and expose your client to the realities of litigation. Mediation provides you with the opportunity to improve your understanding of the opposing parties' case and to assess the risks that this presents. Mediation requires a different skill set, strategy and approach than litigation. To ensure that you are getting the greatest value out of your mediations, follow the below tips:

1. Prepare, prepare, prepare.
You should come to the mediation with a firm grasp of the facts and the law relevant to your case. Your case should be practically trial ready so that you have a real opportunity to truly test the strength of your case, demonstrate your command of the facts and law to your client and the opposing party and be in a position to provide your client with solid advice with respect to the risks of proceeding to trial.

2. Present your case clearly and truthfully.
Mediation is not a time for grandstanding, exaggerating, or misrepresenting your case. Doing so undermines your presentation, makes the opposing side and your client question your understanding of the case, and distracts from the purpose for your attendance at the mediation.

3. Learn.
Take the opportunity to learn as much as you can at the mediation about how the opposing party sees your case and how they intend to present their case if the case proceeds to trial.

4. Be patient and let the process unfold.
Mediation is a process and sometimes can be a long road. Often parties must go slowly through the process to get to a point where resolution is possible.

5. Consider why you are mediating.
Use mediation in those cases where your relationship with the opposing party or counsel is difficult. Mediation is a great way to get parties focused on the issues rather than the personality clashes.

6. Do not be over-confident.
Take the time at the mediation to truly hear what the other party is saying, to analyze their approach and to assess the risk that their approach presents to you and your case.

7. Be honest about the case.
Conduct a true valuation of your case before the mediation, not just a wishlist.

8. Come with a summary.

Prepare a great mediation summary that clearly lays out your position and the facts that support that position.

9. Do not use the opening statement as a time to read your mediation brief.

Use the opening statement to enhance what you have already said in your mediation summary or to respond to what the opposing party has said in theirs. Keep your tone neutral and stay true to the facts.

10. Use the mediator.

Remember you don't have to convince the mediator of the rightness of your position, they are not deciding the case. Use the mediator to help you convince the other side. Know when to use the mediator to carry your arguments. Use the mediator as a sounding board and as your eyes and ears into the other party's room.

Implementing these tips will help increase the value that you get out of your mediations and in turn help you to serve your clients better.

FROM PAGE 29

Third, sometimes your best day at the Court of Appeal is a new trial. That can be a poisoned chalice if the economics of a second trial do not favour your client, or there is every possibility the trial judge will make similar findings again, except this time correcting their mistakes. In other words, you may find that you can isolate that powerful and apparent factual mistake by the court below but taking the appeal process to its logical conclusion may not be in your client's best interests.

You may think by advising against an appeal you are not performing your role. But that is exactly the kind of detached, objective advice you need to give, both from your client's perspective and the Court's.

While discretion on appeal can be the better part of valour, it also is important to know the statistics: of the cases brought before it, the Court of Appeal allows the appeal[2] in about 40-50% of cases each year.[3] That is a crude, potentially misleading number, but helpful to keep in the back of your mind as you give advice at this stage.

Do Not Forget or Ignore the Standard of Review – It Is Your Guidebook for the Appeal

At the start of a tough fact appeal, it is important to honestly grapple with appellate standards of review. The current appellate standards struck by Supreme Court of Canada are well known. A question of law, if you are fortunate enough to find one, will be assessed on the correctness standard. This means the Court of Appeal will answer the question on appeal with no deference to the decision below.

But questions of fact and mixed fact and law, compromising a significant part of what judges do, are approached with significant deference. To succeed on appeal, one must establish an error that is palpable and overriding.[4] This standard is meant to be difficult. An overriding error is one that goes to the very core of the outcome of the case: "[I]t is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall."5 A palpable error is an obvious one. It should hit you like a thunderclap. Or, as the Supreme Court of Canada put it: "such errors are in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."[6]

And you cannot have an obvious error of fact without it being consequential. In that sense, it is a two-part test. You must always have in mind how errors of fact impact the result. If you merely establish a clear error of fact that is isolated and divorced from the key findings leading to the result, the Court of Appeal may conclude that the result can still be sustained.[7]

The colourful language describing the nature of a palpable and overriding error is meant to instil discipline in advocates on appeal. Not every case has such an error. The standard does make your appeal a tough one. But once you know this is the world in which you are operating, you can and should use that standard to guide your thinking, advice, and ultimately your submissions.

Written Advocacy: Tell the Story, Give Context, and Walk the Court Through the Logic of the Error

While the standard of review is of critical importance to understand your role as an appellate advocate, it should not necessarily dominate every aspect of how you approach the task of persuading the Court that mistakes were made in the court below. At the end of the day, it still is an exercise of persuasion, albeit a more challenging one.

While we will not be too prescriptive, we cannot help but make this point at the start: in a fact appeal, you should not have five, six, or seven grounds of appeal.[8] Ideally, you have one. At most three. But we would stress one or two. There are many good reasons for this rule in general, but in fact appeals it rings louder because of the rarity of palpable and overriding errors. Each new ground dilutes the effect of the overall submission. And there is a practical reason for this rule too. Each fact error has to be developed such that the logic of your point is undeniable. It can be difficult for any human to process seven different logical streams pointing to a fact error. The natural tendency of any person reading such a document will be to lose interest or comprehension with some or perhaps all of the grounds. The bottom line here is to not be afraid to pick one horse and ride it. Have the courage to be selective.

The time to spell out the error to the court is in your factum, and more particularly, your opening statement in your factum. It is here where you need to be candid about the nature of your appeal and identify, with specificity, the nature of the error and why it infected the result below. Tell the court why your client should win, using what facts you need to contextualize the judge's error, and point out the glaring flaw requiring the court's attention.

A fact appeal factum's fact section in this sense is obviously critical. It should not necessarily be longer, but you need to be detailed enough to "make the court smart" about what you see as the factual error and its context. In building your fact section, one would normally rely on the trial judge's findings. In a tough fact appeal, this is mostly still true. However, because this is the very thing you are taking issue with, it is necessary to preview the judge's mistake in the fact section with references to how it is not consistent with the record. Put another way, your fact section, at times, will need to be build from the original sources, and not from the trial judge.

Even those facts that are the subject of findings at trial can be put in a different light on appeal. The best advocates are the ones who can best spin the facts (within reason), or who are the best storytellers. At the same time, you must present the record fairly. Be candid and clear about what is in issue and what is not—separate disputed and undisputed facts. If there are bad facts for your client and their appeal, own up to them, and explain why they should not matter to the end result in this appeal. It is far better that you bear hug these problems than for your friend to come in with their response and highlight them. The Court will appreciate your candor.

The meat of your fact appeal factum should be dedicated to the clearest explanation of the error thus far. Do not be afraid to be creative in how you present it. In most cases, short, clear sentences spelling out the problem are your best bet. But charts and other visual tools can be helpful to present the judge's findings as against the record. In preparing this section, turn your mind to how you anticipate your friend responding. Try to forecheck it. Often, a respondent will say either that there is no such palpable error because the finding was available to the judge on the record, or that even if there is such an error, it did not infect the key reasoning leading to the order. If you can put yourself in their shoes, you can put down a marker that may give an effective anticipatory answer to your friend's factum and set you up for the oral hearing.

Oral advocacy: be prepared, be focused, be brief, be gone

The toughest part of the fact appeal is obviously standing up before three justices of appeal and saying a federally appointed justice, who likely has more experience than you do, made a patently obvious mistake that rendered the previous judicial result incorrect and means it must be reversed or redone. It is a tall order. You will face headwinds.

There are many approaches to these difficult situations, and you are best guided by all those well-tried advocacy skills you have already. We would offer some further ideas for the final stage of a tough appeal:

1. Having a good story and theme are critical. It is a persuasive exercise.
2. Practice in front of a colleague your fact error elevator pitch. It is not a full rehearsal, but if you can explain the problem in two minutes to one of your partners and have them grasp it immediately, you are on the right track.
3. Even if you had managed to limit yourself to three grounds in your factum, consider whether you can argue one or two at the hearing. The Court will appreciate this, and you do not necessarily need to abandon the other grounds. You can rely on your factum.
4. If it is a pure fact appeal, say so. Acknowledge you are attempting to climb Everest, but this is a special case which gets past Base Camp.

5. Believe in your argument, but do not oversell it. Be prepared to make reasonable concessions, having in mind your central thesis. Know what you need to win and stand your ground there.
6. Be brief. You need to be comfortable knowing that the Court has read your factum, your friend's factum, and the judgement below. More often than not, you can get right into it with few preliminary explanations and averments. You will know fairly quickly whether you have a chance.
7. Do not belabour the point. If you are under a hail of judicial fire, do not despair. Answer the questions as best you can, knowing that the questions, while difficult for your client, may be asked for a number of reasons. Be prepared to candidly acknowledge the challenge of your appeal before you and come back to your overarching thesis, and then sit down.

A tough fact appeal is not meant to be easy. The Court of Appeal is going to test you and your theory against the exacting standard of review. But if you have your hooks into something that cannot be explained away and gives the judges a sinking feeling that the result cannot stand, you may just come within the 40-50% of cases in the promised land of "appeal allowed."

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1 *Alexion Pharmaceuticals Inc. v. Canada (Attorney General)*, 2021 FCA 157, per Stratas J.A.
2 An appeal is "allowed" when the Court overturns or varies the order under appeal.
3 In 2021, the proportion of civil appeals allowed was 44% of the total civil appeals heard. In 2022, that number was 48%. See, Court of Appeal for British Columbia, 2022 Annual Report, Appendix I.
4 *Housen v. Nikolaisen*, 2002 SCC 33.
5 *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38 *citing South Yukon Forest Corp. v. R*, 2012 FCA 165 at para. 46.
6 *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38 *citing J.G. Nadeau*, 2016 QCCA 167 at para. 77.
7 See e.g., *Morden v. Pasternak*, 2023 BCCA 252.
8 See e.g., *Western Oilfield Equipment Rentals Ltd. v. M-I L.L.C.*, 2021 FCA 24 at paras. 9, 13.

Your Voice Matters

Of historical significance, our association's founders took issue with the Supreme Court of Canada's trilogy of decisions of the late 1970s that imposed a cap on non-pecuniary damages. TLABC's leaders and members have remained vigilant ever since.

A Win in the Courts!

On May 17, we were thrilled to hear that the BC Court of Appeal rejected the government's attempted appeal of the Supreme Court of BC's ruling striking down the 6% disbursements cap.

This decision hinged on how a cap would disproportionately harm those British Columbians who are already disadvantaged. An inflexible cap, with no judicial discretion, places high income earners at an advantage over low income earners, the young at an advantage over the old, the healthy at an advantage over the disabled, and so on.

The flexibility provided by section 12.1, which allows for additional experts when necessary, would be weakened due to the absence of a similar flexibility in terms of being able to recover the costs for those same expenses.

The appeal involved extensive and nuanced discussions of post-Vavilov administrative law issues -- how and when a Court can strike down regulations made by cabinet -- as well as how the cap interferes with the core jurisdiction of the Court.

> ***This means that thousands of British Columbians who have active personal injury claims arising out of motor vehicle accidents will be empowered to advance their claims without restriction on how they fund their evidence.***
>
> ~Elisabeth Sadowski, TLABC President

This is a great example of how TLABC, through courtroom advocacy, can make an impact on the lives of British Columbians.

We are deeply grateful to all the members and firms whose contributions to the PAC fund make it possible to initiate legal challenges and carry out appeals.

TLABC Intervenes

On May 18, Mark Iyengar of Peck and Company and Benjamin Reedijk from Olthuis van Ert made oral submissions to the Supreme Court of Canada in the Kruk and Tsang appeals, appearing as counsel for TLABC.

In Kruk, our argument was focused on the importance of a meaningful right to appeal in criminal cases involving credibility assessments. The right to appeal is the first line of defence against wrongful convictions, yet the ability to review convictions based on credibility assessments has been watered down in recent years.

This is an issue in Kruk, and we have asked the Court to recognize the need to preserve the ability to challenge a trial judge's reasoning with respect to credibility assessments on appeal.

Protecting access to a meaningful right of appeal in credibility cases is essential to safeguarding the liberty of individuals in BC and ensuring that decisions which limit liberty are fair, reasoned, and just.

If you believe there are issues TLABC should be addressing - public policy initiatives that we should be supporting, important cases in which we should seek to intervene, or needed areas of legislative reform - please call us at 604-682-5343

You can support TLABC's work in the courts by becoming a PAC contributor. Just click in the QR code on the next page and contribute whatever amount is comfortable for you.

STAND UP FOR THE RIGHTS OF BRITISH COLUMBIANS

Please support TLABC's advocacy work by becoming a PAC contributor today.

The Trial Lawyers Association of BC has a long history of raising its voice on matters impacting the individual rights of British Columbians.

We continue to be one of the few entities who routinely challenges the power of government, and takes on challenging legal issues to our highest Court.

We do this through PAC. PAC is TLABC's fundraising arm and supports our public affairs and advocacy work. PAC allows lawyers to have a collective voice in the justice community on issues affecting British Columbians.

PAC is 100% funded through voluntary contributions by members, firms and vendors. A healthy PAC fund means that TLABC can quickly respond when issues arise. This is why we still need your financial support.

When you become a PAC supporter, you'll be joining your colleagues in TLABC's mission to support and promote the rights of individuals in British Columbia.

Regardless of your practice area, when you contribute to PAC you are supporting individuals whose rights are being threatened.

Your contributions can make a tangible impact in areas where marginalized communities face systemic challenges, where individuals are denied their basic rights, or where laws and regulations undermine the principles of fairness or justice.

In appreciation, you'll be recognized as a PAC contributor on your Listserv designation, and on PAC signage at TLABC events, online and in *the Verdict.*

Can we count on your support?

You can become a PAC contributor for as little as $25.*

Scan the QR code to make your PAC contribution today!

* Larger gifts always appreciated.

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Updated 27 June 2023

ARTICLE ▸

Trial Lawyers Association of BC Response to AGBC's Intentions Paper re: Single Legal Regulator

INTRODUCTION

The Attorney General of British Columbia released a general intentions paper in September of 2022 (the "Intentions Paper") discussing and recommending a single regulator model for notaries, paralegals and lawyers. The paper begins by recognizing the importance and need for the legal profession to retain its independence and ability to self-regulate. However, The Trial Lawyers Association of British Columbia ("Trial Lawyers") do not believe the single regulator model as presented lives up to that promise.

There have been several responses from key parties affected by changes suggested in the Intentions Paper. In November of 2022, the Canadian Bar Association of British Columbia ("CBABC") provided a response detailing their concerns, including:

- Ensuring the independence of the bar;
- Questioning whether this model would actually improve access to justice;
- Insurance coverage issues regarding legal work provided by non-lawyers;
- Ensuring clear scope of work with respect to paralegals and notaries; and
- Ensuring the quality and integrity of the legal services provided to the public.

Trial Lawyers share all these concerns.

Independence of the bar?

The Trial Lawyers' primary concern is ensuring the independence of the legal profession, which, at its core, requires self-regulation. The need for an independent bar is essential to the integrity of the legal system and forms the foundation for a properly functioning democratic society. As noted in the CBABC response:

> **The regulator (alongside associations and individuals) must retain the responsibility to protect the rule of law. These principles, fundamental to our democracy and essential to protecting the citizens from government over-reach, are under threat throughout the world, including in British Columbia.**
>
> CBABC. *Legal Professions Regulatory Modernization: Response to Legal Professions Regulatory Modernization Intentions Paper.* November 18, 2022. Pg. 6

The Law Society of British Columbia ("LSBC") at its 2022 Annual General Meeting passed a resolution, raised by, and voted on by its members, directing the Benchers to oppose the single regulator model. To date, this direction appears not to have been followed. An essential component of this resolution is the need for more clarity from the government on core issues in the Intentions Paper, which the Trial Lawyers also believes is incredibly important.

Access to Justice

Access to justice is an important and essential need for all British Columbians. One of the purported purposes of the single regulator model, as stated in the Intentions Paper, is to improve access to justice. However, there is no clear evidence that a single regulator model will help further this goal. The CBABC commented on this issue as follows:

> **CBABC does not accept the premise that changes to regulation of lawyers, notaries and paralegals will impact access to legal services significantly, or in the magnitude that the Ministry asserts. We agree this is an opportunity to introduce some changes that will contribute to increasing access to legal services, but to assert that this "broad, more holistic approach to reform" will achieve a greater result than, for example, funding the family law legal aid system, or increasing funding for court services and technology, is an overstatement and an unrealistic assertion.**
>
> CBABC. *Legal Professions Regulatory Modernization: Response to Legal Professions Regulatory Modernization Intentions Paper.* November 18, 2022. Pg. 3

The Trial Lawyers fully support these comments.

Further, as noted by the CBABC, if the government truly wanted to improve access to justice, they could easily and most directly do so by increasing funding for legal aid and allowing for expanded eligibility for service and scope of service available. This was promised by prior governments when they applied the provincial sales tax to legal services, but no government has lived up to that promise.

Need details

As noted earlier, the Trial Lawyers' main concern is the preservation of the independence of the bar and the self-regulation of lawyers. The loss of these elements would jeopardize the ability of lawyers to properly represent their clients and the interests of British Columbians, especially where those interests are in conflict with the government.

The proposal, as drafted, is silent on crucial details regarding the size and composition of the proposed board, in three main areas:

- First, the proposal is silent on crucial details regarding the size and composition of the proposed board. The government recommends government-appointed and elected positions, which would include lawyers, paralegals, notaries, members of the public, and Indigenous people. The Trial Lawyers support the board containing members from the aforementioned groups, especially representatives from our Indigenous communities, but only on the condition that lawyers would continue to make up a majority of the board.
- Second, this same silence is found in the proposed disciplinary framework of the regulator body in the absence of sufficient detail regarding the regulation and disciplining of lawyers. The Trial Lawyers supports the position that lawyers, who have the most insight into legal issues, should be tasked with any disciplinary proceedings for lawyers to ensure the independence of the bar.
- Third, the Intentions Paper also recommends against allowing lawyers to bring resolutions to the regulatory body regarding the conduct of their own board. This recommendation has the impact of removing lawyers, or any member of the legal community, from holding its own regulatory body accountable for its own conduct.

Conclusion

As we anticipate legislation on this issue from the government, we hope the government meaningfully engages with all affected parties in ensuring that these concerns are addressed in the legislation and not left to be determined later in the regulations. It is essential that the independence of the bar be protected in the legislation and not left to the whim of the current or future governments, who can revise regulations without the need to pass new legislation.

The Attorney General released a further report in May 2023, summarizing, but not responding to, comments they received in response to the Intentions Paper. The report does acknowledge a strong response from the legal community emphasizing the independence of the bar and ability for lawyers to maintain self-regulation. In addition, the number one response from the public is the need to increase public funding for legal aid.

It is clear from the responses noted in their own release that legal professionals and the public have significant concerns regarding the lack of detail and information provided in the Intentions Paper. The Trial Lawyers' position is that the regulatory changes proposed in the Intentions Paper do not further the needs of the public or the members of the legal community. Further information and discussion is required to properly inform all parties about any intended changes to the regulation of the legal community and ensure the protection of the independence of the bar and its ability to self-regulate.

WELCOME NEW MEMBERS

A warm welcome to the following new and returning TLABC Members:

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Sandra Ballance, Surrey
Charanjit Bassi, Surrey
London Battye, Lake Country
Pardeep Birak, Vancouver
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Nicola Cox, Vernon
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* ALL MEMBERSHIP INFORMATION AS AT 19 JULY 2023

THANK YOU FROM TLABC

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Add your name to this list!

Contact TLABC Director of Membership & Education Karen St.Aubin for details.

T: 604.696.6523 E: karen@tlabc.org

* ALL MEMBERSHIP INFORMATION AS AT 19 JULY 2023

MEDICAL MALPRACTICE ▸

BY **BRENDA OSMOND**
TLABC Member

Brenda Osmond is a lawyer at Pacific Medical Law. Brenda obtained her law degree from UBC and was called to the bar in 2010. Her law practice is focused on representing patients who have suffered injury as a result of medical malpractice. Throughout her career Brenda has been a speaker at professional development conferences, a frequent contributor to professional publications and an adjunct professor at the Allard School of Law.

Medical Records in Birth Injury Cases

This is the seventh article in our series aimed at providing a detailed examination of the challenges and pitfalls in different types of medical negligence lawsuits and approaches to overcoming them. In this article Brenda Osmond reviews the importance of conducting a detailed review of the medical records in a medical malpractice lawsuit, with a focus on birth injury cases.

Introduction

Medical records provide the foundation for safe health care for patients. They are also the cornerstone of any medical malpractice lawsuit. They can be admissible in court as business records under an exception to the hearsay rule, without calling the maker of the notes to testify, provided they meet the requirements of the Evidence Act, RSBC 1996, c 124. s. 42. Whether the information in the records is an accurate representation of the care provided is a live issue in many medical malpractice lawsuits. The article will explore a number of recurring themes related to medical records, with a focus on how these themes play out in baby cases.

Nothing charted / nothing done

There is a saying in healthcare that if nothing was charted, then nothing was done. As trite as that sounds, it was the winning mantra in *Pinch (Guardian ad litem of) v. Morwood*[1] . Here, the plaintiff mother suffered an eclamptic seizure two days after being seen in the emergency room of the local hospital. In the ER her blood pressure had not been recorded in the chart, and despite hearing detailed evidence from the bedside nurse about her approach to taking and recording a patient's blood pressure, the court found that the blood pressure had not been taken, and if it had been taken it would not have been normal. This would have led to further testing, referrals and treatment which would have prevented the eclamptic seizure and the ultimate brain injury to the infant plaintiff. In this fact-driven case, the court noted that the absence of charting permits the inference that correct steps were not taken.[2,3] Citing *Skeels (Estate of) v. Iwashkiw*[4] *[Skeels]* the court noted:

> **112 The lack of charting does not necessarily mean that procedures were not conducted, nor is the mere lack of charting prima facie evidence of negligence in the treatment. However, the lack of charting makes it more difficult for a court to determine matters of credibility where individuals who are trained to chart, did not do so. This failing, despite the opportunity to do so, makes it harder for a court to accept that the correct steps were followed and appropriate procedures were done as it would have been logical for them to be recorded had they been done: ...**

There is a method of documentation known as "charting by exception" in which a nurse does not chart a parameter unless there has been a change from a previously documented result. *Skeels* involved a delay in delivery due to a failure to recognize and manage shoulder dystocia. The court was critical of the "charting by exception" practice

and specifically noted several examples where results of various assessments were charted even though there had been no change from a previously documented result, suggesting that charting by exception was, in fact, not the practice at that hospital.[5] By extension, this suggested that that the lack of documentation over a critical 1"½ hour period of time in which the plaintiff mother was fully dilated and the baby was eventually delivered, indicated that no care had been provided over that time period.

The lack of documentation in a medical record does not necessarily mean that nothing was done, although it is open to the courts to make that inference. These cases illustrate the importance of a detailed review of the records and the need for plaintiff's counsel to understand the expected workflow when routine procedures are being done, as well as the charting policies of an institution.

Inaccurate / incomplete charting

The importance of the completeness and accuracy of medical records was front and centre in *Brito et al v. Woolley et al*[6] *[Brito]*. This case illustrates the implications of a defendant's poor charting practice. In Brito the plaintiffs alleged negligence in the birth of the second twin who was deprived of oxygen due to the compression of the umbilical cord. The court dismissed the plaintiffs' claim due to a failure to prove causation, but in an unusual step awarded costs to the unsuccessful plaintiffs.

Here, the court noted the reckless conduct of all the defendants in the preparation of the medical records, noting that these records are often the only evidence as to the details of a particular event. The court described the records as being "variously incomplete, inaccurate, and inconsistent. ..."[7]. In addition, "the occurrence of material events was omitted completely from some of the medical records; the description of material events in some of the records was wrong; and the sequence and the timing of material events was inconsistent."[8] In describing the standard expected for medical charting the court noted:

> **[62] The law does not impose a standard of perfection on medical personnel in their preparation and maintenance of medical records. Rather, it is a reasonable standard of care, given the experience of the medical personnel and the context in which the medical records were prepared. Occasional inconsistencies, inaccuracies, and/or omissions are tolerated.**

The court rejected the defendants' contention that they should be awarded costs because the plaintiff unnecessarily pursued inconsistent theories as to the reason for the deprivation of oxygen. The only reason the plaintiff had to pursue various theories of causation was that the incompleteness of the medical records left them with no option other than to investigate various interpretations of those records. In addition, the sequence, timing and occurrence of events had to be proven at trial through lengthy *viva voce* evidence because of the incompleteness of the records.

Invariable / Usual Practice

Not everything done in an interaction with a patient is necessarily charted. Consent discussions are not documented verbatim. Every step taken in a physical assessment may not be charted. The courts recognize these realities, and also recognize that a busy physician will not remember the detail of every patient encounter.[9] Courts are often prepared to accept a nurse or physician's description of their usual practice.[10] But the medical records themselves can sometimes defeat that evidence. *Cojocaru v. BC Women's Hospital*[11] [*Cojocaru*] illustrates this point.

The plaintiff mother in *Cojocaru* had a rudimentary command of the English language having only immigrated to Canada four months earlier. The defendant physician conceded that she had no recollection of her discussion with the plaintiff and had to rely on her invariable routine and chart notes to determine what information she had given the plaintiff about the options and comparative risks of a repeat C-section or a trial of vaginal birth after a previous C-section. The court identified a number of examples where the defendant did not follow her other stated invariable routines, specifically with respect to charting crucial information about conversations with the plaintiff. In rejecting the defendant's "invariable routine" testimony, the court noted the pitfalls of giving too much weight to this kind of evidence:

> **[97] ...Most practitioners practice properly, most of the time. If evidence of "invariable routine" is given too much weight, no medical practitioner would ever be found to have been negligent. When a medical specialist makes no notes, or very scanty notes, and his\her evidence conflicts with other independent evidence of what occurred, the court must be very cautious indeed before accepting the "invariable routine" evidence. ...**

In addition to identifying examples in which the defendant had not followed her invariable practice, the court noted factors that weighed strongly in favour of the plaintiff's evidence that she had not been advised of the risks of a trial of vaginal birth after a previous C-section, including the plaintiff's beliefs, her experience from her first pregnancy as well as cultural influences.[12] Ultimately the court preferred the plaintiff's evidence and found that had she been advised of the risks she would not have considered a trial of labour, and ultimately the infant plaintiff's injuries would have been avoided.

In order to minimize the weight the court ascribes to "invariable routine" evidence it is necessary to comb through the medical records, often beyond the facts specific to the negligence, to identify potential deviations from an invariable routine. Carefully crafted questions at an examination for discovery can lead the defendant to identify a number of "invariable routines" for which exceptions may be found in the medical records. This could decrease the likelihood of the court finding that a critical "invariable routine" was followed.

Changes to medical records

If problems arise during labour and delivery and there are signs of fetal distress, the medical team may find themselves working furiously against the clock, administering resuscitative measures, reviewing and assessing the fetal heart monitoring strip and calling in additional personnel to help. The contemporaneous recording of the chart notes may fall by the wayside. What then?

From time to time it is necessary to make additions and changes to the medical records. The College of Physicians and Surgeons' "Practice Guideline – Medical Records Documentation" [*CPSBC Practice Guideline*] acknowledges that it can be appropriate for corrections to be made to medical records, provided that the physician clearly identifies what alterations were made and when.[13]

When proper procedures are not followed and changes are not marked clearly as "corrections" or "late entries" the possibility of self-serving motives can arise.

In *Paxton v. Ramji*[14] the infant plaintiff was exposed to the known teratogenic drug Accutane in utero. The defendant physician prescribed the medication to the plaintiff mother on the understanding that her husband had a vasectomy 4"½ years earlier. Nonetheless, she became pregnant while on Accutane, and the infant plaintiff was born with a number of birth defects.

The defendant physician kept typewritten clinical notes but made handwritten entries on these typewritten notes on days that were critical to the analysis of the Accutane issue. The plaintiff claimed punitive damages because of these handwritten changes. Although the court found that the chart alterations were made after the alleged breach of prescribing Accutane, and for the purpose of masking the breach, the court did not order punitive damages. Acknowledging that the alteration of notes heightens, complicates and prolongs the dispute, the court suggested this concern could be adequately addressed as a costs issue. The court labelled the act of altering a medical record as "reprehensible" but found that it did not reek of "enormity or gross impropriety" of the type recognized in awards of punitive damages.[15]

Steinebach v. Fraser Health Authority[16], [Steinebach] provides another example of changes made to a medical record after the bad outcome was recognized, and without being properly identified as late entries. Here the plaintiff called a handwriting expert

who testified that certain words in the chart notes that were dated *before* the birth of the infant were added in different ink *after* the birth of the infant, at which time it was known that the health of the newborn was compromised. In addition, some of the information that had been entered late was not even available at the time of the initial note.[17]

The plaintiff in *Steinebach* applied for an order for special costs against the defendant on the basis of those late additions to the hospital chart, among other things.[18] The court did not order special costs, finding that the trial judge did not conclude that these late entries even though not labelled as such, were not done to deliberately mislead the court or to bolster the defendant's evidence.

Although special costs were not awarded in this case, *Steinebach* does highlight the importance of reviewing the *original chart* in a case where the chronology of events, and the implications of what a physician knew at each moment of the case, is critical. Photocopies can be useful for an initial review of a case, but there is no substitute for viewing the original record.

Plaintiff's counsel needs to be alert to the possibility that after-the-fact additions or changes have been made to the medical record that are not properly annotated as late entries. Although this can helpfully call into question the veracity of the evidence of the defendants, it will not usually rise to the level of "gross impropriety" required to attract punitive or special costs awards.

Electronic Medical Records and Medical Data

As more and more clinics and hospitals move to electronic medical records, we lose the opportunity to identify notes handwritten in a different pen or written in the margin of a page. But electronic health records in British Columbia must include an audit trail that records when changes are made to the record, what changes are made, and by whom.[19] In addition to the medical chart, medical equipment often retains an electronic record of results. It can be important to ask for the electronic data from monitoring equipment, including fetal heart monitoring strips, to ensure that you have the complete picture of all of your client's assessments and monitoring. This information is not always available through the medical records department, nonetheless that might be the best place to start with your requests for information. The medical records department should be able to advise you where to direct your specific requests for information derived from the medical technology. Of course if the action is started and there is a hospital defendant, those requests will need to go through defence counsel.

Conclusion

Contemporaneous charting is one of the requirements for records to be admitted as business records under the *Evidence Act*. While late-entries into medical records are recognized as a necessity from time to time, they must be clearly marked as such. If they are not, and they are determined to be late entries either by handwriting analysis, comparison with facts that appear elsewhere in the records, or even by "time stamp" on a dictated operative or discharge note, the veracity of the witness/defendant can be called into question. Even chart entries not directly related to the alleged breaches can be important to impugn a defendant's claim of an "invariable practice." There is no substitute for a line-by-line review of the medical records, often assisted by an expert who knows what should be there, and what shouldn't be there, and can assist in spotting out-of-order entries and other problems.

1 *Pinch (Guardian ad litem of) v. Morwood*, 2016 BCSC 938 (CanLII).
2 *Ibid*, para 13.
3 Also see *Waap v. Alberta*, 2008 ABQB 544 (CanLII) at para 10 for a discussion of the court's prerogative to make an inference that if nothing was charted it is because nothing was done.
4 *Skeels (Estate of) v. Iwashkiw*, 2006 ABQB 335 (CanLII).
5 *Ibid*, para113.
6 *Brito et al v. Woolley* et al, 2005 BCSC 443 (CanLII).
7 *Ibid*, para 16.
8 *Ibid*, para 22.
9 See *Hewlett v. Henderson*, 2006 BCSC 309 (CanLII) at para 44 for an example of the court not accepting the defendant physician's evidence that events were ingrained in his mind even though they were not charted.
10 *Turkington v. Lai*, 2007 CanLII 48993 (ON SC) at para 93.
11 *Cojocaru v. BC Women's Hospital*, 2009 BCSC 494 (CanLII).
12 *Ibid*, para 100.
13 PSG-Medical-Records-Documentation.pdf (cpsbc.ca), September 1, 2014, last revised May 6, 2022.
14 *Paxton v. Ramji*, 2006 CanLII 9312 (ON SC).
15 *Ibid*, para 73.
16 *Steinebach v. Fraser Health Authority*, 2010 BCSC 832 (CanLII)
17 *Ibid*, para 56.
18 *Steinebach v. Fraser Health Authority*, 2011 BCSC 1369 (CanLII).
19 *Health Professions Act*, RSBC 1996, c.183, s. 3-5(2).

EMPLOYMENT LAW UPDATE ▸

BY **ROSE KEITH KC**
TLABC Past President
TLABC Member

TLABC COMMITTEE
- Women Lawyers Retreat Planning Committee

Rose Keith KC is Associate Counsel at Harper Grey. She graduated from the University of Saskatchewan Law School in 1992 and was called to the Bar of the Province of British Columbia in 1993. Ms. Keith's practice has focused on personal injury and employment law. She is a roster member of Mediate BC with extensive experience as both counsel and mediator in conducting and participating in mediations. She serves on TLABC's Women Lawyers Retreat Planning Committee and is an active member of the BC Branch of the Canadian Bar Association.

BC v. Gibraltar Mines Ltd.

The British Columbia Court of Appeal has provided clarity to employment law practitioners in their April 21, 2023 decision in *British Columbia (Human Rights Tribunal) v. Gibraltar Mines Ltd.*[1] The case was decided by a five-member bench of our court of appeal with the unanimous decision written by Hunter J.A. The decision considered the proper application for the test of family status discrimination and provides clarity on the issue of whether it is a prerequisite to a finding of prima facie discrimination on the basis of family status that there was a change in the terms or conditions of employment.

S. 13(1) of the Human Rights Code prohibits discrimination against a person regarding employment or any term of employment based among other things, on family status. Before an employer is required to justify its actions, an employee complainant is required to first establish a *prima facie* case of discrimination. In circumstances of family status discrimination, the test that is to be applied to establish a *prima facie* case of discrimination has been uncertain and controversial for a number of years and there has been a definite lack of clarity amongst employment law practitioners on what is required to satisfy the test.

The controversy has arisen in part due to the fact that while family status is a protected ground in human rights statutes, there is no separate express protection for parental status. Family status has been interpreted to include protection for parents. The difficulty has been understanding what that means and how that is applied in principle. The *Gibraltar Mines* case provided the court of appeal the opportunity to weigh in on this difficult issue and to accordingly provide direction to employers and those practicing in this field on what is required.

The *Gibraltar Mines* case began at the BC Human Rights Tribunal where the complainant, Lisa Harvey, filed a complaint of discrimination on the basis of family status. Ms. Harvey and her spouse were both employed at the mine. The mine operates 24 hours per day, 7 days per week. Ms. Harvey was a journeyman welder and her spouse was a journeyman electrician. At the time that Ms. Harvey became pregnant, both she and her spouse worked the same 12-hour shifts, but they sometimes worked different night shifts. When her parental leave was coming to an end, Ms. Harvey sought a workplace accommodation to facilitate childcare arrangements which involved changing both her and her spouse's work schedules. She and the employer were unable to agree to a suitable accommodation, resulting in Ms. Harvey's complaint on the basis of family status.

The specific accommodation which Ms. Harvey was seeking was to be moved to a different shift which she says would work best for she and her spouse to facilitate childcare. *Gibraltar* took the position that it was not obligated to accommodate the requested shift change to fit childcare needs unless "there was some special needs situation." *Gibraltar* ultimately proposed a shift change that would have Ms. Harvey and her spouse on opposite shifts which would enable them to organize childcare without difficulty because one of them would always be off work on any given day to pick up and drop off the child at daycare. This proposal was rejected on the basis that putting Ms. Harvey and her spouse on opposite shifts could have a very negative effect on their family life.

Initially the complaint was filed on the basis of sex, marital status and family status. *Gibraltar* successfully applied to have the complaint on the basis of sex and marital

status dismissed on a preliminary application. The Tribunal declined to dismiss the complaint on the basis of family status and undertook an analysis that set the stage for the later judicial review application.

The Tribunal began its analysis of family status by noting that to be successful at a hearing, Ms. Harvey has to prove that:

(1) She has a characteristic protected under the *Code;*

(2) She experienced adverse treatment regarding her employment with *Gibraltar* Mines; and

(3) Her protected characteristic was a factor in the adverse treatment.[2]

When it comes to a complaint with respect to alleged discrimination on the basis of family status, the British Columbia Court of Appeal decision in *Campbell River & North Island Transition Society v. H.S.A.B.C.*[3] added an extra twist. In this case, the Court of Appeal said that a complainant's case of discrimination on the basis of family status is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employer. In effect, to be successful in a complaint of discrimination on the basis of family status, a complainant has to show not just adverse treatment regarding her employment but to show "a serious interference with a substantial parental or other family duty or obligation."

Gibraltar submitted that it had not changed a term or condition of Ms. Harvey's employment and that she had not suffered a serious interference with a substantial parental obligation, arguing that circumstances that amounted to "commonplace childcare difficulties" do not satisfy the test, noting the childcare options that were available to her if she wished to pursue them.

In the *Campbell River* case, the complainant was successful when the employer changed her hours of work, resulting in a serious interference in her ability to satisfy her parental obligations towards her son. The court specifically said:

> **An employer's obligation to accommodate changes in an employee's family status may extend beyond continuing to offer employment on exactly the same terms as before the status changes, at least where the employee is able to demonstrate that a work requirement, including a particular schedule, creates, not a situation of "impossibility", but rather a "serious interference with a substantial parental or other family duty."**

The Tribunal disagreed with *Gibraltar* on its preliminary dismissal application. The application had been based on Ms. Harvey not alleging facts that could meet the *Campbell River* test because it does not allege that there was a change to a term or condition of Ms. Harvey's employment when she returned from maternity leave. The Tribunal held that the only issue is whether, if the alleged facts are proven, the Tribunal could find a breach of the *Code* on the basis that Ms. Harvey's regular shift schedule created a serious interference with a substantial parental obligation or duty. The Tribunal in coming to this conclusion considered whether there were other factors that would take her complaint out of the ordinary circumstances facing parents juggling the demands of their employment with providing care to their children. The Tribunal found those facts to exist on the evidence that if Ms. Harvey and her spouse worked the same 12-hour shift at the mine, the only daycare where she could obtain a spot for her child was not open long enough to allow either of them to pick up and drop off their child. As a result, they had to take either vacation time or family leave so one of them could either care for the child or take the child to daycare. The Tribunal concluded that a hearing was required to determine whether the evidence satisfied that *Gibraltar*'s decision to not modify the work schedules of Ms. Harvey, or her spouse, created a serious interference with a substantial parental obligation.

Gibraltar sought judicial review of the Tribunal's decision on two grounds:

1. That the Tribunal had misinterpreted Campbell River by failing to find that a pre-condition for prima facie family status discrimination was a change in the terms and conditions of employment; and
2. That in deciding not to dismiss the family status discrimination portion of the complaint, the Tribunal had exercised its discretion in a patently unreasonable manner.

The Chambers judge concluded that the Tribunal's interpretation for the test for *prima facie* discrimination in employment was incorrect and quashed the decision. This conclusion was reached on the basis of the Court of Appeal's decision in *Envirocon Environmental Services, ULC v. Suen*[4] in which the Court considered the question of whether the requirement in *Campbell River* was whether an employee had to show that the change in the term of employment resulted in a serious interference with a substantial parental or other family duty or obligation of the employee was still good law. The Court reaffirmed Campbell River and made the following comment:

> **If the term "family status is not elusive of definition, the definition lies somewhere between the two extremes urged by the parties. Whether particular conduct does or does not amount to prima facie discrimination on the basis of family status will depend on the circumstances of each case. In the usual case...it seems to me that a prima facie case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee.**

BCCA'S ANALYSIS

The Court of Appeal in *Gibraltar* began its analysis with what the proper interpretation of Campbell River was. The Court noted that in Campbell River the Court was considering the types of conflict between work and family obligations that could engage family status and contravene the Code.

The conclusion was that the conflict must amount to a serious interference with a substantial parental or other family duty or obligation of the employee. The Court did not consider or conclude that it was necessary to establish prima facie discrimination that there be a change to a term or condition of employment. The Court also agreed with the Tribunal that the mention of the usual case as being when there is a change of a term or condition of employment referred to in Suen was not an exhaustive statement of the test. The court came to this conclusion for three reasons:

1. The issue was not before the court in Campbell River – the issue before the court in Campbell River was whether the term "family status" could encompass difficult childcare arrangements, not whether a change in the employee's circumstances or status could lead to a term or condition of employment resulting in serious interference with a substantial or other family duty of the employee. The Court of Appeal concluded that what was decided in Campbell River was that family status included the responsibility for childcare arrangements, subject to a materiality requirement. The court did not decide that a change in a term or condition of employment is the only circumstance in which a prima facie case of discrimination could be made out.
2. The Code does not require a change in a term or condition of employment – the Code does not require a change in a term or condition of employment to trigger prima facie discrimination. There is nothing in the context of the Code that would limit its protections to circumstances arising only from a change in a term or condition of employment, rather the object of the Code suggests an expansive and not restrictive approach.[5]
3. Human rights legislation must be given a broad and liberal interpretation – interpreting Campbell River as restricting the protection of the Code to circumstances where the terms of employment have changed would frustrate the broad remedial purposes of s. 13.

The Court of Appeal concluded that s. 13 applied whenever a term or condition results in a serious interference with a substan-

tial parental or other family duty or obligation of an employee, whether as a consequence of a change in the terms of employment or a change in the employee's circumstances. The Court concluded that the Tribunal was not in error in declining to dismiss Ms. Harvey's complaint on the ground that *Gibraltar* had not changed her terms of employment.

The Court of Appeal concluded as follows with respect to the test for establishing prima facie discrimination in a family status case:

> **101 I conclude that for purposes of assessing conflicts between work requirements and family obligations, prima facie discrimination is made out when a term or condition of employment results in a serious interference with a substantial parental or other family duty or obligation. To put this test in terms of Moore, to establish prima facie adverse impact discrimination as a result of a conflict between work requirements and family obligations, an applicant must establish that their family status includes a substantial parental or other duty or obligation, that they have suffered a serious adverse impact arising from a term or condition of employment, and that their family status was a factor in the adverse impact.**

Summary – The Effect of *Gibraltar*

The Court of Appeal's decision changes somewhat the obligations on the part of an employer, or at least their understanding of their obligations. Where previously employers were clearly under an obligation to provide an employee returning from parental leave with the position that they had prior to leave, the *Gibraltar* decision makes it clear that the obligation extends further than this. If that original position results in the employee suffering a serious adverse impact in a substantial parental duty, the employer will have to make accommodations for the employee to alleviate the adverse impact. It will remain to be seen how the Tribunal and our Courts interpret serious adverse impact and the practical application of *Gibraltar*. Regardless, the Court has now provided clarity where uncertainty previously existed.

1 2023 BCCA 168
2 *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 (S.C.C.) at para. 33
3 2004 BCCA 260
4 2019 BCCA 46
5 *British Columbia Human Rights Tribunal v. Schrenk* 2017 SCC 62 at para. 52

CASE NOTES ▸

BY **EDWARD (ED) P. GOOD**
TLABC Sustaining Member
PAC Contributor

Edward P. Good has been a member of TLABC since 1984, a contributor to *the Verdict* since 1992 and served on the Editorial Board for almost twenty years. Ed practices plaintiff-side personal injury as a sole practitioner, and is sought out for his experience in civil jury trials. Passionate about injury prevention and rehabilitation, Ed has been involved as a volunteer with organizations including Disability Alliance BC (formerly the Coalition of People with Disabilities), the Brain Injury Association, and the Paraplegic Association.

He is proud to have contributed to BC's bicycle helmet laws. In a former life, Ed was a marine biologist, but seasickness drove him to the Bar.

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COSTS — Matrimonial proceedings — Outcome of litigation • Conduct of parties • Special costs • PRACTICE — Orders — Enforcement — Remedies for non-compliance — In January 2021, court ordering respondent to attend examination for discovery, failing which his response to family claim would be struck — Respondent arriving late for discovery, and leaving after 15 minutes, before claimant had concluded her questions — Master then striking response to family claim for failure to comply with January order, finding his leaving after 15 minutes tantamount to non-attendance — Master also dismissing respondent's application for reconsideration — Appeal judge finding the respondent to be criticized for his behaviour, but that behaviour did not rise to the level of "the most egregious" behaviour justifying striking his response — On subsequent application as to costs, appeal judge ordering the respondent pay special costs of the January 2021 order requiring him to attend for discovery, of the application to strike when he failed to attend, of an application for reconsideration, and of an application related to setting the appeal hearing. H. (T.K.) v. H. (M.D.) (https://www.bccourts.ca/jdb-txt/sc/23/00/2023BCSC0099cor1.htm) S.C., Armstrong J., 2023 BCSC 99, New Westminster E57026, January 23, 2023 , 9pp., [CLE No. 79051] • See also 2022 BCSC 755, [2022] C.D.C. 77211(CLE) • Claimant on her own behalf; J.M. Dreyer, for respondent. Principal case authority: Carrier v. Tate, [2009] C.D.C. 42712 (CLE), 2009 BCCA 183 — considered.

MOTOR VEHICLE INSURANCE — No fault benefits — Deductibility • Plaintiff awarded personal injury damages including $55,000 for the cost of future care — On defendants' application for deduction pursuant to Insurance (Vehicle) Act, s. 83, and Insurance (Vehicle) Regulation, Part 7, defendants seeking to deduct the entire award for the cost of future care — Plaintiff arguing that none of the deductions sought should be made — Trial judge finding plaintiff's evidence not undermining the presumption referred to in the cases that "ICBC can safely be relied upon to keep its promises" — However, judge not allowing all deductions claimed, but allowing a total of $46,750 — Recognizing uncertainty as to how ICBC would deal with the disallowed items, judge applying a 20% contingency deduction, for a net deduction of $37,400 from future care costs — On defendants' appeal, court finding the 20% contingency deduction was "untethered to the evidence", and so was "fatally speculative" — Appeal allowed. Watson v. Fatin (https://www.bccourts.ca/jdb-txt/ca/23/00/2023BCCA0082.htm) C.A., Saunders, Fitch & Marchand JJ.A., 2023 BCCA 82, Vancouver CA47614, February 21, 2023 , 12pp., [CLE

No. 79268] • Appeal from Milman J., 2021 BCSC 1210, [2021] C.D.C. 74866 (CLE), indexed as Fatin v. Watson • R.C. Brun, KC, and J.J.L. Brun, KC, for appellants; D.D. McKnight, for respondent; D.D. McKnight, for respondent. Principal case authorities: Aarts-Chinyanta v. Harmony Premium Motors Ltd., [2020] C.D.C. 72290 (CLE), 2020 BCSC 953 — considered. Del Bianco v. Yang, [2021] C.D.C. 75329 (CLE), 2021 BCCA 315 — considered. Norris v. Burgess, [2016] C.D.C. 62328 (CLE), 2016 BCSC 1452 — considered. Schmitt v. Thomson, [1996] Civ. L.D. 57; [1996] P. Inj. L.D. 20; [1996] C.D.C. 5437 (CLE) (B.C.C.A.) — considered.

PRACTICE — Discovery of documents — Documents held by non-parties • BANKRUPTCY — Trustees — In personal injury action arising from 2015 MVA, jury awarding plaintiff damages of $4 million, approximately $2 million more than defendant's insurance coverage with ICBC — Defendant making proposal under Bankruptcy and Solvency Act, not yet approved by his creditors, and subsequently initiating legal action against ICBC and others for negligence in their conduct of the MVA action — ICBC now seeking production of materials held by the bankruptcy trustee, a motion opposed by the trustee on grounds that s. 26 of the BIA precludes production of the trustee's file to persons not listed in that section and ICBC and other parties in the defendant's civil action did not fall within that list — Application granted — Status and details of the proposal in bankruptcy being relevant to the issue of any damages owed to defendant by ICBC or other defendants, application was not a fishing expedition, and requirements of Rule 7-1(18) (production of documents not in possession of a party) had been met — While BIA might be a complete code with respect to matters of bankruptcy and insolvency, nothing in BIA precluded document discovery of a trustee's file in a civil action. Lau v. Insurance Corp. of British Columbia (https://www.bccourts.ca/jdbtxt/sc/22/23/2022BCSC2355.htm) S.C., Chan J., 2022 BCSC 2355, Vancouver S1910044, November 24, 2022 (oral), 8pp., [CLE No. 79107] • M. Clark, for defendant ICBC; S. Cordell and D. Rondeau, for defendants; J.G. Dives, KC, for defendants; B.L. Lewis-Hand, for third party. Principal case authorities: Katzman v. Zuker, 2000 Carswell Ont 4035 (Ont. S.C.J.) — distinguished. Northwest Organics, Limited Partnership v. Roest, [2017] C.D.C. 64149 (CLE), 2017 BCSC 673 — considered. Weddell, Re, 2016 ABQB 248— considered. Surrey Credit Union v. Wilson (1990), 45 B.C.L.R. (2d) 310 (S.C.), af 'd 47 B.C.L.R. (2d) 242 (C.A.) — considered.

PRACTICE — Evidence — Expert reports — Admissibility • An action arising out of motor vehicle accident, on a voir dire in the liability trial, plaintiff applying for order declaring an engineering report prepared by Dr. T. on behalf of the defendant inadmissible on the basis of the author's conflict of interest — Despite not objecting earlier, plaintiff's counsel saying he had only realized close to trial that he had retained Dr. T. about a year earlier in respect of the same motor vehicle accident — Court finding there was no information to which Dr. T. had access that would serve to prejudice the plaintiff in the action — More importantly, the delay in advising of the potential conflict had deprived the defendant of the ability to address the potential conflict while preserving the ability to rely on expert evidence to support her position — Court finding that would not serve the interests of justice and would be unduly prejudicial to her — Application dismissed. Dhingra v. Kang (https://www.bccourts.ca/jdb-txt/sc/22/22/2022BCSC2299.htm) S.C., Ahmad J., 2022 BCSC 2299, New Westminster M188713, M188747, M212166, M217316 , November 28, 2022 (oral), 8pp., [CLE No. 78936] • B.J. Yu, for plaintiff; A. Estey and K. Blake, for plaintiff; S.Z. Schwartz and O.L. Wilson, for defendants; A. Ng, for defendant. Principal case authorities: Martin v. Gray (1990), 77 D.L.R. (4th) 249 (S.C.C.) — considered. Towers Ltd. v. Quinton's Cleaners Ltd., 2009 MBQB 34 — considered.

PRACTICE — Evidence — Privilege — Settlement privilege • Evidence — Expert reports • FAMILY LAW — Matrimonial property — Valuation — Parties separating in 2015 after 21-year marriage — Husband inheriting a Vancouver property ("Bellevue"), in respect of which he advanced a claim for an exclusion pursuant to the Family Law Act, s. 85 — Husband unilaterally obtaining a historical appraisal of Bellevue in April 2020 — Former counsel for husband sending the appraisal to former counsel for wife as an appendix to a without prejudice settlement offer in August 2020 — In March 2021, parties attending mediation, in which the historical appraisal was attached to the mediation brief of the husband, disclosed to the wife, her counsel, and the mediator — Wife subsequently including the historical appraisal in her list of documents and serving a notice to admit which sought to have the husband admit that he obtained the historical appraisal and that the fair market value of Bellevue should be based upon the historical appraisal — On husband's application, court finding the historical appraisal protected by litigation and/or settlement privilege. O'Connor v. Mills(https://www.bccourts.ca/jdb-txt/sc/22/22/2022BCSC2236cor1.htm) S.C., Hardwick J., 2022 BCSC 2236, Vancouver E191117, November 30, 2022 (oral), 10pp., [CLE No. 78833] • A. Winters and J. Harrigan, for claimant; S. Beebe and A. Sung, for respondent . Principal case authorities: Abdul-Ahad v. Challa, 2021 BCSC 795, [2021] C.D.C. 74432 (CLE) — considered. Aquilini v. Aquilini, [2012] C.D.C. 51550 (CLE), 2012 BCSC 1616 — distinguished. Blank v. Canada (Minister of Justice), 2006 SCC 39, [2006] 2 S.C.R. 319 — considered. Union Carbide Canada Inc. v. Bombardier Inc., 2014 SCC 35 — applied.

PRACTICE — Examination for discovery — Further examination • Discovery — Independent medical examinations — Further examination — Plaintiff's personal injury trial adjourned in May 2020 due to COVID-19, and re-set for February 2023 — Court dismissing defendants' applications for: adjournment of trial, further examination for discovery of plaintiff, and updated IME — Passage of time in itself, without more, insufficient basis for further discovery or further IME. The trial of the plaintiff's personal injury action, originally set for May 2020, was adjourned due to COVID-19. The defendants had examined the plaintiff for discovery in July 2018 for two hours, and had a physiatrist conduct an independent medical examination [IME] in February 2020. The trial was now scheduled for February 2023 for ten days. In November 2022 the defendants sought orders: (i) to adjourn the trial; (ii) that the plaintiff provide certain information arising from her discovery; (iii) that the plaintiff attend a continued examination for discovery; and (iv) that the plaintiff submit to an updated IME. Held, applications dismissed. First, there was no basis to adjourn the trial. Second, the plaintiff had provided the information requested at discovery through her counsel. Third, there was no basis to order a further discovery; there were no questions arising from the first discovery because the questions asked had been answered, and the passage of time in itself was not sufficient reason to require further discovery. Fourth, there was no evidence that the passage of time had changed the complexion of the case, and no evidence that a further IME of the plaintiff was required. If the defendants wanted updated information, it was open to them to request updated medical records and updated income information from the plaintiff. Ali v. Aujla (https://www.bccourts.ca/jdb-txt/sc/22/24/2022BCSC2403.htm) S.C., Master Harper, 2022 BCSC 2403, Vancouver M166653, November 1, 2022 (oral), 6pp., [CLE No. 79458] • M.J. Bauer, for plaintiff; R.S. Wallia, for applicant defendants. Case authority: Concord Pacific Acquisitions Inc. v. Oei, [2018] C.D.C. 67599 (CLE), 2018 BCSC 1368— applied.

PRACTICE — Witnesses — Disclosure of names and evidence summaries •In personal injury case defence failing to comply with trial management conference order to provide witness list, will-say statements, and trial schedule by certain dates — Court upholding plaintiff's objection to defence calling those witnesses, taking into account the lack of reasonable explanation for the failure to give notice before trial, and potential prejudice to plaintiff arising from trial by ambush — It would not be in interests of justice to permit defence to call the witnesses. The plaintiff, an ICBC drivers licensing examiner, sued for damages for injuries suffered in an accident that occurred during a road test. At the trial management conference [TMC] held seven weeks before the My 30 trial, the defendants' trial brief identified 21 witnesses including six ICBC employees. The TMC order required each party to provide to the other a list of the witnesses to be called at trial and will-say statements for each non-party, non-expert witness, by May 16, and required the plaintiff to provide a draft trial schedule by May 16, the defence by May 24. The defence did not provide a witness list or will-say statements by May 16, nor a draft trial schedule by May 24. On the Thursday before trial defence counsel provided an updated, larger witness list but no specific will-say statements. Plaintiff's counsel gave notice that he would object to the defence calling any of the witnesses on the new list. The next day, the defence provided a trial schedule indicating that the defence would only be calling two non-party, non-expert witnesses, ICBC employees JC and JG. The plaintiff completed her evidence on the second day of the trial, and her husband and sister-in-law completed theirs by June 3. On June 4, a Saturday, plaintiff's counsel emailed defence counsel asking for will-say statements for JC and JG, while maintaining his objection. The only response came on Monday morning at 9:50 a.m., when the defence provided phone numbers for JC, JG and three other ICBC employees. On June 6, plaintiff's counsel advised the court that he intended to object to the defence calling JC and JG. Defence counsel advised that they intended to call three ICBC employees. Held, plaintiff's objection upheld. The interests of justice were best served by not permitting the defence to call the witnesses. The three intended ICBC witnesses were not identified as witnesses within the time or in the manner directed in the TMC order, and proper will-say statements were not provided. It was material that the defence did not provide a reasonable explanation for the failure to comply with the TMC

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order, or to identify the proposed ICBC witnesses with certainty until the seventh day of trial, after the plaintiff had testified and shortly before she was to close her case. The plaintiff would be prejudiced by permitting the defence to call the three witnesses because she had been placed in the position of facing trial by ambush. It was reasonable to infer that precluding the witnesses from testifying was not likely to prevent the determination of an issue on the merits. Finally, the interests of justice weighed heavily in favour of sustaining the plaintiff's objection. If permitted, an adjournment of the trial could be necessary to enable the plaintiff to respond, which would be prejudicial and inefficient. Further, if a party is permitted, without good reason, not to comply with a TMC order that is intended to increase trial efficiency, prevent trial by ambush, and enhance trial fairness, the very purpose of the TMC will be undermined. Creamore v. Parilla (https://www.bccourts.ca/jdb-txt/sc/22/24/2022BCSC2402.htm) S.C., Warren J., 2022 BCSC 2402, Vancouver M176205, June 8, 2022 , 11pp., [CLE No. 79369] • Trial reasons at 2022 BCSC 2075, [2023] C.D.C. 78677 (CLE) • A.C. Richard Parsons, G.S. Hoff and E. Sadowski, for plaintiff; Barbara L. Devlin and L. Morgan A/S, for defendants. Case authority: Fu v. Zhu, [2017] C.D.C. 64222 (CLE), 2017 BCSC 749 — applied.

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ARTICLE ▸

BY **GREGORY S. PUN KC**

Gregory S Pun KC was a member of the BC Bar 1991-2018. He left the practice of law in 2012 because of severe ongoing depression and now resides in Edmonton. In addition to the aspects of his past and present professional activities that are stated in the accompanying article, he was a frequent speaker for CLEBC and Canadian Defence Lawyers, an adjunct professor at UBC Law, chair of the CBABC sections for Legal Research and Appellate Advocacy, and had numerous items published in journals such as The Advocate and The Lawyers Weekly.

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What To Do In Law After You Are Out Of Law

Introduction

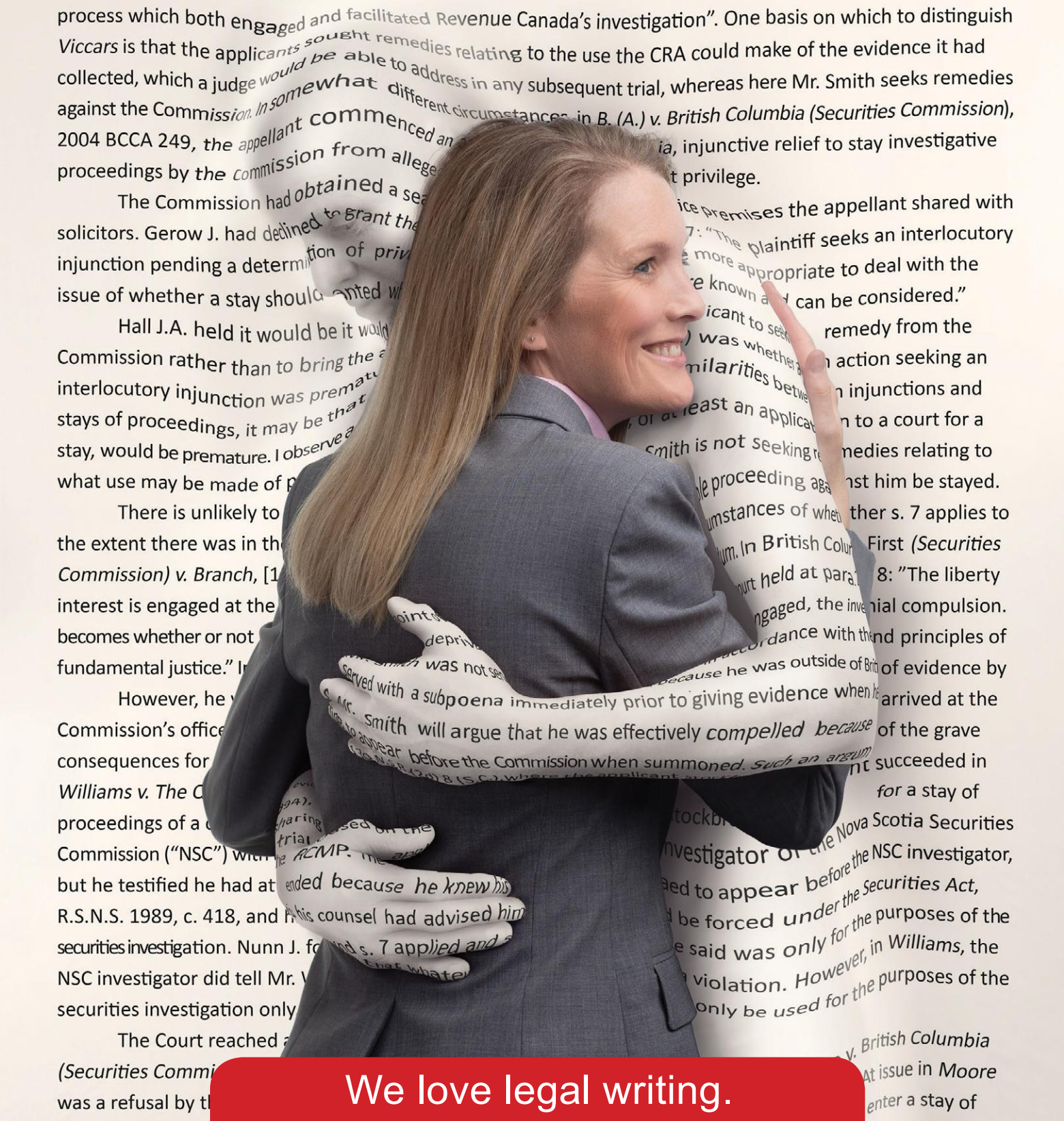
This is a personal story, but I tell it in case that it may have some broader use to others by way of analogy and inspiration. My thesis is that there are many enjoyable and useful activities to do in law even after you leave law. The options mentioned here reflect my interests and circumstances (mentoring, mooting, and an interest-based club styled "The Paisley Irregulars"), but it should be relatively easy to extrapolate to your interests and circumstances.

A short introduction is perhaps necessary for context. I was a lawyer at Alexander Holburn Beaudin + Lang LLP for some years doing research and appellate advocacy (1998-2007 + 2011-12), and I was briefly the Law Officer for the BC Court of Appeal under Chief Justice Lance Finch (2008-10). In 2012, I began to experience severe depression, to the extent that I could no longer practice law. With the guidance of the Lawyers Assistance Program and the support of Alexander Holburn, in September 2012 I started a medical leave that ultimately turned into a permanent retirement from the profession at age 48. By May 2017, following a couple of setbacks, my family (based near Edmonton) insisted that I move closer to them, which I did in early 2018. Somewhat by accident (and substantially due to depression-based apathy), I forgot to pay my Law Society fees in December 2018, and I lost my membership in January 2019. So, I am well and truly out of the British Columbia-based legal profession.

It is important for me to note, without belabouring the point, that all of my involvement with mentoring, mooting, and the Paisley Irregulars, has occurred while suffering from long-term, severe, treatment-resistant depression (my official diagnosis). I am very fortunate that I have good medical care and that my financial situation is stable (due to excellent long term disability insurance through my old firm). Although medications have not been effective, the psychological value of doing meaningful and fulfilling activities, in a field I like with people I like, has been immensely therapeutic. Let me emphasize this — for me, depression can be socially isolating, and these activities help give me some social connection and purpose, which is very important for my mental and physical well-being. This is something that I tell my family, friends, doctors, counsellors and insurers as often as possible. And so I am happy to write this article.

Mentoring

One facet of my continued involvement in the legal profession is mentoring of law students, which tends to transform into mentorship and friendship with (young) lawyers. I have had mentorship relationships going back to 1998, which is why I put "young" in parentheses in the previous sentence — the particular lawyer that I am thinking of is now nearly 25 years' call and holds a senior and important position in BC. Conversely, one of my most recent mentees was called to the Alberta Bar in February 2023 and I had the pleasure of attending her Call ceremony.



Nearly a dozen of my ongoing mentorship relationships arose since leaving the profession as a result of my depression. All of these are connected to the Thompson Rivers University (TRU) law school in Kamloops. Most of these relationships were established through the CBABC Mentorship Program, but several others arose through means that are too convoluted to explain here.

A side-venture in this mentorship enterprise is helping students who are applying for judicial clerkships. As noted above, I was the Court of Appeal's Law Officer for a few years, over a decade ago. Thus I occasionally get asked by the Careers Development Officer at TRU Law to help students prepare for clerking interviews. I look over their application letters and CVs, and do mock interviews with them. Despite my involvement, some of them have actually been hired by the courts.

Although I happen to focus on mentorship of law school students, I hasten to note that mentorship is not only for students and junior lawyers. Mentorship (or just "friendship") is of value to everyone: associates becoming partners, or lawyers transitioning from one type of practice to another (e.g. from private firm to in-house work), or moving out of law into another career entirely, or leaving active practice for retirement. All might well benefit from mentorship from someone who has already trodden that path.

So, to reiterate my thesis, mentorship is a way to do something meaningful in law even after you leave law — just find the niche that suits you.

Mooting

I have had an interest in mooting since I was a law student (I did the Jessup International Law Moot in 1988). And as you might anticipate, as a former appellate lawyer, mooting holds a lot of charm for me.

To get to my main point — in spring 2013, shortly after I started my medical leave, I came back to the firm in an attempted return-to-work program. One day, I was reporting to the partner in charge who had just received a phone call from a TRU student asking if we would do a moot practice for him. I took the student's number, called him back, and arranged to do the requested practice. That was the start of a now decade-long run being involved in the competitive mooting program at TRU Law. In that time I have helped to coach their teams for the BC Law Schools Moot and the Jessup International Law Moot.

My involvement with the Jessup Moot in particular has been rewarding and beneficial in many ways. First, it gave me a chance to work with a long-time friend as a co-coach, and I made a new and dear friend (the supervising professor at TRU). In our six years, TRU teams have been awarded six prizes for "top five" written arguments and one prize for "top three" oralists. We brought back two former mooters to be assistant coaches in furtherance of our succession plan. More than half of our former mooters have come back to be practice judges (many on multiple occasions).[1] When I help organize the numerous practice sessions each year, I get to go through my roster of friends in the profession to put together the practice panels, and I make a few new friends each year, too. And finally, coaching gives me a reason to stay in touch with my own mentors, as I seek their advice about advocacy skills in order to better coach the students.

In addition, this involvement with mooting has taken on a parallel life. Without going into detail, over the years I have (a) many times been a judge for the 1L moots at TRU Law, (b) given guest lectures to the 1L students in preparation for those moots, (c) helped to establish the inaugural "showcase moot" which has now become the TRU Internal Moot, and (d) delivered a guest lecture with a leading lawyer for the TRU Oral Advocacy Club. I am also pleased to report that I maintain some ongoing contact with about half of the 50 mooters that I have coached over this decade.

All of this arose from a single moment that very nearly didn't happen, and it gave me something fun and meaningful to do in

law after I left law.[2]

Interest-Based Club Activity – The Paisley Irregulars

By "club" I mean any group of like-minded individuals. My club is a group of about 22 people surrounding Martin Taylor KC (formerly of the BC Supreme Court and Court of Appeal). The core members are his former judicial law clerks; a few others (like me) are members *honoris causa*. Most are in Vancouver, but some are in Kelowna, Edmonton, Fredericton, London (UK), and Glasgow.

Martin has a long and deep interest in *Donoghue v. Stevenson*, the famous case that arose in the Scottish town of Paisley.[3] Thus we are styled the "Paisley Irregulars" and we may possibly be the world's largest organization dedicated to the law and lore concerning the case.[4] Martin has accumulated all manner of things related to *Donoghue v. Stevenson*, including photos (of Donoghue, Stevenson, solicitor Walter Leechman, the Wellmeadow Café, etc.), an original Stevenson bottle, documents from the House of Lords registry (e.g. Donoghue's affidavit in support of pauper status) and conference brochures. Martin donated his mementos to Allard Hall, and we call that collection the "Paisley Midden."

In 2021, to honour Martin and to encourage interest in *Donoghue v. Stevenson*, we established the "Paisley Irregulars Essay Competition in Negligence Law," an annual competition open to Canadian law students (at law schools and under articles), which you may have seen advertised in a recent edition of *The Advocate*. Four other fellow Paisley Irregulars are the Essay Committee: they set the essay topic, judge the submissions, and award the $1000 prize; *The Advocate* has offered to publish the winning essay – our thanks to the Editor for that courtesy). On our website (www.Paisley Irregulars.ca), we advertise the Essay Competition and publish some other materials (such as the sheet music and audio file for our specially commissioned bagpipe tune called "The Paisley Snail").

In May 2022, Martin and Professor John Kleefeld of UNB Law (our Paisley Irregular in Fredericton) were speakers at the global conference hosted by the Scottish Law Society to commemorate the 90th anniversary of the Donoghue judgment.[5] A further six of us Paisley Irregulars contributed short videos that were also presented as part of the conference.

The Renfrewshire Museum in Paisley saw our May 2022 conference videos and then found our website. The Museum thus contacted me (I am the webmaster and chair of the Essay Competition) to ask for our help because they are developing a display on *Donoghue v. Stevenson*. Imagine my surprise at getting an email from the Renfrewshire Museum — in Paisley — asking for our help to put together their display! So that has become a cottage industry for me in recent months: reviewing their text for factual and legal accuracy, providing photos and documents for the display (culled from the Paisley Midden at Allard Hall), and suggesting other avenues for research (for example, we recently made contact with a great-grandson of May Donoghue).

So, here is something that you might do in law after leaving law: form a club with some like-minded people on a topic of interest, and see where your fandom takes you.

In Passing and In Conclusion

In addition to my three main activities above, I mention in passing that I also did or do a few other things. I did a few guest lectures at TRU Law in legal writing and research, I was a guest assessor for PLTC (advocacy and interviewing/advising) and I was a co-author of some books. I gave those up at various times for various reasons, but I mention them in an attempt to help spark your imagination as to activities that might be of interest to you.

I have found it possible to become a minor financial benefactor to TRU Law. This has only taken a small amount of money (all credit to a brilliant financial advisor), which enables me to fund three course prizes each year ($500 each: one in advocacy, two in legal research and writing) and an entrance scholarship ($5,000 per year for five years). There have been several unexpected pleasures from this (beyond a welcome tax deduction). One, I get a thank you card from the recipients, which allows me to reply and thus develop a relationship with at least some of them. Two, on a few occasions I have awarded the prizes in person (by Zoom during the height of COVID) or by proxy (for two years, the prior recipient of the entrance scholarship has awarded it to the current recipient on my behalf).

And thirdly, as a donor I have been asked to speak at fundraising events; most notably for me, in support of the Lance Finch Memorial Fund for Mooting at TRU Law. Speaking in tribute to my mentor and friend was a great pleasure and honour.

As I said at the outset, the activities that I have outlined above are specific to my interests and circumstances. They may hold no charm for you. But there may well be activities related to the profession that do hold charm for you. I encourage you to identify those activities and then to talk with someone about them. Opportunities abound, and you will find yourself fielding offers to participate sooner, and to a greater degree, than you might think. If my experience is anything to go by, there are many fun, interesting, and beneficial things to do in law after leaving law.

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1 The prizes, the students willing to return as coaches, and the students willing to return as practice judges, suggest that we are doing something right = "rewarding and beneficial".

2 It is especially fun and meaningful to hear myself *giving* advice that I once received from my coaches and mentors.

3 [1932] AC 562, 1932 SC (HL) 31. Voted the most famous case reported in the Session Cases by the Scottish Council of Law Reporting: https://www.scottishlawreports.org.uk/session-cases-bicentenary-1821-2021/donoghue-v-stevenson-tops-the-poll/

4 The words "may" and "possibly" are carrying a lot of weight in this sentence.

5 *The collected Conference papers were recently published by CLE of BC: https://www.cle.bc.ca/donoghue-v-stevenson-90th-anniversary/*

TECHNOLOGY ▸

BY **MARK VIRGIN** & **MICHAEL MATIER**
with contributions from **KEVIN ROBERTSON**
TLABC Associate Members

Mark Virgin is an experienced litigator whose practice focuses on civil, commercial and administrative law. He assists clients with a broad range of matters, including family law disputes, insurance disputes, personal injury claims, product liability suits, and professional negligence actions. Mark has presented before professional bodies such as the Canadian Defence Lawyers, the CLEBC, and the Pacific Legal Technology Conference for TLABC. He has published articles on a variety of topics and has been recognized by the CBA for his years of ongoing community service.

Michael practices at Virgin Hickman as a research lawyer. He has diverse experience in areas including real estate leasing, IP licensing and development, and corporate commercial and regulatory matters. Michael complements his legal research and analysis skills with practical litigation and claims handling experience, having practiced at an insurance defense boutique and made appearances in BC Provincial Court and BC Supreme Court.

Testing the Limits of Free Speech and the PPPA

On April 9, 2023, the BC Court of Appeal released its judgment in *Linkletter v. Proctorio, Incorporated*, 2023 BCCA 160, upholding the chambers judge's ruling that the respondent's underlying action for copyright infringement and breach of confidence would not be dismissed under section 4 of the Protection of Public Participation Act (the "PPPA").

In this article, I examine the context and outcome of the recent Linkletter appeal, as well as the broader landscape of recent appellate court decisions regarding the PPPA and its Ontario counterpart. In conclusion, I observe that although the government introduced the PPPA with the aim of rebalancing legal protections in favor of freedom of expression, the appellate courts have thus far refrained from utilizing the PPPA to expand free speech into areas governed by private contracts, confidentiality obligations, or copyright restrictions on expression.

Background

In 2013, Proctorio first developed software that could remotely monitor student test takers without human supervision. In 2017, UBC entered into a licensing agreement with Proctorio for its software. With the advent of COVID-19 in spring 2020, UBC greatly expanded its use of Proctorio's software.

In addition to the software, Proctorio also provided access to an online self-serve "Help Centre" for faculty and administrators through its licensing with UBC. This Help Centre included links to videos hosted by Proctorio on YouTube. However, these links were not searchable from YouTube's site and could only be accessed through the Help Centre links.

In June 2020, the appellant, Richard Linkletter, a learning technology specialist in the Faculty of Education, became concerned with what he perceived to be the mishandling of student complaints. He began posting critical tweets about Proctorio on Twitter. He also created a "sandbox" course on Proctorio, with himself named as the instructor, which provided him access to the Help Centre.

On August 23 and 24, 2020, Linkletter posted links obtained through the Help Centre on Twitter. The links directed to seven of Proctorio's videos hosted on YouTube. Linkletter explained he was linking the videos to demonstrate how the software's identification of "suspicious" activities based on physical movements was likely to disproportionately impact certain students falling into protected classes by reason of disability, ethnicity, or national origin.

On August 28, 2020, Linkletter posted again on Twitter, stating that Proctorio had taken down the links he posted. On September 2, 2020, Proctorio filed an action against Linkletter and quickly obtained an injunction. In response, Linkletter applied to have the action against him dismissed under Section 4 of the Protection of Public Participation Act (the "PPPA").

Legislative Intent of the PPPA

On first reading in the legislature, then Attorney General David Eby indicated that the PPPA was intended to allow courts, early into proceedings, to determine whether the

lawsuit arises from an expression on a matter of public interest. If so, the court must then assess whether the likely harm to the plaintiff is serious enough that the public interest in the lawsuit continuing outweighs the public interest the impugned expression. Where the harm to the plaintiff is insufficiently serious, the court must dismiss the action.

The mechanism supporting such dismissal is found in the multi-step test provided in section 4 of the PPPA.

At the first step, the applicant must establish that the proceeding arises from an expression of theirs and that such expression relates to a matter of public interest. At the second step, the respondent has the onus of establishing that "there are grounds to believe" the underlying claim has substantial merit and that the applicant has no valid defense. If both steps are met, the applicant must further establish that the harm resulting from the expression outweighs the public interest in protecting the expression.

1704604 Ontario Ltd. v. Pointes Protection Association

The PPPA was modeled on similar provisions adopted in Ontario in 2015. While the PPPA was being introduced in the BC legislature, the Ontario Court of Appeal ("ONCA") released its first consideration of the Ontario legislation in *1704604 Ontario Ltd. v. Pointes Protection Association*. On September 12, 2020,the Supreme Court of Canada (the "SCC") issued a unanimous decision in *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22.

The underlying dispute in *1704604 Ontario* concerned a breach of contract in relation to a real estate matter. The plaintiff, *1704604 Ontario* Ltd. (the "Developer"), was proposing a 91-lot subdivision in Sault Ste. Marie. To proceed, the Developer required approval from the Sault Ste. Marie Conservation Authority (the "Conservation Authority") and the Sault Ste. Marie City Council. The applicant, Pointes Protection Association ("Pointes"), opposed the development on primarily ecological grounds before the Conservation Authority and City Council.

The Conservation Authority approved the development, prompting Pointes to apply for judicial review. However, the City Council denied approval, prompting the Developer to appeal to the Ontario Municipal Board (the "OMB"). The OMB granted Pointes standing to contest the appeal. Pointes then agreed to abandon its judicial review application, and to not contest the validity of the Conservation Authority's decision at the OMB hearing, in return for the Developer's cost waiver.

However, after Pointes' president testified in opposition to the development before the OMB, the Developer commenced an action against Pointes, claiming it was an implied term of the settlement agreement that Pointes would not make any statements critical of the Developer or its proposal during the OMB proceedings. In response, Pointes sought to have the action dismissed under Ontario's equivalent legislation to the PPPA.

The chambers judge denied Pointes' application, finding it had not established a valid defense to the Developer's claim. Pointes appealed to the ONCA where the court unanimously agreed that the chambers judge erred in putting the onus on Pointes to establish a defense.

On appeal, the SCC confirmed that the respondent Developer was required to establish "grounds to believe" Pointes had no valid defense in addition to establishing grounds to believe in the merits of their claim. While this analysis does not ask the court to assess the claim on its merits, a respondent must establish *"a basis in the record and the law – taking into account the stage of litigation at which a [PPPA] motion is brought – for finding that the underlying proceeding has substantial merit and that there is no valid defense."*

On the same standard, the SCC agreed that the Developer's arguments as to an implied term of the agreement were without merit.

While not required to dispense with the appeal, the SCC further endorsed the ONCA's finding that Pointes' interest in the subject matter of the expression, ecological concerns, and the mode of expression, testimony before an administrative tribunal, were relevant factors supporting dismissal at the final step of the analysis.

Linkletter's Application to Dismiss

Considering the first step of the test under the *PPPA*, the chambers judge found both that the proceeding arose from Linkletter's expression, in the form of his tweeted links, and that his expression concerned a matter of public interest, being Proctorio's software.

Accordingly, the onus shifted to Proctorio to establish each of the remaining three elements of the test. At this second step, the chambers judge held that Proctorio met its onus of establishing grounds to believe on the record that its claims for breach of confidence and copyright infringement against Linkletter had merit and that Linkletter had no defence.

At the final weighing step, the chambers judge found Proctorio established an at least theoretical risk of loss due to Linkletter's expression either by making it easier for users to circumvent Proctorio's software, or by allowing competitors to access Proctorio's confidential information. Though these losses were unlikely to materialize, the chambers judge noted that these could have been greater had Proctorio not obtained an early injunction.

Considering further the parties' motivations, the chambers judge found Linkletter had acted out of a genuine sense of public duty and concern for students. However, the chambers judge found that Linkletter's expression, the tweeting of video links, was not essential to Linkletter voicing his criticisms about Proctorio's software.

The chambers judge also disagreed that Proctorio was primarily acting to silence criticism against it, noting that Proctorio had not taken similar action against other online critics. Instead, the chambers judge held that *"the only expression that Proctorio seeks to enjoin is the public sharing of confidential information from the Help Center and Academy intended exclusively for instructors and administrators."*

Having found that it was not necessary for Linkletter to have infringed Proctorio's copyright or breached confidence in order to express his opinion, the chambers judge held that the public interest in Linkletter's impugned expression did not outweigh the public interest in maintaining the proceedings.

BC Court of Appeal

The BC Court of Appeal (BCCA) heard Linkletter's appeal of the chambers decision on December 2, 2022, and released its reasons on April 19, 2023.

Linkletter appealed on three issues: whether the judge erred in concluding there were grounds to believe the breach of confidence claim had substantial merit; whether the judge erred in concluding that there were grounds to believe the breach of copyright claim; and whether the judge erred in his weighing of the public interest at the final step of the analysis.

The BCCA held that each of the impugned findings on appeal concerned questions of fact or exercises of the chambers judge's discretion, and so were entitled to deference. It further confirmed that given Proctorio's burden on the first two issues had been only to establish "grounds to believe," the chambers judge's findings would stand so long as there was any basis that was legally tenable and reasonably capable of belief.

Assessed on that standard, the BCCA found that the chambers judge had committed no error. Though there was conflicting evidence on certain of the issues, the existence of some competing evidence did not vitiate the grounds to believe that Proctorio may succeed.

The BCCA further endorsed the framing of the public's interest in Linkletter's expression as being the public's interest in protecting infringement of copyright or breach of confidence, and not simply the public's interest in Proctorio's software. Accordingly, the risk of harm to Proctorio, though minimal, outweighed any negligible interest the public would have in protecting Linkletter's infringement of copyright protections or beach of confidence.

SCC Consideration of the PPPA

On May 19, 2023, the SCC released its decision in *Hansman v. Neufeld*, 2023 SCC 14, the first SCC treatment of BC's PPPA.

Hansman concerned a defamation claim brought by Chilliwack Schoolboard Trustee Barry Neufeld against Glen Hansman, the former president of the BC Teachers' Federation. The case revolved around Hansman's statements that Neufeld's publicly expressed views on educational initiatives were *"bigoted, transphobic, and hateful,"* and Hansman's suggestion that Neufeld was unfit for public office.

Initially, Hansman succeeded in having the defamation application dismissed in chambers, but the decision was reversed by the BCCA. However, in a 6-1 decision, the SCC reinstated the dismissal.

The SCC found that the BCCA erred in ruling that the chambers judge was required to address the presumption of damages in a defamation action during the weighing analysis. The majority held that while the presumption may establish the existence of damages, those damages were not presumed to be severe enough to require them to be given weight.

Furthermore, the SCC found that the BCCA erred in ruling that the chambers judge should have considered the *"chilling effect"* on others' free speech if the plaintiff's defamation action were dismissed under the PPPA. Such considerations were unrelated to the text of the PPPA, which only considers the harm suffered by the respondent as a result of the applicant's expression.

The SCC also held there was a strong public interest in protecting Hansman's expression as a form of *"counter speech,"* which engaged both the protected Charter values of free speech and the equality concerns of protected groups under section 15 of the Charter. Hansman's expression also served a truth-seeking function, as it was made in response to journalist requests for a countervailing position to Neufeld's public statements.

The release of the Hansman decision marked the first instance where any higher court upheld the dismissal of an action under BC's PPPA. However, to date, the BCCA has not upheld a dismissal under the PPPA, even within the context of a straightforward defamation claim such as in Hansman.

Conclusion

While both levels of court in *Linkletter* distinguished the applicant's actions in posting video links from the actions of critics who merely expressed their opinions, there are "grounds to believe" that this may be a distinction without a difference.

From the Linkletter decision, it appears open to respondents to argue at the weighting stage, for instance, that society's interest in free expression only goes so far as to protect the expression of an individual's opinion, which lessened, if any, interest attaching to the sharing of information supporting such opinions, particularly if such information is subject to confidentiality obligations.

Furthermore, while not cited in the *Linkletter* decision, the ONCA in *1704604 Ontario* suggested directly that where an applicant's expression may constitute a breach of contract, they would be unable to succeed at the weighing step as *"there would be little public interest in protecting a defendant's right to make certain statements if the defendant had made a fully informed decision to bargain away his or her right to make those statements in exchange for something of value."*

Respectfully, the author would disagree with that in principle.

Each of us frequently "bargains away" our right to make certain expressions through various, generally un-negotiated contracts in our daily lives. Where an individual receives access to information that is kept out of public knowledge, such agreements are usually a condition precedent to this access. Commonly, such obligations are present in "whistleblower" scenarios where a person under general confidentiality obligations may come across information they had never contemplated receiving when they agreed to confidentiality obligations, and where the public's interest in that information may be significant.

Following *Linkletter*, it does not appear the PPPA would offer assistance to such a whistleblower.

Furthermore, it is difficult to reconcile the emphasis placed by the SCC in Hansman on the "truth-seeking" function of free speech if the PPPA analysis assumes that the public's interest in uncovering truth diminishes if the applicant has prior private law obligations restraining their ability to share that truth.

In introducing the PPPA, the BC government made it clear that its intent was to cause a re-weighting between the protection of reputation and the protection of free expression.

While the recent *Hansman* decision suggests that the PPPA may provide an avenue for the early dismissal of pure defamation claims, to date, there is little reason to believe that outside of the "traditional" defamation context, the PPPA will carry much weight in shifting the protection of legal interests overall in favour of free expression. Indeed, the jurisprudence to-date suggests the BC appellate courts have little appetite for expanding the realm of free public expression to impinge on existing spheres of confidentiality or other private law restrictions on expression, even within the narrow context of defamation claims.

LEGISLATIVE WATCH ▸

BY **JESSIE LEGAREE**
TLABC Board of Governors
TLABC Member

TLABC COMMITTEE
- New Lawyers Committee

Jessie graduated in 2015 from University of Toronto then promptly returned home to the Fraser Valley. She articled at RDM Lawyers LLP where she remains, focusing on employment and estate litigation and managing a department that tackles most things 'civil'.

Prior to being sucked into the legal vortex, Jessie was immersed in politics. Now she's a volunteer who faithfully picks up a lawn sign yet has no lawn.

Jessie also serves on the TLABC New Lawyers Committee and hopes to provide a helpful resource on legislative and related developments for busy trial lawyers.

At the time of writing, the BC Legislative Assembly has concluded its fourth sitting of the 42nd Parliament and is on its extended summer break (which begins mid-May, naturally). The government had a busy May with 16 government bills receiving royal assent on May 11, 2023, while no members' bills moved beyond introduction (including M 215, *Non-Disclosure Agreements Act* written about in the last issue). Below are a few pieces of legislation that I expect to be of greatest interest to my fellow trial lawyers.

Family Law Amendment Act, 2023

Several important amendments have been made to the *Family Law Act, SBC 2011, c 25*. If you practice Family Law, it is important to review this legislation for yourself. Below are highlights of the changes that, at the time of writing, are waiting on regulation to come into force as they have already received Royal Assent.

Pets

The law has been exceedingly slow to catch up with society on treating pets as members of our households. As someone who flew their cat to and from Toronto when in law school, the writer welcomes an acknowledgement in legislation of their special value. Section 1 of the *Family Law Act* has added a definition for "companion animals," which does not include service dogs, an animal kept as part of a business or for agricultural purposes.

In a new section 97, the court may make orders respecting companion animals. The court is required to consider such factors as the circumstances in which the companion animal was acquired, the extent to which each spouse cared for it, any history or risk of family violence, any cruelty or threats of cruelty to an animal, the relationship a child has with the companion animal, willingness and ability to care for basic needs and "any other circumstances" the court considers relevant. An order, however, must not be made declaring that the parties jointly own the companion animal or requiring the parties to share possession.

While continuing to tie parties together through custody of a pet may be onerous, activists and pet-lovers have spoken out that this may be required in the best interest of a pet. The decision to specifically disallow joint custody aligns with the court's general attitude that pet issues are not a good use of their time.

Section 92 of the *Family Law Act* is also amended to allow agreements respecting property division to include terms around ownership or possession of a companion animal to be one spouse or shared. Therefore, there may be agreements that are reached that can be enforced by the court relating to custody.

Section 193 specifies that orders specifically relating to companion animals are able to be made by provincial court.

Property

The courts have been navigating a legal quagmire in how to deal with excluded property that has then been formally transferred or used "for the family." A new s. 81.1 specifies that common law presumptions of advancement or resulting trust do not apply to ownership of property as between spouses. An addition has also been made to the excluded family provisions in s. 85 that if property is excluded then this exclusion applies despite any transfer of legal or beneficial ownership from a spouse to the other spouse. Agree or disagree, at least this gives clear direction for the court.

The legislature replaced s. 96 with similar language but adding a couple of considerations for the court to look at regarding the division of excluded property: the terms of any agreement between the spouses respecting excluded property and if the Supreme Court makes a determination for unequal division respecting significant unfairness which cannot be addressed by unequal division of family property and/or family debt. Notably, this section does not apply in relation to a companion animal.

Section 24 sets out transition provisions that if a proceeding under the *Family Law Act* was started before the date of Royal Assent (May 11, 2023) respecting property division or to set aside or replace an agreement respecting property division, then unless the spouses agree otherwise s. 81.1 does not apply and ss. 85 and 96 will apply as they were prior to the amendments.

Pension

A number of changes have also been implemented relating to sections that govern the division of pensions. These changes were based on recommendations made in a report by BC Law Institute Report in March 2021. Some changes have been implemented while others await other legislative changes first.

Changes in effect now include: allowance for a deceased spouse's personal representative to file a notice to cause the spouse's estate to become a limited member of certain types of pension plans; clarification that a member's entitlement to disability benefits does not impact the manner in, or time at, which other benefits under the pension plan are to be divided; in cases where the member dies before pension commencement and before the limited member receives their proportionate shares, permits the commuted value of the limited member's proportionate share to be calculated as of a date set by regulations as opposed to the day before the member's death.

The legislative changes acknowledge that while private annuities are similar to pensions, in practice annuities are more nuanced. Section 118.1 sets out if an annuity is "in pay" when it is being divided it is governed by part 6, and if not then it follows the general property division in part 5 of the *Family Law Act*. There is also the addition of s. 117.1 that sets out provisions for dividing benefits under locked-in retirement accounts and life income funds.

Business Corporations Amendment Act, 2023

The government is creating a new public corporate transparency registry to identify beneficial ownership in private companies in BC. Sound familiar? It'll likely be quite similar to the Land Owner Transparency Registry ("LOTR") that rolled out in 2020 requiring disclosure of personal information of beneficial owners of land owned by corporations, trusts, and partnerships in BC. Both efforts are aimed at curtailing the use of BC companies or land for money laundering or other criminal purposes.

Currently, all private companies in BC must have a transparency register with details of significant individuals maintained at the company's records office. Access is limited to the current directors of the company, law enforcement and inspecting officials. The new registry will set BC apart as one of two provinces in Canada to have information that is accessible by members of the public while federally amendments were proposed to create a free, searchable, and public beneficial ownership registry for corporation governed by the *Canada Business Corporations Act*. The registry was recommended in the final report of the Commission of Inquiry into Money Laundering in BC published June 3, 2022 (the "Cullen Report").

It is expected the new registry will be launched in 2025 and it will have a searchable database by the public to be able to determine beneficial ownership of any BC private corporation. A beneficial owner is defined as a person holding directly or indirectly 25% or more of the shares of a corporation. Once up and running, businesses will be required to submit and confirm information annually and any time there is a significant change in ownership or control of the Corporation. Again, it is likely to follow similar privacy practices as the LOTR for what information is publicly available and we can also expect some hiccups along the way although hopefully this registry will not be rolled out during the global instability of a pandemic.

Civil Forfeiture Amendment Act, 2023

The government has passed legislation to expand the use of the *Civil Forfeiture* Act to go after proceeds of laundered money in BC. Confiscating unexplained wealth was also one of the recommendations in the Cullen Report. Among the amendments are the creation of unexplained wealth orders which will require people to explain how they acquired assets if investigators believe there is a possibility of unlawful activity. Amendments also include the empowerment of the Civil Forfeiture Office to look for property hidden in the names of trustees of a trust or family members. There are a number of provisions relating to transitional rules it will be important to review for which provisions apply when.

A new Division 1.2 outlines the process for the director to apply for an unexplained wealth order which only applies in relation to property or an interest in property located in BC. The court must

make an unexplained wealth order if satisfied that the director has "reasonable grounds" to suspect the respondent or person affiliated with the respondent directly or indirectly engaged in unlawful activity or the respondent is or is affiliated with a politically exposed foreign person. It may be that the respondent is a registered or unregistered owner of the property or the whole or portion of an interest in the property, is connected to a trustee of a trust that holds the whole or a portion of an interest in property, or connected to a corporation that holds the whole or a portion of an interest in the property and the property or interest in property has a fair market value of at least $75,000.

The BC Civil Liberties Association has raised serious concerns about this legislation as an unnecessary expansion of government power that violates the *Charter of Rights and Freedoms* and the presumption of innocence. Premier Eby has indicated he expects a court challenge and that he will prevail. This is all a bit ironic given that when the writer first met Premier Eby he was then executive director of the BCCLA. Stay tuned for the outcome of the inevitable court challenge.

Societies Act

Substantial amendments were made to the *Societies Act* in 2021 that were to take place in stages, including the last of the changes taking effect in May 2023. This includes such things has the directors' terms of office (s. 11(1)), required information to be set out in a register of directors (s. 20(10)(e) and (h)), employee remuneration disclosure if any employee or contractor earns in excess of the prescribed amount (currently $75,000) (s. 36(1)(b)), passing of a resolution without a meeting and disallowing a vote by proxy at directors' meetings (s. 54), requirements for a conflicted director/senior manage to remain in a meeting (ss. 56 and 62), minutes are only required for general meetings not other gatherings, simplified notice procedure by email if societies have at least 101 members (s. 77), content for the notice of general meeting (s. 78), requirements for members' proposals (s. 81), requirement to have a record keeper appointed if dissolving in or after May 2023, and records must be kept in BC or available for inspection in BC (s. 122.1), as well as other changes and additions. If you advise societies, it is important to be aware of what changes are now in force from the *Societies Amendment Act, 2021*.

Concluding Remarks:

The interpretation and commentary on government legislation and bencher publications are mine, and you should review any new legislation or notices that may impact your clients carefully.

If you have concerns about upcoming legislative or legislative-esque matters, please contact one of the members of the TLABC Executive who will be pleased to discuss matters with you. If you want to discuss the politics behind it, I am all ears.

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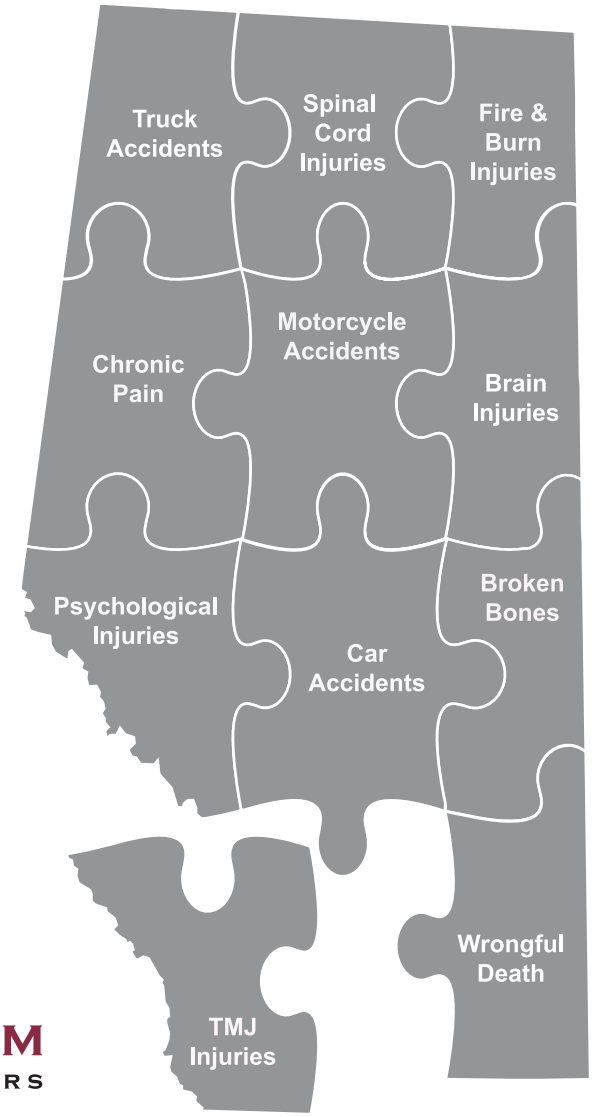

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