the Verdict

ISSUE 176 / SPRING 2023

TRIAL LAWYERS ASSOCIATION of BC

Kids in the Car? Family Law Considerations in Impaired Driving Investigations

Public Perceptions of Trial Lawyers in B.C.

Standard of Care in Birth Injury Cases

PM 40027828

OUR MISSION: TO SUPPORT AND PROMOTE THE RIGHTS OF INDIVIDUALS IN BRITISH COLUMBIA

UPCOMING PROGRAMS

Mark your calendar with these CLE sessions

Friday 3 March 2023
Family Law Conference (in-person)
Seminar, 6 CPD Credits

Thursday 9 March 2023
Family Violence 10:
Expert Evidence in Family Violence Cases
Webinar, 2.5 CPD Credits

Friday 28 April 2023
Spring Soiree - Social Event (in-person)

Thursday 11 May 2023
Under Pressure: Pressure Tactics in Litigation (in-person)
Seminar, 6 CPD Credits

Friday 9 June 2023
Estate Litigation Conference (in-person)
Seminar, 6 CPD Credits

Friday 29 September 2023
Criminal Conference (in-person)

TRIAL LAWYERS ASSOCIATION *of* BC

View all upcoming programs at
www.tlabc.org/upcomingprograms

CONTENTS

Articles

Columns

Featured

Columns + Miscellaneous

DIGITAL EDITION
tlabc.org

@BCTrialLawyers
@tla_bc
@tlabc

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.

The new year is now fully upon us and it promises to be (yet another) exemplar of Heraclitian wisdom, *the only constant in life is change*. The most recent change looming for the legal profession, of course, being the modernization of the regulatory framework of legal professionals, touched upon in this issue in a number of places.

And, fortunately for you, our readers, the other constant in life is the quality of contributions we receive from our columnists and guest authors for the *Verdict*.

Knocking on a Closed Door: Access to Family Law Justice in British Columbia
Georgialee Lang's powerful piece tackles the lack of access to effective legal representation to lower income and middle class British Columbians, especially in the field of family law.

Kids in the car
Criminal lawyer and *Verdict* editorial board member Kyla Lee's article explores the far-reaching legal implications when children are found in the car of a parent driving under the influence.

Public Perceptions of Lawyers in BC
Steve Mossop of Leger Vancouver examines the public perception of trial lawyers in British Columbia, which is positive. Polls show that lawyers are generally held in high regard, though behind other esteemed professions such as nurses, police officers and social workers.

Tug-of-War Over Sentencing Continues in the SCC's Sharma Decision
Jonathan Desbarats examines a close 5-4 decision of the Supreme Court of Canada around the controversial sentence given to Cheyenne Sharma, a woman of Ojibwa ancestry who had no criminal record before being arrested for drug-related offences.

Michèle Ross's **Paralegal Perspective** column takes a detailed and nuanced view of how a single regulator of the legal industry could affect paralegals, as well as the process over the past several years leading up to this change.

Jessie Legaree's **Legislative Watch** is a must-read column focusing on the implications of the *Mortgage Services Act, Health Professions and Occupations Act and Strata Property Act*.

Enjoy!

the Verdict

ISSUE 176
SPRING 2023

ADDRESS CHANGES & UPDATES
tla-info@tlabc.org

LETTERS TO THE EDITOR
editor@tlabc.org

ADVERTISING INQUIRIES
Jenny Uechi
jenny@tlabc.org

PUBLISHER
Jenny Uechi
jenny@tlabc.org

EDITOR EMERITUS
Kenneth A. Price

MANAGING EDITOR
Shawn Mitchell
shawn@tlabc.org

EDITORIAL BOARD
Candace Cho
Jock Craddock
Magal Huberman
Jesse Kendall
Kyla Lee
Nicholas Peterson
Donald J. Renaud
Jennifer Tater
Elsa Wyllie

LAYOUT & DESIGN
Ronald Garaygay
Colour Time Printing + Digital Imaging

The purpose of *the Verdict* is to provide information and opinion that is timely, practical, and relevant. The editor welcomes your submissions. Statements and opinions expressed are not necessarily those of TLABC.

Publication of advertising does not imply endorsement.

the Verdict is published quarterly by

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA
380 – 2608 Granville Street, Vancouver BC V6H 3V3 Canada
TELEPHONE 604 682 5343 TOLL FREE 1 888 558 5222
EMAIL tla-info@tlabc.org WEBSITE www.tlabc.org

Estimated Readership: 6000
Registered with the National Library of Canada. ISSN No. 1185-8931
Publications Mail Agreement No. 40027828

Return undeliverable Canadian addresses to:
the Verdict, Circulation Department
380 – 2608 Granville Street
Vancouver BC V6H 3V3
EMAIL verdict@tlabc.org

Cover photo by **Ryoji Iwata** on Unsplash.

Get Involved!

Are you interested in volunteering on a TLABC committee? Visit tlabc.org/committees to learn more.

Committees include:

- Criminal Defence
- Education Planning
- Family Law
- Membership
- New Lawyers Planning
- Public Affairs (PAC)
- *the Verdict* - Editorial Board

TRIAL LAWYERS ASSOCIATION of BC

PRESIDENT'S MESSAGE ▸

BY **BILL DICK KC**
TLABC President
TLABC Member
Champion of Justice

TLABC COMMITTEE
- Litigation Oversight Committee

Bill Dick KC is a litigation lawyer and a partner at Murphy Battista LLP's Vernon office. Bill has extensive experience representing plaintiffs in serious, complex personal injury claims, including medical malpractice and insurance disputes at trial and on appeal. In addition to his courtroom experience, Bill is an effective advocate for clients involved in mediation and arbitration. He also has expertise in representing clients in complex commercial litigation, construction law disputes, and class action lawsuits.

It is hard to believe that a year has gone by and my term as President has come to an end. I have always appreciated TLABC as an organization and what it offers its members, but one gets a far better appreciation and insight when assuming the role of President. I cannot express enough gratitude for having the assistance and guidance of our talented CEO Shawn Mitchell and all of the staff at TLABC. They are quite simply excellent and we are lucky to have such a dedicated and capable team. We also have such a deep pool of talent to draw on from our membership. So many people step up and contribute their valuable time and energy. I was also very lucky to have with me an excellent group of table officers.

In reflecting on the year, the word that comes to mind is change. No-Fault has certainly been a catalyst in bringing about many of the changes that are occurring to our organization. During this year, we have continued to be actively involved in serious reflection of who we are, the brand we represent, and changes we need to bring to ensure that we remain true to our values and Constitution and relevant and beneficial to our membership. This is a work in progress, and we will continue to evolve and adapt going forward.

I am particularly pleased with the work that was initiated on diversity, equity, and inclusion and am looking forward to seeing the implementation of the various recommendations that have been made.

Lastly, I continue to be extremely pleased with the contributions that TLABC make through our various court challenges and interventions. 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. In the end, as an organization, we make and continue to make a difference in the lives of our members, and more broadly, to the community and society we live in. I am grateful to have had the privilege of being President of an organization that we can all be proud of. I know Liz Sadowski will do an excellent job this year as our new President and I wish her the very best.

TLABC's Spring Soirée

Order your tickets today!

The Bash is back - renamed and rescheduled to the Spring Soirée!

Date
Friday 28 April 2023

Location
Join TLABC friends and colleagues at the historic Stanley Park Pavilion (610 Pipeline Road, Vancouver). The Pavilion is easily accessible via Pipeline Road with parking available.

Cancellations
Refunds are subject to an administration fee of $25. No refunds will be given for no-shows or cancellations after 17 April. Substitutes are always welcome.

Mail or email order form to
Trial Lawyers Association of British Columbia
380 - 2608 Granville Street, Vancouver BC V6H 3V3

Phone: 604-682-5343 / Toll Free: 1-888-558-5222
Email: tla-info@tlabc.org
Website: www.tlabc.org/SpringSoiree2023

Please send me _____ tickets at $175 + GST each

Total amount enclosed $_____

Name

Firm Name/Company

Address

City, Province, Postal Code

Telephone

Contact Email

Payment (GST R127190742)

Tickets not paid for by April 17 will be released and sold to those on our wait list.

❑ Cheque: ❑ enclosed ❑ to follow (payable to TLABC)
❑ Visa ❑ MasterCard ❑ AmEx

Name on card

Card Number Expiry Date

Signature

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.

THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

Editorial Note: These case notes are selected from CLEBC's Case Digest Connection and are reprinted with the permission of CLEBC. Case Digest Connection is an online service that alerts you regularly with summaries of new cases from the British Columbia courts. Learn more about this subscription service at https://www.cle.bc.ca/case-digest/ or by calling CLEBC customer service at 604-893-2121.

COSTS — Matrimonial proceedings — Outcome of litigation • Offer to settle — Court finding claimant the more substantially successful party at trial and entitled to costs under SCFR 16-1(7), but also finding that she ought to have accepted respondent's offer to settle made shortly before trial — Considering that the offer was reasonable but not as favourable as or better than the award made after trial, claimant awarded costs up to date of offer, with parties to bear their own costs after that date. Following trial the court made orders regarding a number of issues relating to family property and child and spousal support. The claimant sought costs of the action on the basis that she was either entirely or substantially successful on the most significant and time-consuming issues. The respondent sought costs as of February 2022 based on his offer to settle made shortly before trial. Held, costs to claimant up to date of offer; parties to bear own costs after that date. Overall, the claimant was the substantially successful party at trial, particularly in regard to the respondent's Guidelines income and her compensation for her interest in a company. The respondent was more successful in regard to the parenting schedule, and the parties had divided success on a number of more minor issues. Therefore, pursuant to SCFR 16-1(7), the claimant was entitled to costs. However, the claimant ought to have accepted the respondent's offer to settle. The offer was very similar to the orders the court made, in regard to the respondent's Guidelines income, child support, spousal support, parenting schedules, and compensation payments over time. The respondent's offer was reasonable, but viewed globally, it was not as favorable as or more favourable than the award made after trial. Rule 11-1(5)(a) applied and the claimant ought to be deprived of some or all of her costs and disbursements after the date of the offer. The fairest outcome was an award of costs to the claimant up to the date of the offer, with the parties to bear their own costs and disbursements after that date. Z. (D.) v. Z. (M.) (https://www.bccourts.ca/jdb-txt/sc/22/15/2022BCSC1510.htm) S.C., D. MacDonald J., 2022 BCSC 1510, Vancouver E202457, August 29, 2022 , 14pp., [CLE No. 78021] • Supplementary to 2022 BCSC 706, [2022] C.D.C. 77169 (CLE) and 2022 BCSC 1462, [2022] C.D.C. 77975 (CLE) • M. Henricksen, for claimant wife; J. Lewis, for respondents. Principal case authorities: M. (S.A.) v. M. (J.A.), 2017 BCSC 2348, [2018] C.D.C. 65845 (CLE) — considered. Sampley v. Burns, [2018] C.D.C. 66873 (CLE), 2018 BCCA 178— considered. Wafler v. Trinh, [2014] C.D.C. 55326 (CLE), 2014 BCCA 95 — considered.

SEE PAGE 74

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.

Knocking on a Closed Door: Access to Family Law Justice in British Columbia

Introduction

"Access to justice" is on the lips of lawyers, judges, academics, paralegals, and a multitude of legal agencies including Law Societies, non-profit organizations and forums, federal and provincial justice departments and attorneys-general, legal aid purveyors, native counselling services, pro-bono law groups, the Canadian Judicial Counsel, lawyer's associations, and many others.

Access to justice is defined by the United Nations Development Program as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances."[1] Practically speaking, family law justice entails legal services for families in crisis because of child welfare issues, separation and divorce, bankruptcy, or death. While Canadians can be proud of their justice system, they cannot herald affordable and effective representation because it does not exist, although it has been studied laboriously for two decades.

A Canadian Forum on Civil Justice survey determined that 48.4% of Canadians will face a civil or family justice problem in a three-year period. In a United Nations report on justice, Canada achieved high praise in every category except "civil justice" where lack of accessibility and affordability and unreasonable delay were highlighted. As former Supreme Court of Canada Justice Thomas Cromwell pointed out: "Access to justice is the biggest challenge facing our legal system."[2]

But is it just the poor and working poor who are shut out of the justice system? Resoundingly no. Former Chief Justice of the Supreme Court of Canada, Beverley McLachlin offered this sobering pronouncement:

"Among the hardest hit are the middle class. They earn too much to qualify for legal aid, but frequently not enough to retain a lawyer for a matter of any complexity or length. When it comes to the justice system, the majority of Canadians do not have access to sufficient resources of their own, nor do they have access to the safety net of programs established by the government."[3]

How often have you heard a lawyer say: "If I needed a lawyer, even I couldn't afford one!"

Legal Aid

Shockingly, legal aid spending by the federal government has remained at $112.386 million for the last fifteen years, a sum distributed amongst all of Canada's provinces and territories. Provincial funding has increased across Canada by 78% with the notable exceptions of Alberta and Nunavut where provincial funding has increased by 159% and 175% respectively.[4] Despite provincial increases in funding, it is difficult to see any substantial improvement in Canada's justice system.

In British Columbia access to legal aid in family matters is limited by income level and type of legal problem. The issue of eligibility for legal aid is best illustrated by the constraints identified on the Legal Aid website. For "Family Limited Representation" a family of two must earn less than $2,740 a month and the definition of income is defined as including student loans. If an applicant has property including cash in the bank or a vehicle the test for acceptance is stricter. Notably, only certain family law problems, called "serious family problems" are eligible for coverage and are defined as:

a. An immediate need for a protection order;
b. A serious denial of parenting time or contact with a child;
c. A threat to remove the child from the jurisdiction;
d. An unlawful refusal to return the child to their guardian.

According to West Coast LEAF, the criteria for legal aid results in three out of every five applicants being denied representation. In West Coast LEAF's 2017 test case the plaintiff Nicolina Bell applied for legal aid as a single mother but coverage was denied because she had a small amount of money in retirement savings, which she was compelled to exhaust before she would be accepted and provided with legal aid.[5] Seventy percent of applicants for legal aid are women, raising the ugly spectre of systemic inequality.

Legal aid in BC also means that your lawyer can only work for 35 hours, which is intended to cover investigation, document disclosure, all preparation and court attendance. Ten additional hours are available for preparing for a Supreme Court matter, alternate dispute resolution, and issues related to property on a reserve.[6] With the appalling lack of a sufficient number of judges at the British Columbia Supreme Court, a lawyer can easily sit in chambers all day and not get heard, only to return on a second date and suffer the same fate. Family law trials continue to collapse for lack of a jurist to hear cases.

Unfortunately, qualifying for a legal aid lawyer does not mean that one is available. Recently an individual contacted me, advising that she had qualified for legal aid but could not locate a lawyer accepting legal aid clients in the south Okanagan.

But underfunding legal aid does not just lock individuals out of the justice system. Rather, the financial costs of underfunding are significant. As BC Commissioner Len Doust KC wrote in the "Public Commission on Legal Aid":

> **"...shortchanging legal aid is a false economy since the costs of unresolved problems are shifted to other government departments in terms of more spending on social and health services, the cost of caring for children in state custody, and so on."** [6]

In their 2017 Report, the Edmonton Social Planning Council identified loss of employment and health issues as the spin-off from a lack of affordable legal services, leading to costs of $800 million dollars a year to Canada's public institutions. Physical health problems and emotional stress are a direct result of lack of access to justice, a plague that effects disadvantaged groups more than the average person, particularly Indigenous Canadians.[7]

On a brighter note, in 2013 the Legal Services Society of BC expanded their services to include an enhanced family and child protection duty counsel, unbundled family services, and the Family LawLINE, offering free telephone advice.[8]

Self-Representation

Why would an individual appear in court without a lawyer?

The obvious outcome of limited legal aid is the increase in self-representation in family courts. The Department of Justice estimates that between 50 to 80% of family law litigants are self- represented. The BC Court of Appeal reports that 46% of family law appeals in 2016 had at least one self-represented litigant.[9]

Dr. Julie Macfarlane's National Self-Represented Litigation Project Report describes a social event where she learned that "of the 10 individuals at a party, six had been divorced. The combined spending on legal costs of these six adults-$1.2 million." She also learned that many litigants begin with a lawyer but cannot keep up with escalating legal fees and lose their representation. Others are left with crippling debt after borrowing from family and friends in their attempts to maintain legal services.[10]

In 2006, the Canadian Judicial Council released guidelines for judges, court administrators, and lawyers on dealing with self-represented litigants. While the guidelines are useful, from the perspective of legal counsel, self-represented litigants often turn simple cases into formidable litigation with endless adjournments, arguments rife with speculation and hearsay, and a failure to adhere to rules of procedure. [11]

Represented parties are often prejudiced by their self-represented counterparts. Reports indicate that self-represented litigants are less likely to settle their cases, as opposed to litigants who have a lawyer. The drag on the justice system is likely immeasurable as judges try to assist and cope with thousands of cases on their dockets with lawyerless litigants. It is undeniable that dealing with an unrepresented party adds to the costs of the represented party, which typically results in clients unhappy that their lawyer has to help their unrepresented spouse. As one Alberta lawyer reported in a study conducted by Professor Nicholas Bala et al:

"Everything with a self-rep is difficult, must be in writing, and ends up costing my client...No adjournment requests are agreed to, nothing by consent, everything ends up in chambers and judges never award costs as "he/she didn't know the process" Each unnecessary appearance costs my client."

Judges report that if one or both sides are unrepresented, settlement is less likely and the time to reach a resolution of the legal issues significantly increases. Judges' comments include:

" I am always more cognizant of the perceived imbalance that exists when only one party has a lawyer."

Not surprisingly, lawyers agree that self-represented litigants are "well-treated" by the bench, although the self-represented typically believe they are "not well treated at all" by judges.[12]

How can the family justice system better serve self-represented parties? In the Alberta Court of King's Bench in Calgary, there is a courtroom set aside for cases where if both litigants are self-represented they are provided with specialized services. In Ontario the Superior Court of Justice provides self-represented litigants with a 10-page document titled "Memorandum for Trial."[13]

While some academics suggest that the introduction of child and spousal support guidelines and changes to family property law have benefitted self-represented parties by ostensibly making these areas easier to navigate, this author disagrees with those that espouse this view. Family law is complex and complicated. It is a minefield for those without legal training.

Paralegals to the Rescue?

This author believes that Canada's access to justice problem may be alleviated by licensing paralegals and expanding the services they can provide. Ontario's Madam Justice Annemarie Bonkalo in her 2016 report made a number of recommendations to the Law Society of Ontario which included creating a "specialized license for paralegals to provide specified services in family law," noting that paralegals can play a role in Ontario's access to justice problem.[14]

The Law Society approved her recommendations and implemented the development of a license for paralegals with the goal of addressing unmet legal needs in family law, with a view to protect the public through education, training, licensing and regulation. The proposal for licensed family law paralegals, referred to as "family legal services providers" was voted on and approved by the governors of the Law Society of Ontario on December 1, 2022, despite vociferous challenge by Ontario's family law bar.

The program requires paralegals to complete 260 hours or about three months of full-time education and training, and to pass a licensing exam. Services by paralegals will include completing applications for joint and uncontested divorces and applications to change child support based on a payer's line 150/T4 slip, but excluding special expenses. It is understood that it will take about two years to get the program up and running.

In March 2019 the Law Society of British Columbia convened the Licensed Paralegal Task Force, chaired by Trudi Brown KC, with the intention of consulting the profession to identify opportunities to deliver family law legal services. A report was published in September 2020, resulting in the implementation of a regulatory "sandbox" for paralegals and others. This "Innovation Sandbox" helps lawyers and others interested in providing legal services to test ideas in a controlled environment. Craig Ferris KC, past president of the Law Society, described it this way:

" The innovation sandbox is a forward-thinking approach that allows us to test and monitor whether individuals and businesses who are not lawyers or law firms can make affordable legal services available to British Columbians who currently get no legal help, while still ensuring there are proper safeguards to protect the public."[15]

The Law Society's website sets out the non-lawyer individuals who have been approved to offer services, including several who dispense family law advice, prepare documents, conduct legal research, assist in settlement negotiations, coach self-represented litigants, and appear in court for judicial case conferences, trial management conferences, and chambers applications.

The argument against licensing family law paralegals has been taken up by the bar. In Ontario the Toronto Lawyers Association, with a membership of 3,700 lawyers, questions how paralegals, with a two-year college course followed by six to eight months of family law courses can be equipped to represent clients given the complexity of family law cases. They pointed out that legal practitioners must understand family law legislation and also contract law, tax law, corporate law, bankruptcy law and criminal law.

The Toronto Lawyers Association also states that there is no evidence to suggest that paralegals will be less expensive than lawyers, noting that Ontario paralegals in other areas of the law charge rates similar to junior lawyers. Finally, they report that the paralegal initiative in Washington State did not succeed and was shut down, and that Utah's paralegal program has produced only a handful of licensed paralegals, in part due to rigorous application requirements.

In the Association's commentary to the Ontario Law Society's recommendations to license family law paralegals, they suggested the following:

1. A greater emphasis on digitalization and remote hearings;
2. Expansion of the unified family court;
3. Expansion of legal aid;
4. Expansion of pro bono programs by private lawyers and law students;
5. A levy on lawyer's licenses to fund family law services for those whose incomes disqualify them for legal aid and cannot afford counsel;
6. Expanding the licensing of foreign trained lawyers;
7. Supporting efforts to expand legal coaching and unbundled services;
8. Improving public information programs in the court;
9. Making the legal process for family law less adversarial and competitive;
10. Reducing legal complexity in family law, which drives legal costs and increases the time required to address legal issues.[16]

The recommendations by Brett Harrison of the Toronto Lawyers Association are commendable and his suggestion of expanding Ontario's unified family court reminds this author of British Columbia's continuing rejection of a unified court, despite the support of the Law Reform Commission of Canada going back almost 50 years, multiple family justice studies and reports espousing a unified court, and the cries of BC lawyers for the past several decades, including the Family Law Committee of the Trial Lawyers Association of British Columbia, urging the provincial government to implement this highly needed reform of the courts.[17] Today, unified family courts are found in Ontario, Manitoba, New Brunswick, Saskatchewan , Newfoundland, Nova Scotia and Prince Edward Island.

At the opening of the Ontario Superior Court of Justice in 2019, Associate Chief Justice Frank Marrocco affirmed that Ontario's Unified Family Courts were a boon to access to justice in family law.[18] But British Columbia politicians are deaf to the resounding chorus of those who implore them to pursue a unified family court.

Conclusion

As a 34-year veteran of the family law bar in British Columbia it is disheartening to see how little progress has been made in giving reality to the slogan "Justice for All." Is it because family law is the "poor cousin" in the justice system?

I can do no better than quoting the Honourable Donna Martinson KC, formerly of the British Supreme Court when she said:

"The devaluing of family law is difficult to understand. It deals with issues that profoundly affect Canadian families. It is perhaps the area of the justice system with which people come into contact the most and by which they form their views about whether the justice is in fact fair and just."[19]

Thousands of pages have been written, multiple studies and surveys have been conducted, and dozens of recommendations have been made and then ignored. Perhaps the next generation of family law lawyers, judges, and politicians will listen and open the door to all. Godspeed to them!

1 Jenkins Maxwell, "Access to Justice: The Great Gap in Canada's Justice System" Edmonton Social Planning Council, October 2017
2 Jenkins, supra
3 Jenkins, supra
4 Jenkins, supra
5 Westcoast Legal Education and Action Fund "(LEAF"), "Four Busted Myths About Legal Aid in British Columbia: Access to Justice Should Not be Reserved for Those Who Can Afford It." February 5, 2020
6 West Coast Legal Action and Education Fund (LEAF), *"Four Reasons the Battle for Legal Aid Still Matters"* April 17, 2019
7 Jenkins, supra
8 McLaren Jamie KC, *"Road to Revival: An External Review of Legal Aid Delivery in British Columbia,"* January 2019
9 McLaren, supra
10 MacFarlane, Dr. Julie, "The National Self-Represented Litigation Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report," May 2013
11 Canadian Judicial Council, "Statement of Principles on Self-Represented Litigants and Accused Persons," September 2006
12 MacFarlane, supra
13 MacFarlane, supra
14 Madam Justice Bonkalo, Minister of the Attorney General Report "Family Law Legal Services Review" December 31, 2016
15 Law Society of British Columbia, "Licensed Paralegal Task Force Report" September 25, 2020
16 Brent Harrison, Toronto Lawyers Association, "Letter re: Family Legal Services Provider License Consultation Paper" October 19, 2020.
17 Janzen Judith, BarTalk "Unified Family Courts: Why Not British Columbia?" October 2021
18 Associate Chief Justice Frank Marrocco "Opening of the Courts Speech" ontariocourts.ca September 10, 2019
19 McLaren, supra

BIBLIOGRAPHY

Bauman, Robert, Chief Justice of British Columbia, "Access to Justice in Family Law: Thinking Outside the Box," Pacific Business and Law Institute, September 12, 2017

Donaldson, Rebecca M., "Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice" Seattle University Law Review Vol. 42:1

Institute for the Advancement of the American Legal System, "To Close the Justice Gap, We Must Look Beyond Lawyers" November 4, 2021

Public Perceptions of Trial Lawyers in BC

BY **STEVE MOSSOP**
EVP Leger Vancouver

Steve Mossop is EVP of Leger Vancouver and leads a team of researchers in BC serving clients with full-service market research solutions. Prior to this he ran his own company (Insights West) for 10 years after spending his earlier career at Ipsos and Angus Reid Group. Steve has released over 700+ different public opinion polls and has correctly predicted the outcomes of over 26 elections and is a frequent public speaker and media personality in BC.

Editor's Note: At its May 2022 strategic planning retreat, TLABC's board of governors approved a staff recommendation to undertake the development of a brand strategy for the organization. As part of that work, the Association retained Will Creative to lead and guide the overall process and the development of the strategy and subsequent creative. It also retained Leger Polling to gather some much-needed insight for the process.

Going into the field in late August 2022, Leger was tasked with finding out what British Columbians think about lawyers generally, and trial lawyers more specifically, as well as the views and perspectives of members about the TLABC and the work that it does on their behalf and to support them. We are grateful to Steve Mossop of Leger Polling and his team for the work that they did, and for agreeing to put together this piece summarizing the results.

Everyone has heard a good lawyer joke and perhaps the best ones I've heard have come from lawyers directly. If you ask a lawyer their opinion about how the general public perceives their profession, you will likely get some interesting and sometimes perhaps not so flattering answers. But what is the true public perceptions of lawyers? And how do you measure accurate brand perceptions?

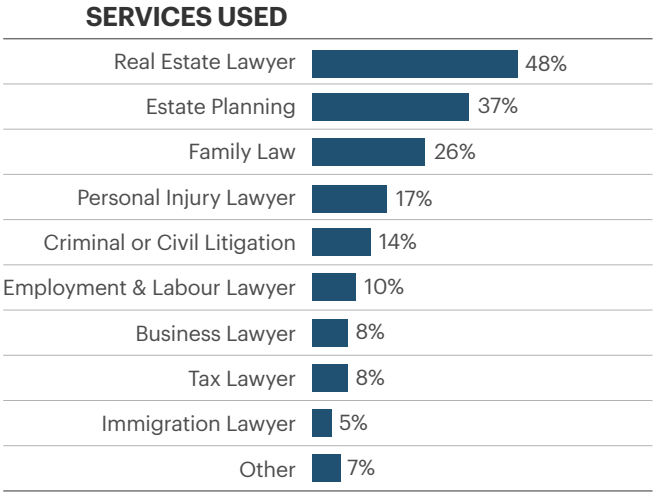
The Trial Lawyers Association of BC recently partnered with Leger to conduct a public opinion poll of 1,000 BC residents to uncover existing perceptions of lawyers as a profession, as well as measuring awareness and reputation of the Trial Lawyers Association of BC brand. We used the same methodology that we've used to predict the last 10 election outcomes in Canada better than any other pollster, so we are well-equipped to answer these questions accurately.

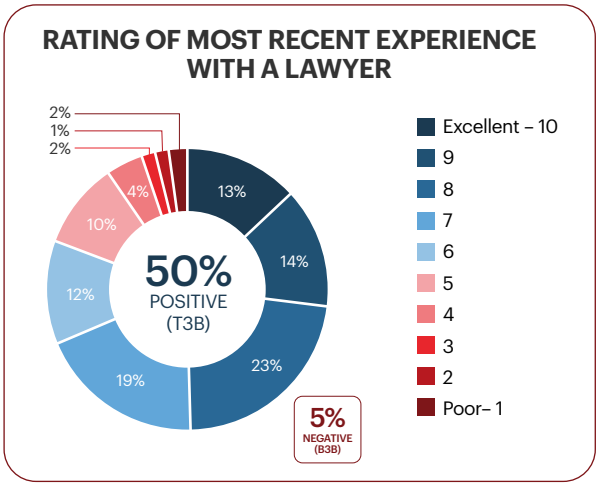
At Leger, we spend a significant amount of time and effort measuring brand perceptions. We do this for private and public companies, consumer products, governments, politicians, and not-for-profit organizations.

> **Throughout the pandemic, we saw massive shifts in brand perceptions of organizations like governments, essential service providers, and even seemingly mundane organizations like banks, food companies, utilities, and crown corporations.**

It was the actions of those organizations that dramatically shifted perceptions over the past few years. Trial Lawyers Association of BC, through its advocacy work, public relations, education, communications, and content creation has been shaping brand perceptions, and Leger has uncovered some interesting findings that might be surprising.

Past experiences with Lawyers are generally positive, with half having given their relationship a positive rating. The general public mostly works with Real Estate and Estate Planning Lawyers.





Base: Those who used Lawyer (n=773)
A6. What types of legal services have you used?
A7. Thinking about your most recent experience with a lawyer, how would you rate it overall?

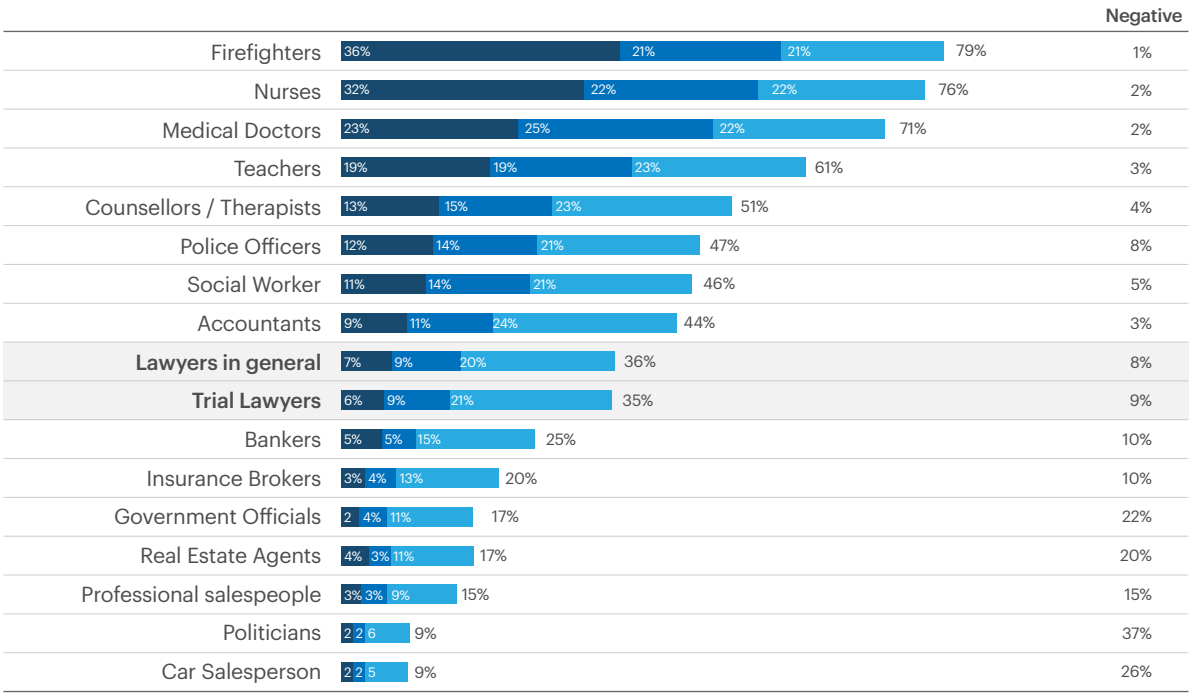
To begin with, brand perceptions of lawyers are actually quite positive. Over one-third (36%) of BC adults hold very positive views of lawyers overall (and 35% of trial lawyers specifically) and only 8% have negative views of the profession (the rest are in the neutral camp). In fact, perceptions of lawyers are similar to those held of bankers, accountants, police officers, and social workers.

When asked for words they would use to describe lawyers, attributes such as professional, negotiator, good communicator, organized, hard-working and expert top the list. Negative words such as arrogant, greedy, exploitative, and shady do arise, but the percentage mentioning positive attributes outweigh negative by a factor of two-to-one.

It is likely that positive brand perceptions can be partially attributed to high past use and therefore high levels of familiarity with lawyer services here in BC. Nearly eight-in-ten (77%) BC adults have ever used the services of a lawyer, and 31% have used those services in the past two years. Overall satisfaction ratings with that experience are quite positive with 50% rating their last service experience an 8, 9 or 10 on a 10-point scale where 1 is poor and 10 is excellent. Only 9% had a negative experience (rating of between 1 and 4).

The highest ratings are given to aspects such as ethics, outcome, and efficiency, with positive ratings on fairness, responsiveness, and quality customer service.

British Columbians do not make a distinction between Lawyers and Trial Lawyers. Having a positive previous experience is a significant factor affecting the image of the profession



Base: All respondents (n=1,147)
A1. Overall, what is your perception of the following professions?

Nearly two-thirds of BC residents (63%) are familiar with Trial Lawyers Association of BC and perceptions among those who know the association are quite positive. Awareness and familiarity levels of the Trial Lawyers Association of BC are very similar to those levels found for organizations like the BC Association of Chiefs of Police, the BC Real Estate Association and are only 10 to 15 percentage points lower than well-known organizations like the Nurse Practitioners of BC and the Law Society of BC. This is despite Trial Lawyers Association of BC having public relations and marketing budgets that are a fraction of the size.

Trial Lawyers Association of BC is also well rated positively on attributes such as trustworthiness, upholding a high standard of professionalism, being well-managed, standing for justice and for advancing the legal profession to mention a few. Member ratings are 20 to 30 percentage points higher than those of the general public on these dimensions, reflecting the positive perceptions of the organization internally.

Steve Forbes, editor-in-chief of the eponymous media group, once said, "Your brand is the single most important investment you can make in your business." I've been measuring brands for 30 years, and I believe that time and effort spent on branding efforts is a good investment that can pay dividends in the form of improved brand awareness and changed public perceptions.

Trial Lawyers Association of BC is in a good position to examine their advocacy work, public relations, and content it creates for its members and the general public in order to change and improve public perceptions of the profession, and their organization in the future. With continued efforts in these areas, it would not be surprising if the next time we measure public perceptions we will find the needle has moved even further in the right direction.

THE CANADIAN ACADEMY OF DISTINGUISHED NEUTRALS

BRITISH COLUMBIA CHAPTER

www.BCMediators.org

The Academy is pleased to recognize the following mediators & arbitrators for
Excellence in the field of Alternative Dispute Resolution


Frank Borowicz


Joseph Boskovich


Hon. Mary Ellen Boyd


Barb Cornish


Nick De Domenico


Brian Gibbard


Paul Godin


Jeffrey Hand


Janice Hansen


Bryce Jeffery


Rose Keith


William Knutson


Dean Lawton


Richard Lindsay

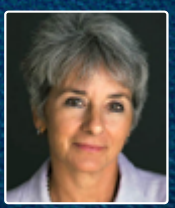

John Logan


Simon Margolis


John Moshonas


Chris O'Connor


Vincent Orchard


Carol Roberts


Alan Schapiro


Kerry Short


Scott Snider


Paul Taberner


Mark Tweedy


James Vilvang

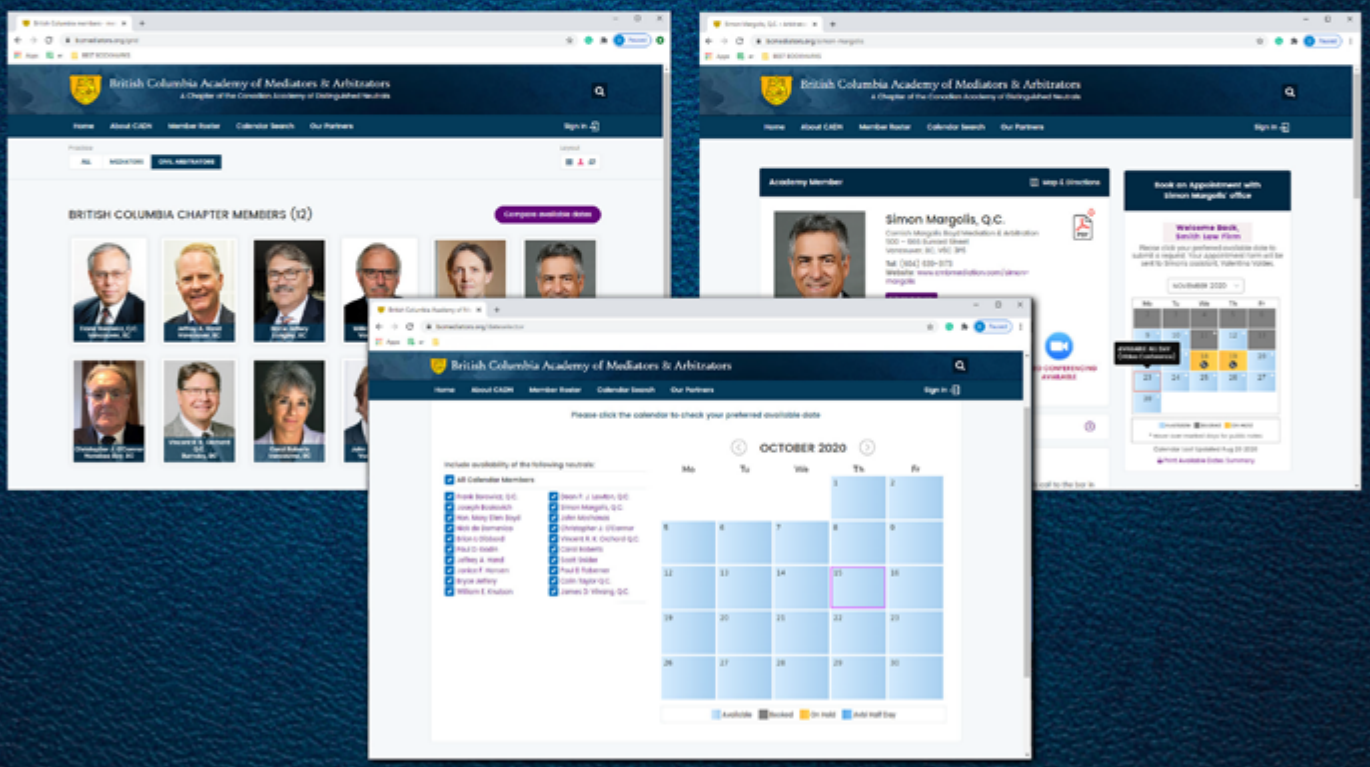
CADN is affiliated with NADN.org, the premier ADR professionals association in the USA

THE CANADIAN ACADEMY OF DISTINGUISHED NEUTRALS

BRITISH COLUMBIA CHAPTER

www.BCMediators.org

Reserve appointments in seconds, for free, or search for the ideal neutral for your case by expertise, qualifications or preferred date availability...



Need a neutral *outside* of BC? Please visit our national roster of over 170 top litigator-rated Mediators & Arbitrators at

www.mediators.ca

Our association websites are entirely FREE to firms, funding provided by our membership

Estate Litigation Essentials Plus

Friday 9 June 2023
9:00 – 5:00 pm
Fairmont Waterfront
Vancouver & Virtual

This Beginners PLUS seminar is just what you need for the nuts and bolts of estate litigation. Whether you are starting out in this area of litigation or a seasoned practitioner looking for a refresher course, attending this seminar will help you to better understand first principles, and will provide you with updates on the law. Concepts to be covered include wills variation, prosecuting and defending a mental capacity claim, all types of civil fraud, marshalling evidence, and practice pointers. An esteemed panel of speakers will be sure to educate you on matters substantive and practical in estate litigation.

This is a great investment to your legal education for those looking to pivot into this practice area and those who are already there!

TRIAL LAWYERS ASSOCIATION *of* BC

www.tlabc.org/2023Estates

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 more than 40 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 (131 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.

Safety Deposit Boxes in Estates

The court retains a general jurisdiction over the actions of executors/trustees and will normally require that a trustee discharge his or her duties with good faith, and with the standard of care of a reasonable and prudent person of business.

However, where a trustee is granted powers which are to be exercised at his or her sole discretion, the court traditionally would not interfere, unless the trustee had not turned his or her mind to the exercise of the discretion, or they had acted unfairly or in bad faith.

The case of *Re: Blow Press Ltd. v. U.S.W.A. (1977) O.R. (2d) 516* held that the court had jurisdiction to intervene in the exercise of a discretion by trustees in three situations:

1. a mala fide exercise of such a discretion;
2. a failure to exercise such a discretion; or
3. a deadlock between trustees as to the exercise of such a discretion

It is not uncommon for a will or a trust to be drafted with adjectives giving trustees "absolute," "uncontrolled," or "full discretion" to trustees, to use their authority. The courts traditionally have not interfered unless they found mala fides with respect to its exercise of such discretion.

In recent years, however, there are now a number of estate decisions in British Columbia that have allowed for interim distributions in certain circumstances, when the trustee is refusing to distribute under their discretion.

WESA

While the *Wills, Estates and Succession Act*, SBC 2009 c-13 (the "WESA") does not specifically allow for interim distributions of intestate estates, Administrators are no longer required to wait one year from the intestate person's death to distribute the surplus of the personal estate, as was previously required by section 74 of the *Estate Administration Act*.

Personal representatives can now distribute all forms of assets after 210 days have passed since the issuance of the representation grant, provided that no proceedings have been commenced that might affect the distribution of the estate.

A new provision, section 155 (2) WESA prohibits a personal representative from distributing the estate after the 210-day waiting period without a court order if:

1. proceedings have been commenced as to whether a person is a beneficiary or intestate heir;
2. a variation claim has been brought; or
3. other proceedings have been brought, which may affect the distribution.

Interim Estate Distributions Granted

Trustees generally have the right to exercise their discretion to refuse to make any interim distribution to the beneficiaries until their accounts are approved by the court, by way of a passing of accounts.

In *Reznik v. Matty* 2013 BCSC 1346, an application was brought by three of four residual beneficiaries for an order directing distribution of $15,000 to each of them from the

$50,000 held back in the estate. The executor of the estate was the fourth beneficiary, and it had been 13 years since the deceased will maker had passed away. The court held that the power given to the executor under the will to retain a portion of the estate did not displace the duty to distribute the assets.

In assuming general jurisdiction, Reznik was followed in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.), which stated at paragraph 282:

> **"As a superior Court of general jurisdiction, the Supreme Court of Ontario has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters."**

The court reasoned that there was significant delay, and that the estate was of significant value and liquidity that the executors assent to the distribution was compelled, and thus the executor was ordered to pay $10,000 to each of the residual beneficiaries.

In *Davis v. Burns Estate*, 2016 BCSC 1982, the court held at paragraph 31 that the following criteria govern whether an interim distribution should be made:

a. the amount of the benefits sought to be distributed as compared to the value of the estate;
b. the claim of the beneficiaries on the testator;
c. the need of the beneficiaries for money; and
d. the consent of the residuary beneficiaries to the proposed distribution.

In *Davis v. Burns*, the applicant was 76 years of age, had been the deceased will-maker's common-law spouse for five years and had been friends with the will-maker's ex-husband and the will-maker for many years prior. The former spouse was bequeathed 20% of the assets of the estate (approximately $500,000).

The applicant had no funds and a negative monthly cash inflow. The court found that the other parties to the court action would not be prejudiced by an interim distribution to him, and so the court ordered an advance of $250,000, given his advanced age, and the will's specific direction that he should "have fun" with the monies after her death.

Nykoryak v. Anderson 2017 BCSC 1800 was a wills variation action that followed the criteria set out in Davis v. Burns and ordered an interim distribution to each of the personal defendants from the estate funds in the amount of $50,000 each.

Each of the applicants provided evidence of their financial need and hardship and the court found that the plaintiff's security was still more than adequately protected from any award at trial.

In *Re Zanrosso Estate* 2021 BCSC 2928, the court commented that the new provisions of WESA did not directly address the possibility of court intervention, should an executor/trustee refuse or neglect to distribute the estate.

Counsel in this decision agreed that the court had general jurisdiction to order an interim distribution of estate assets and relied

on *Reznik v. Natty* as the authority.

The court found that it had authority to order a personal representative to make an interim distribution of an estate, further to its general jurisdiction and stating that such authority is discretionary and must be exercised in order to do justice between the parties.

The court referred to the criteria set out by the Court of Appeal in *Hecht v. Hecht* 1991 BJ 3475, but stated that it was not an exhaustive list of potential considerations.

At paragraphs 42-46, the court found that the factors to be considered by the court when deciding whether to exercise its discretion to grant leave to the executors include:

a. the amount of the benefits sought to be distributed as compared to the value of the estate;

b. the claim of the beneficiaries on the testator;

c. the need of beneficiaries for money; and

d. the consent of the residuary beneficiary to the proposes distribution.

The court stated that since the legislator had not seen fit to expressly provide for interim distributions from an estate over the objection of the personal representative, that an order should only be made in exceptional circumstances, and with the burden on the applicant to justify the issuance of such an order.

In the case of *Re Antonias Estate* 2021 BCSC 2388, the court ordered an interim distribution where the applicants were the sole beneficiaries of the residue of the estate, sharing equally and were siblings ranging in age from 76 to 89 years of age, some of them with health issues, and some with concerns that they would pass away before the estate was distributed.

The executor did provide an offer to make an interim distribution, the same that was sought in the court order, but did so on the basis that a release would be signed and returned. The beneficiaries did not comply with the request to sign the release.

The applicants relied on the decision of *Reznik v. Matty* and the quote of *Austin v. Beddoe* (1893) that if an executor has assented to an interim distribution and the assets available to the estate after an interim distribution are sufficient to cover all outstanding liabilities, and had basically made that acknowledgement, it is appropriate to have assets released.

The court ordered the beneficiaries to indemnify the executor from any loss arising from the interim distribution in the event that there was an estate shortfall in assets versus liabilities.

The court ordered an interim distribution of $528,000 and noted that the estate holdback would be approximately $447,000 over and above executor's fees of 3.5%.

Conclusion

Since approximately 2013, the British Columbia courts have been more willing to override the typical absolute discretion of a trustee as to whether or not to make an interim distribution.

Historically, the courts would only interfere where there was mala fides on the part of the trustee before they would order a distribution of estate assets.

As the recent cases indicate, if there is evidence of an appropriate set of facts that "justice is done" by ordering an interim distribution, then the courts will seriously consider doing so.

Such evidence should consist of matters such as: inordinate delay, financial need, the advanced age of beneficiaries, holdback protection for the remaining beneficiaries' interests, sufficient funds to pay future debts, and an indemnity from the beneficiaries in the event of a shortfall.

If such evidence is accepted by the court, then recent cases in British Columbia indicate that the court will give serious consideration to ordering an interim distribution of estate assets, if necessary, over the objection of the executor/trustee.

As the court in the Zanrosso decision stated regarding the criteria set out by the Court of appeal in the 1991 Hecht decision - "this is not an exhaustive list." This statement appears to indicate a greater willingness of the BC courts to order interim distributions of estate assets in appropriate circumstances.

CBABC Response regarding Ministry of Attorney General's Intentions Paper

BY **THE CANADIAN BAR ASSOCIATION,** BC Branch

The Canadian Bar Association, BC Branch represents over 7,600 lawyers, students, and judges. We are dedicated to protecting the rule of law, the independence of the judiciary and the Bar, and improving laws, justice and legal systems and access to justice. We believe in equality, diversity and inclusiveness in the profession and in justice and legal systems and are committed to the process of reconciliation with Indigenous peoples.

This is a short version of the Canadian Bar Association, BC Branch's Submission to the Ministry of Attorney General's Intentions Paper regarding the regulation of legal service providers.

Summary

In March 2022, the Ministry of Attorney General announced its plans to modernize the regulatory framework for legal services providers in British Columbia, with legislation to be introduced in Fall 2023. The Ministry's Intentions Paper, released on September 14, 2022, asserted that reforms to the regulation of lawyers and notaries and the introduction of regulation of paralegals are required "to help make it easier for British Columbians to access legal services and advice". The Ministry identified that as its first objective. Its second objective was that the governance framework for regulation would ensure that the public interest is paramount. The Ministry sought input from the public and the professionals who are subject to regulation now and in the future.

In October 2022, CBABC hosted a series of virtual and in-person Roundtables for lawyers, including CBABC members and non-members, to provide their views on the Ministry of Attorney General's proposed reforms to lawyer regulation as set out in its Intentions Paper.

CBABC has been a long-time supporter of a single regulator model to ensure efficiency and congruence in the regulation of lawyers, notaries and paralegals. However, that support is contingent on lawyers:

- maintaining independence and self-regulation; and
- setting strong parameters for:
  - the scope of practice
  - criteria for education and competencies
  - an effective investigation and discipline framework, and
  - the provision of satisfactory insurance coverage.

CBABC does not accept the premise that changes to the 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.

It is paramount that any reforms to the regulation of lawyers, notaries and paralegals preserve the independence of lawyers from regulation by government. The principle of self-regulation of lawyers must ensure that it is lawyers who make the governing decisions. The regulator (alongside associations and individuals) must retain the responsibility to protect the rule of law.

Throughout CBABC's engagement regarding the Intentions Paper, lawyers repeatedly emphasized that details and specifics matter. While CBABC shares some recommendations in response to the six broad categories for reform, to make meaningful, concrete contributions, CBABC should be included in continued development of the legislation, regulation and rules as more specific ideas emerge. Such engagement is essential to the self-regulation of lawyers. Such engagement is essential to the self-regulation of lawyers. Continued engagement with the professional associations and their regulators will assist in avoiding unintended negative consequences, particularly when new concepts are introduced. The more frequently that discussions can bring lawyers, notaries and paralegals together, the more likely it is that the hoped-for outcomes will be achieved.

Self-regulation

It is paramount that any reforms to the regulation of lawyers preserve the independence of lawyers from regulation by government. Without an independent profession, there can be no access to justice. Undue government interference in the regulation of the legal profession would hamper the ability of lawyers to advocate for their clients zealously and serve their clients effectively. More broadly, an independent legal profession is crucial because it allows lawyers to contribute to law reform, ensures a functional justice system, and allows the judiciary to maintain their independence; all of these roles are critical for a free and democratic

society governed by the rule of law. The principle of self-regulation of lawyers must ensure that it is lawyers who make all governing decisions. As Justice Estey held in *AG Can v. Law Society of BC*, [1982] 2 SCR 307 at 335-336, 1982 CanLII 29:

> **...the independence of the bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.**

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 citizens from government over-reach, are under threat throughout the world, including in British Columbia. One only needs to review the commentary of politicians and candidates for public service at all levels of government throughout the past year to see that the rule of law is not understood, and not protected by some of those individuals.

Access to Justice

Both CBABC and its parent organization, CBA, have been involved in significant studies and made recommendations to address this complex issue, such as *Foundation for Change* and *Reaching Equal Justice*. CBABC is a member of Access to Justice BC and endorses the *Triple Aim approach* to addressing the issue.

Since the implementation of the 7% provincial sales tax on legal services provided by lawyers, which was introduced with the rationale that the taxes collected would fund the legal aid system, CBABC has repeatedly called on the government to make good on the promise to use the funds collected to support the legal aid system. Government continues to refuse to do so, yet that step would provide thousands of British Columbians with access to legal advice and representation they otherwise cannot afford, enabling them to resolve child support and parenting disputes which form most of the family law matters in our courts.

Any professional providing legal services incurs the costs of running their business and contributing to British Columbia's economy. These costs, including facility rental, information technology, employment of support staff and systems to comply with regulatory requirements, are by necessity covered by fees charged to clients. Should paralegals or others become regulated as independent legal professionals, they too will have these costs.

CBABC has made previous submissions about the important role of lawyers in the area of family law and strongly cautioned against permitting other professionals, such as notaries, to engage in this area. Without repeating those submissions, we point out that increasing the supply of professionals in family law is not a solution that will assist those individuals who are waiting for a lawyer or cannot afford a lawyer, unless those professionals have the education and appropriate apprenticeship/supervision to properly assist those clients. This inevitably means that they will also be charging fees to cover the costs of their training, their regulation, and their overhead, and passing those on to clients. There is no data indicating those costs will be less than what lawyers charge. Accordingly, there is no guarantee that increasing the supply of assistance from say, paralegals, will enable those who cannot afford services to access them from a new category of professionals. Further, there does not seem to be a supply of paralegals wishing to start family law service practices (see discussion under Flexible Licensing Framework).

In summary, access to legal services and access to justice and resolution of disputes are important issues to be addressed. Government, legal professionals, the regulator, educational institutions, not-for-profit organizations, courts and tribunals must keep working on this issue and make more progress together. Regulation of a new category of legal professionals who do not yet have the desire, education, or experience to step into a complex and demanding area of client service will not meaningfully address this concern and is not in the public interest.

Risk

Every time a member of the public places their trust in legal advice they have received from a lawyer or notary, there is a risk that their trust is wrongly placed, which can result in significant loss to the client. Lawyers and notaries are self-insuring, meaning that they take on the collective risk that members of their professions might fall below practice standards, regardless of their shared education, articling training, and admissions exams. That self-insurance ought to continue.

If all legal service providers are covered under the same insurance program or pool, the cost of insuring (and indemnifying) non-lawyer service providers will effectively be borne by lawyers, as our numbers are overwhelmingly greater than notaries and paralegals. Allowing non-lawyers to provide unsupervised legal services to the public may increase access to legal services, but it also brings with it a potentially significant increase in risk to the public, and a corresponding increase in risk of professional liability claims. Lawyers, and by extension their clients, should not be forced to take on the cost of insuring other professionals.

The Intentions Paper does not address how the risk posed by paralegals or other professionals will be addressed. This is a very important consideration in regulation to protect the public and must be considered before legislation is introduced.

Reconciliation

Pursuant to the Declaration on the Rights of Indigenous Peoples Act, the government should take all measures necessary to ensure that the proposed regulatory framework—in all respects—is consistent with the United Nations Declaration on the Rights of Indigenous Peoples. This duty has heightened importance in the present context given the justice system's colonial history and the harms it has caused, and continues to cause, to Indigenous peoples. In addition, the proposed regulatory framework should assign the regulator a mandate to support reconciliation with Indigenous peoples, who have experienced, and continue to experience, heightened barriers to accessing justice.

CBABC expects that the Law Society's *Indigenous Framework* will be considered in drafting the single statute and that the obligation for cultural competency training in Indigenous matters will continue.

Recommendations

General Principles

1. Any reforms to the regulation of lawyers should preserve the independence of lawyers from regulation by government.
2. Changes to the regulation of lawyers, notaries and paralegals will not impact access to legal services significantly, or in the magnitude that the Ministry asserts. Funding the family law legal aid system, for example, would achieve a greater result.
3. "Access to legal services" and "access to justice", as terms with multiple definitions, should be defined in the statute if they are to be relied upon.
4. Increasing the supply of professionals in family law by permitting other professionals, such as notaries, to engage in this area is strongly cautioned against. Regulation of a new category of legal professionals who do not yet have the desire, education or experience to step into a complex and demanding area of client service will not meaningfully address access issues and is not in the public interest.
5. The issue of risk and insurance must be carefully considered in the development of the single regulator and before legislation is introduced.
6. Lawyers, and by extension their clients, should not be required to take on the cost of insuring other legal professionals.
7. Pursuant to the Declaration on the Rights of Indigenous Peoples Act, the proposed regulatory framework should be consistent – in all respects – with the United Nations Declaration on the Rights of Indigenous Peoples.
8. The proposed regulatory framework should assign the regulator a mandate to support reconciliation with Indigenous peoples, who have experienced, and continue to experience, heightened barriers to accessing justice. The Law Society's Indigenous Framework should be considered in drafting the single statute and the obligation for cultural competency training in Indigenous matters should continue.
9. CBABC's support of the single regulator model is contingent on lawyers:
   - maintaining independence and self-regulation, and
   - setting strong parameters for:
     - the scope of practice,
     - criteria for education and competencies,
     - an effective investigation and discipline framework, and
     - the provision of satisfactory insurance coverage.
10. The single regulator should not have a role in regulating legal services if that role goes beyond regulating the individuals and legal entities providing the legal services.

11. The core responsibilities set out under Intentions 2.1-2.3 should be narrowly interpreted and prioritized to avoid the regulator losing focus.
12. Further clarity regarding the terms, "public interest", "access to legal services", "effective legal professions", and "guiding principles" is required.
13. Data on the nature of practice for small firms, large firms, Indigenous, Black and other racialized lawyers, small communities, large urban centres, different areas of practice, and different stages of career should be collected and made available. This would help ensure that there is sufficient information available to the Board to inform its decisions.
14. A smaller, more agile Board composition is needed, to be consistent with effective and modern regulatory operations, and should comprise a mix of appointed and elected members.
15. Geographic diversity on the Board should be maintained.
16. The representation of Indigenous, Black and other racialized individuals on the Board should continue to be prioritized.
17. In order to ensure self-regulation, the majority of the Board must be licensees subject to regulation, the majority of which should be lawyers.
18. The distribution of Board positions of the single regulator could, for example, comprise 19 members as follows:
    - 4 public members
    - 2 notaries, with one from outside of Vancouver
    - 2 paralegals, with one from outside of Vancouver
    - 11 lawyers
        - 5 from Vancouver County
        - 2 from New Westminster County
        - 1 from Victoria County
        - 1 from Nanaimo County
        - 1 from Thompson-Okanagan
        - 1 from Northern and Eastern BC (from the current Prince Rupert, Cariboo and Kootenay Counties).
19. The "practice of law" should be defined in the statute, and the notaries' core scope of practice should also continue to be defined, with a mechanism to potentially expand that scope without legislation. Any change, however, must only come after the regulator's review of education, competencies, risk, increased insurance coverage, continuing professional development, and the protection of the public.
20. The paralegals' scope of practice should be prioritized for examination by the regulator. Until further clarification, paralegals' scope of practice should not be included in a statute.
21. The model of "case by case" granting of licenses should be clarified. While the licensing framework should be sufficiently flexible to accommodate innovative ways of delivering affordable, high-quality legal services to the public, this must not mean regulation of legal professionals on an individualized basis.
22. The regulatory requirements of lawyers, notaries, paralegals and others should be simplified, to reduce the costs of compliance. Where appropriate, based on a risk-benefit analysis, the provision of legal information and law-related assistance by certain individuals should continue to be exempted from the framework or made subject to reduced requirements.
23. Neither this flexible licensing framework nor any other aspect of the regulatory framework should deny or impede an individual's ability to access a lawyer.
24. The modernization of the Law Society's disciplinary framework should continue and be adopted for all professionals regulated under the single regulator.
25. All mechanisms that will allow the Law Society to address licensees who have frequent encounters with the Law Society disciplinary process, and thus create the highest risk, are encouraged.
26. Lawyers should remain the majority on disciplinary panels involving lawyers.
27. The responsibilities of a regulator should be separate from those of a professional association, and a regulator should act in an advocacy role in alignment with its legislation.
28. The Annual General Meeting should be retained as a mechanism to hear from the general public and regulated licensees. There should, however, be a publicized methodology to screen proposed resolutions to ensure that they address matters within the regulator's authority and that the public interest in the resolution is identified.
29. If there are public concerns with regulation, as opposed to a complaint about an individual legal service provider, there should be a publicized methodology to allow members of the public to bring forward such concerns to the regulator.
30. CBABC should be included in continued development of the legislation, regulations and rules as more specific ideas emerge. Such engagement is essential to the self-regulation of lawyers.

Navigating Mediations

BY **MARK VIRGIN**
TLABC Associate Member

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.

Mandatory mediations, initiated by a Notice to Mediate, are a regular feature in BC litigation.

Most litigators are therefore familiar with the requirements of preparing for and attending mediations. However, the mediation process' legal foundation and enforcement mechanisms, are rarely considered by lawyers unless and until the process breaks down.

In this article, we seek to provide some insight into this often under-considered area of the law.

We first canvas the mediation process' significant steps, as provided for in the *Notice to Mediate (General) Regulation* B.C. Reg. 4/2001 (the "Regulation"). We then address some of the leading cases where courts were asked to resolve issues under the Regulation. We then provide our observations as to the general principles which can be taken from the caselaw.

Our hope is that after finishing this article, readers will be better prepared to identify and begin addressing issues which could arise when navigating their own mediations.

The Regulation

The Regulation applies to civil proceedings, except for those which are expressly excluded therein. Excluded proceedings include motor vehicle accidents, which are subject to separate mediation regulations, claims for physical or sexual abuse and family law proceedings.

Any party may initiate mediation by serving a Notice to Mediate (the "Notice") on the other parties. Once the Notice is served on all parties, compliance with the Regulation is mandatory.

Unless a court otherwise directs, a Notice may be served anytime from 60 days after the first Response to Civil Claim is filed until 120 days before the date of trial.

Once the Notice is issued, the parties must agree to a mediator within the time specified (14 days for four or fewer parties; 21 days for five or more parties).

If the parties do not agree to a mediator within the time allowed, any party can apply to a roster organization to have a mediator appointed. The Alternative Dispute Resolution Institute of British Columbia (ADRBC) is presently the organization for this purpose.

A mediation session must begin within 60 days of the date a mediator is appointed, and at least seven days before the date of trial.

The mediator must determine whether the proceedings' complexity necessitates a pre-mediation conference. If required, the mediator will issue a notice to attend the pre-mediation conference on the parties.

At the pre-mediation conference, the mediator must seek to have the parties consider all organizational matters, including finalization of pleadings; the issues to be dealt with on mediation; exchanges of information, documents and reports; and scheduling and time limits.

At least 14 days before the mediation, the parties must provide the mediator a statement of facts and issues, setting out the legal and factual basis of the party's claim or of their defences. The form of this statement is prescribed at schedule 2 of the

SEE PAGE 54

MEDICAL MALPRACTICE ▸

BY **LETTY CONDON**
TLABC Member

Letty trained as family physician in England and obtained her medical degree from The University of Sheffield in 2009. Letty also completed her law degree at Allard School of Law in 2022. Letty supports the lawyers at Pacific Medical Law in investigating concerns over medical malpractice through her broad clinical experience and legal training.

Standard of Care in Birth Injury Cases

This is the fifth 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. Each article will focus on specific injuries and will highlight the obstacles a plaintiff faces in bringing their case to a successful conclusion. By comparing cases involving similar injuries, we hope to illustrate how the plaintiff succeeded, and, when they did not, strategies that may have been available to improve their chance of success.

This article will focus the standard of care in birth injury cases and, specifically, issues related to the nature of obstetric practice and the patient population, expert obstetric opinion and identifying the applicable standard of care, and the possible pitfalls facing lawyers who take on such cases.

Introduction

Medical malpractice dates back to 1767 when, in the jury trial of *Slater v. Baker*, C.B 1767, liability was imposed on a surgeon for re-fracturing the leg of a patient, Mr. Slater. Mr. Slater had injured his leg and the leg had been set by another surgeon. Mr. Slater claimed that the two defendants, Baker and Stapleton, had then negligently broken the callus of his injured leg. In determining what was ultimately the standard of care, Justice Wilmot identified that physicians and surgeons were to be judged by "the usage and law of surgeons, ... the rule of the profession as testified to by the surgeons themselves." In 1767, the Court was permitted to take the description of the surgical experts, as to what they would have done under the circumstance, as the standard for the profession. Physician experts retain significant influence over birth injury claims today.

However, determining the standard of care and demonstrating that it was not met requires the medical malpractice lawyer to do more than obtain supportive expert opinion. A trier of fact must determine the applicable standard of care based on all of the available evidence. Childbirth encompasses a fairly unique set of circumstances within medicine, and this is relevant to determining what evidence can support a claim that the standard of care was not met. Pregnancy is often considered not to be a pathological condition, despite the significant impact that the process can have on the health and well-being of the pregnant person. Accordingly, childbirth is often described as "natural" when a pregnant person goes through labour and delivery without the help of medicine or intervention, and often when there is minimal surveillance of the process. The occurrence of a birth injury can be an unexpected traumatic event as most persons in labour anticipate the delivery of a healthy baby and hope for few, if any, interventions. Healthcare professionals are therefore faced with the challenge of maximising "the use of preventative measures during the normal delivery process to minimize the need for interventions."

This article will consider some of the unique aspects of this area of medical malpractice law. Although childbirth is strongly influenced by a desire not to intervene, there is always a need to be prepared for complications, given that minutes can matter if a problem arises. Cases that featured a failure to be prepared and intervene in a timely way will be reviewed. The autonomy and decision-making power of the person in labour is of profound importance, and we will illustrate how issues of informed consent are often argued in these cases. And finally, we will examine the impact that the evolution of the standard of care over time can have on a birth injury case, and how the courts view the use of guidelines.

Failing to intervene

Obstetricians and other healthcare professionals may be liable for medical negligence where they fail to act. Patient factors may impact upon whether interventions are provided to people in labour. Racialised women have reported significantly higher rates of mistreatment during pregnancy and childbirth, and are less likely to receive medical interventions. Racialised women are also at an increased risk of maternal mortality and adverse infant health outcomes. Nearly half of maternal deaths and severe maternal morbidity events are preventable. Preventable factors in maternity care include where there has been a delay in diagnosis and delay in providing treatment, or where there is a failure to prepare for complications during labour. These factors can lead to delays and complications in labour that result in birth injuries.

Where obstetricians fail to prepare for complications that arise during labour and delivery, they may not meet the standard of care expected of them in their role. In *Ediger (Guardian ad litem of) v. Johnston*, 2013 SCC 18, [Ediger], the infant plaintiff brought a claim for medical malpractice at the time of her birth. She suffered from severe and permanent brain damage as a result of a persistent bradycardia around the time she was delivered. Mrs. Carolyn Ediger, the plaintiff's mother, was induced and, the following day, her labour stalled. Dr. Johnston, the defendant, elected to proceed with a "mid-level" forceps delivery in a regular labour room, without ensuring the immediate availability of an anesthetist or operating staff, despite this being "the riskiest type of forceps delivery."

Although the appeal concerned causation, the decision turned on the trial judge's finding that the applicable standard of care required "that surgical back-up be 'immediately available' to deliver the baby by C-section upon failure of the mid-level forceps attempt." Dr. Johnston proposed that this only required him to ensure that the anaesthetist was standing by to assist and not occupied by another surgery. However, the standard proposed by Dr. Johnston was held to be "unresponsive to the risk in question and potential harm arising from it." The standard of care endorsed by the trial judge, of "immediately available" surgical back-up, was identified by the Supreme Court of Canada to require the physician to "take precautions that are responsive to the risk of persistent bradycardia resulting from the mid-level forceps procedure."

Failing to pre-empt risk in an obstetric setting is not always evident in the medical records of the person injured and documentation does not always reveal where a person has failed to take precautionary steps. Here, the anaesthetist that Dr. Johnston was relying upon if Ms. Ediger required emergency care, was occupied at the time of the infant plaintiff's bradycardia with another patient, one in a "life and death situation."

Notably, it is open to the trier of fact to find evidence outside of the medical record as a more reliable account of the events. In Ediger, the trial judge, whose decision was upheld by the Supreme Court of Canada, held that the most specific and reliable account of the events around the time of the bradycardia was from the recollection of a doctor involved at the time of delivery. This doctor's evidence was preferred over the documentation of the nurses present at the time. The trial judge identified that "minutes mattered" and, following the onset of the infant's bradycardia, "[h]ad back-up been available even five to ten minutes more quickly, most – possibly even all – of the injuries could have been avoided." In part because the trial judge found the timing described by the physician present at the time to be more reliable, Dr. Johnston was found liable for the infant plaintiff's injury as a result of his failure to ensure immediate surgical back-up, and so he failed to meet the standard of care.

Consent

Patient autonomy is a foundation for decision-making in labour and delivery and can help make birth safer both for the pregnant person and the baby. Consent is a key aspect of decision-making and Slater introduced the idea of informed consent into medical malpractice. The court stated that the patient had "information needs" and "the treating surgeons had a duty to provide that information." During pregnancy and labour, the information needs include those of the pregnant person regarding both their own health and wellbeing and the health and wellbeing of their unborn baby. However, paternalism continues to affect how decisions are made in obstetrics and how the person in labour is presented with information about how their labour will be managed. Historically, the locus of control in decision making has resided with the doctor, but there are calls for healthcare professionals to proactively clarify that the locus of control lies with the person in labour, who should be advised that they will be supported in labour even where they decide to take a riskier option.

Racialised women have reported significantly higher rates of mistreatment during pregnancy and childbirth, and are less likely to receive medical interventions. Racialised women are also at an increased risk of maternal mortality and adverse infant health outcomes.

Whether a physician has obtained informed consent from a pregnant person, and thereby met the standard of care expected, was considered in *Brodeur (Litigation guardian of) v. Provincial Health Services Authority,* 2016 BCSC 968. The infant plaintiff was delivered by emergency caesarean section when her mother, Amanda Brodeur, suffered a uterine rupture during her labour. Prior to this pregnancy, Ms. Brodeur had already delivered a child by caesarean section. The plaintiffs alleged that Ms. Brodeur did not provide informed consent to proceeding with a vaginal delivery instead of an elective caesarean section. Specifically, they argued that Dr. Delisle, when providing antenatal care to Ms. Brodeur, failed to adequately inform her of the risk of uterine rupture during vaginal birth after caesarean delivery (VBAC).

The Court found a different doctor and a nurse negligent in their care of Ms. Brodeur, but Dr. Delisle was found to have met the standard of care. The Court identified that a physician "has a duty of care to answer any specific questions asked and to volunteer, without being asked, information about a patient's treatment options and to disclose any material, special or unusual risks." Moreover, applying *Hopp v. Lepp,* [1980] 2 SCR 192, the Court stated that "the scope of this duty is determined on a case-by-case basis, and is assessed via an application of the standard of care." Dr. Delisle identified that she had checked the "VBAC box" on the antenatal record and would only have done so when she had discussed the topic and the associated risks. Dr. Delisle demonstrated in court what her typical VBAC risk discussion would involve. The medical record showed that "Ms. Brodeur expressed preference for a repeat caesarean section," and Ms. and Mr. Brodeur were both found to be credible witnesses. However, their

description that Ms. Brodeur had asked at every appointment for a caesarean section and their claim that she was not made aware of the risks of VBAC was not accepted by the Court. Furthermore, although the Court did acknowledge that Dr. Delisle's description of what her typical risk discussion would involve "was somewhat artificial given the context," her testimony was held to be credible and reliable. Given that the court found that Dr. Delisle met the standard of care regarding informed consent, the judge did not continue to the causation analysis for the lack of informed consent claim.

Proving that informed consent was not obtained remains a challenge for medical malpractice lawyers. In Brodeur, the court noted that Ms. Brodeur had refused medical advice before and determined that she did so based on her "belief in her own well-being." Specifically, it was Ms. Brodeur's decision to continue working, although she had been advised to stop work and go on bedrest, that informed the Court's finding that Dr. Delisle did provide the required information about the risks. The court used Ms. Brodeur's decision to continue working as evidence to support the finding that the reason she went ahead with the VBAC was not because she was not informed of the risks, rather it was that she believed that everything would be fine.

There are perhaps many reasons why a person may feel they must, can, or should continue to work but, appropriate or not, decisions such as this may influence a claim for medical negligence on the basis that informed consent was not obtained. Conversely, in Ediger, the Court determined that Mrs Ediger's "primary concern" was for the welfare of her baby. When Dr. Johnston delivered the infant plaintiff by a "mid-level" forceps delivery, the Court found that Dr. Johnston had a duty to obtain informed consent from Mrs. Ediger prior to proceeding with the forceps delivery. This included informing Mrs Ediger of "the material risks associated with the procedure, including the risk of bradycardia." The trial judge stated that there was "no doubt" that "Mrs. Ediger would "have undertaken a risk to herself in order to avoid a risk to the baby," and the Supreme Court of Canada was confident that the trial judge "would have concluded that Mrs. Ediger would have foregone the forceps delivery and opted instead for a C-section." Consent was not an issue to be decided by the Court on this occasion but this decision does reveal how the plaintiff's testimony can strongly influence whether or not the healthcare professional met the standard of care expected when obtaining informed consent.

Changes over time

Obstetric care has changed in the last 20 years and some changes specifically impact on the risk of birth injury and the standard of care expected of obstetric healthcare professionals. For example, the Society of Obstetricians and Gynaecologists of Canada issued a Clinical Practice Guideline in April of 2019 that recommended antenatal magnesium sulphate for fetal neuroprotection. Specifically, the use of magnesium sulphate in pregnancy at less than 34 weeks' gestation, when the person presents in active labour or when preterm birth is planned, reduces the risk of death and moderate to severe cerebral palsy. There have also been changes to way in which babies are delivered with caesarean sections representing 19.9% of deliveries in 1999 and 29.9% of deliveries in 2019. Caesarean sections performed when full dilatation has occurred, or second stage caesarean delivery, is also becoming more common and is associated with an increased risk of neonatal trauma and admission to the neonatal unit .

The ways in which the fetal heart rate is classified during pregnancy and labour has also changed over this time. Despite this evolution, the interpretation of fetal heart monitoring continues to be the source of much debate in birth injury cases. For example, in *Medina v. Wong*, 2018 BCSC 292, the Court was faced with expert opinion that provided two different interpretations of the fetal heart tracing. The infant plaintiff was born by caesarean section and suffered a brain injury around the time of birth. His mother went into labour and, following a period of monitoring by intermittent auscultation, nursing staff commenced monitoring the fetal heart rate by external fetal monitoring. All of the experts agreed that the SOGC Guidelines were the guidelines that they were expected to follow when interpreting external fetal monitoring. The experts for the defence described that the timing of the decision to expedite delivery by caesarean section was reasonable, based in part on the external fetal monitoring. However, the experts for the plaintiff opined that the timing was not reasonable, and that the defendant physician, Dr. Wong, failed "to summon obstetrical help in the face of an obvious abnormal fetal heart rate."

Although the Court accepted that the SOGC Guidelines and the guidelines produced by the defendant hospital had "the common objective of standardizing interpretations and the actions that are required," ultimately, "[g]uidelines are just that, guidelines" and they were not determinative in deciding whether the standard of care was met. Despite admitting that he did not follow the guidelines, Dr. Wong was found to have met the standard of care when he did not call for an obstetric consult but instead ordered an epidural when he was faced with a heart rate tracing that he himself described as having "some areas of concern."

Even supportive expert opinion was not enough for the case to succeed. The Court, in describing the theory of "two schools of thought," identified that where the trier of fact is convinced "that there is more than one viable approach," medical practitioners, "acting reasonably, may reach opposite or different conclusions based on the same medical evidence." Guidelines themselves can introduce uncertainty and the Court identified that the guidelines in question potentially did not accommodate an abnormal strip which then improves. Ultimately, the Court acknowledged that the experts for the defence and for the plaintiff differed on their interpretation of the fetal heart tracing. Finding for the defendants, Justice Abrioux described that the role of the court is "not to weigh the competing schools of thought and assess their relative merit." Here, the Court found that it was not possible to conclude that Dr. Wong "improperly exercised" his judgement in his interpretations such that it was actionable.

So where does this leave a lawyer whose birth injury case relies upon the interpretation of the fetal heart rate tracing? Just as in Slater, the expert medical opinion is key. But so is understanding the wider circumstances of the case.

Conclusion

Proving that a birth injury was the result of medical negligence requires careful examination of the medical records and an understanding of what the medical records cannot and will not show. Successfully bringing a claim of medical negligence may also require detailed discussion with medical experts about the strengths and limitations of guidelines relevant to the care provided. Patient factors may also impact upon the standard of care and, specifically, whether informed consent was obtained when a decision is made to intervene or not in labour. Ultimately, the unique nature of labour and delivery creates considerable uncertainty for malpractice lawyers, even where guidelines and the medical records suggest that the healthcare professional failed to meet the standard of care.

1 Miller, Robert D., Slater v. Baker and Stapleton (C.B. 1767): Unpublished Monographs by Robert D. Miller (Madison WI: By Author 2019), Monograph #3 – Page 19 of 21
2 *Ibid,* Monograph #3 – Page 2 of 21
3 *Ibid,* Monograph #4 - Page 8 of 22
4 *Ibid,* Mongraph #13 – Page 13 of 57.
5 Medina v. Wong, 2018 BCSC 292, para 107
6 See for instance, https://kidshealth.org/en/parents/natural-childbirth.html
7 Beck CT, Watson S, Gable RK. Traumatic Childbirth and Its Aftermath: Is There Anything Positive? *The Journal of perinatal education*. 2018;27:175-184.
8 Çalik, K.Y., Karabulutlu, Ö. & Yavuz, C. First do no harm - interventions during labor and maternal satisfaction: a descriptive cross-sectional study. *BMC Pregnancy Childbirth* 18, 415 (2018).
9 Saraswathi Vedam et al., "The Giving Voice to Mothers study: inequity and mistreatment during pregnancy and childbirth in the United States," *Reproductive Health* 16, (June 2019),
10 Institute of Medicine, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care*, (Washington, DC: Institute of Medicine, March 2002), and Elizabeth A. Howell et al., "Race and Ethnicity, Medical Insurance, and Within-Hospital Severe Maternal Morbidity Disparities," *Obstetrics & Gynecology* 135, no. 2 (February 2020): 285-293.
11 Oribhabor GI, Nelson ML, Buchanan-Peart KR, Cancarevic I. A Mother's Cry: A Race to Eliminate the Influence of Racial Disparities on Maternal Morbidity and Mortality Rates Among Black Women in America. Cureus. 2020 Jul 15;12(7):e9207.
12 Braveman P. What are health disparities and health equity? We need to be clear. *Public Health Reports*. 2014;129(1_suppl2):5–8.
13 Geller SE, PhD, Koch AR, MA, Martin NJ, AA, Rosenberg D, PhD, Bigger HR, MD, Illinois Department of Public Health Maternal Mortality Review Committee Working Group. Assessing preventability of maternal mortality in Illinois: 2002-2012. *American journal of obstetrics and gynecology*. 2014;211:698.
14 Para 1
15 *Ediger (Guardian ad litem of) v. Johnston*, 2013 SCC 18, para 4
16 *Ibid,* paras 4 and 6
17 *Ibid,* para 16
18 *Ibid,* para 42
19 *Ibid,* para 44
20 *Ibid,* para 49
21 *Ibid,* para 17
22 *Ediger (Guardian ad litem of) v. Johnston*, 2011 BCCA 253, para 52.
23 *Supra,* note 15, para 17
24 Lothian JA. Choice, Autonomy, and Childbirth Education. *The Journal of perinatal education*. 2008;17:35-38.
25 Supra, note 1, Monograph #1 – Page 3 of 8
26 Goldberg HB, Shorten A. Patient and provider perceptions of decision making about use of epidural analgesia during childbirth: a thematic analysis. *J Perinat Educ*. 2014 Summer;23(3):142-50.
27 Heath, N. We need to change the way we deal with informed consent during childbirth. Voices. 27 Aug 2021. Available online via https://www.sbs.com.au/topics/voices/health/article/2019/07/11/we-need-change-way-we-deal-informed-consent-during-childbirth
28 Kotaska A, Informed consent and refusal in obstetrics: A practical ethical guide. *Birth Issues in Perinatal Care*. 7 March 2017. Vol 44(3): 195-199
29 *Brodeur (Litigation guardian of) v. Provincial Health Services Authority,* 2016 BCSC 968, para 1
30 *Ibid,* para 18
31 *Ibid,* para 20
32 *Ibid,* para 42
33 *Ibid,* para 45
34 *Ibid,* para 44
35 *Ibid,* para 87
36 *Ibid,* paras 45 and 92
37 *Ibid,* para 95
38 *Supra,* note 16, para 55
39 *Ibid,* para 58
40 No. 376-Magnesium Sulphate for Fetal Neuroprotection
41 Canadian Institute for Health Information. Caesarean Section Rate [indicator]. Accessed October 27, 2022
42 Rahim A, Lock G, Cotzias C, Incidence of second-stage (fully dilated) caesarean sections and how to best represent it: A multicentre analysis. International Journal of Gynecology & Obstetrics, 2022: 156(1): 119-123.
43 Murphy DJ, Liebling RE, Patel R, Verity L, Swingler R. Cohort study of operative delivery in the second stage of labour and standard of obstetric care. BJOG. 2003;110:610-615.
44 *Medina v. Wong*, 2018 BCSC 292, para 81
45 *Ibid,* paras 208, 209, 216, and 219
46 *Ibid,* para 187
47 *Ibid,* para 272
48 *Ibid,* paras 162 and 165
49 For a more fulsome discussion of "two schools of thought" see Donaldson, A. Defences to a Medical Malpractice Claim – Navigating the Minefield, The Verdict, Fall 2020, Issue 161: 28-22.
50 *Ibid,* para 97
51 *Ibid,* para 272
52 *Ibid,* para 241
53 *Ibid,* para 99
54 *Ibid,* para 272

PAC Honour Roll

Public Affairs Committee Fund

*Monthly Contributors

CHAMPIONS OF JUSTICE

Firms

Collette Parsons Corrin LLP
Guy Collette, Daniel Corrin, Richard Parsons

Collins Peterson Injury Lawyers
Simon Collins, Nick Peterson

Doak Shirreff
J. Ab Estephan, Lee Turner

Integra*
Erica Enstrom

Johnston Franklin Bishop LLP
Marsha Bishop, Trina Brubaker, Stuart Cappus, Simon Irving, Greg Phillips, Heather White

KazLaw Injury Lawyers
Marc Kazimirski

Maryn Law

McComb Witten Marcoux*
Siavash Khazamipour, Robert Marcoux, Garry McComb, Meghan Neathway, Brittany Therrien, Jeffrey Witten

Murphy Battista LLP
Giuseppe Battista KC, William Dick KC, Kevin Gourlay, Irina Kordic, Joseph Murphy KC, Alexander Sayn-Wittgenstein, Scott Stanley

Mussio Goodman
Eric Goodman, Wesley Mussio, Thomas O'Mahoney, Karol Suprynowicz

RDM Lawyers LLP
Shelly Avram, Jessie Legaree, Douglas Lester KC, Kathleen Jenkins, Karen McNeilly, Spencer Thomson

Rice Harbut Elliott LLP
Michael Elliott, Jonathan Harbut, Anthony Leoni, John Rice KC

Slater Vecchio LLP
James Buckley, Sam Jaworski, Nicole Kelly, Aimee King, Todd Lucyk, James Richards, Michael Slater KC, Saro Turner, Anthony Vecchio KC

Stephens & Holman
Thomas Braidwood, William Bucci, Simon Holman, Mark Kozlowski, Alexander McQuarrie, Karen Munro, Paul Nigol, Larry Trach, Brendan Veale

Warnett Hallen LLP
Manjot Hallen, Paul Warnett

Watson Goepel LLP
Janet De Vita, Anastase Maragos

Individuals

Todd Cherniak*
Christopher Dyson
Kevin Gourlay
Bonnie Lepin
Thomas P. Harding*
Michelle Ma
William G. Slater*

Updated January 6, 2023

PAC Honour Roll

Public Affairs Committee Fund

DIAMOND Firms

DIAMOND Individuals

Leonard M. Cohen

Mark Virgin

PLATINUM Firms

Add your firm's name to this list!
Contact TLABC Manager of Philanthropy Jan Hawkins
T: 236-317-1919 E: jan@tlabc.org

PLATINUM Individuals

Andrew Brine*
Chris Carta*
Douglas Chiu
J.F. Raymond Chouinard*
Raj Dewar*
Meena Dhillon*
Robert C. Doell*
David H. Doig*
Tyrone A. Duerr*
Bryan Fitzpatrick*
Edward Patrick Good*
Oana Grant*
David Grunder*
Paul Hergott*
Simon Irving
Gary R. Jackson*
Farouk Jiwa*
Dylan Kozlick
Wm. Rory Lambert*
Georgialee Lang
Kyla Lee
Conrad Margolis*
Veronica Medved
Shawn Mitchell*
Paul L. Mitchell KC*
Edward L. Montague*
Karen Munro*
Ronald D. Nairne*
Etienne Orr-Ewing*
Daniel S. Shier
Jeremy Thom
Arthur E. Vertlieb KC*
James D. Vilvang KC*
Zack Vilvang*
Rob Wickson
Gordon Zenk

GOLD Firms

Fulton & Company LLP*
Lyle Backman KC
Frank Scordo

Vocational Consulting Group
Derek Nordin

GOLD Individuals

Susan P. Apperley*
Jock Craddock*
Stewart L. Daroux*
Jon M. Duncan*
Max Durando*
Stephen E. Gibson*
Jim Hanson*
Michael Holroyd*
Sam Jaworski*
Larry E. Kancs*
Jesse Kendall
John S. Kennedy
A. W. McGarvey*
Richard McMullan*
John L. Mickelson*
Scott Morishita
David N. Osborne*
J.A. Pankiw-Petty
Hovan Patey*
Elisabeth Sadowski
Krista Simon*
Trevor R. Todd*
Adam Ueland*
Kevin Westell*

SILVER Firms

Bronson Jones & Company*
Dohm Jaffer & Jeraj*
Drysdale Bacon McStravick LLP*
Hammerco Lawyers LLP*
Jon M. Duncan Law Corporation*
McNeney McNeney Spieker LLP*
Sugden McFee & Roos LLP*
Waterstone Law Group LLP

SILVER Individuals

Roy Antunes*
Anonymous*
Anonymous
Stuart Cappus*
Tara Chandler*
Candace Cho*
Robert C. Claus KC*
Lawrence W. Coulter*
Megan Ejack*
Kevin A. Filkow*
Keri Grenier
Ashley Harrison
Nathaniel Hartney*
Timothy Huntsman*
Deb Jamison*
Tyler Jones*
Andrew Kemp*
Naz Kohan
Jeffrey Logan
Alexia Majidi
Heather McMahon
Sahaub Missaghi*
Matthew A. Nathanson*
Greg Phillips*
Dana Quantz*
Andrew Rebane
Terrence Robertson KC
Kelley Stewart*
Jennifer Tater*
Howard Teasley*
Peter J. Thornton*
Simon Tucker*
Seth Wheeldon*
Daniel Winks*
Joseph Zak*

BRONZE Firms

Anonymous
Campbell Redmond
Donald D. McKnight Law Corporation
GhostPractice*
McConchie Criminal Law

BRONZE Individuals

Anonymous
Merri Hagan
Heather McMahon
Janelle O'Connor
Karen St.Aubin
Stephen W. Turner

Updated January 6, 2023

STAND UP FOR THE RIGHTS OF BRITISH COLUMBIANS

Please support TLABC's advocacy work by contributing to the PAC fund today.

Why Should I Contribute to PAC?

- ✓ You'll be directly supporting the court-based advocacy work that TLABC does on behalf of individuals
- ✓ You'll get discounts on in-person seminars
- ✓ You'll join a group of like-minded people who believe in access to justice
- ✓ You'll get to see your name on the PAC Supporter Honour Roll in the Verdict and on the TLABC website
- ✓ There's strength in numbers - because we can't do this work without you!

I'm in. Let's do it!

Name _____

Firm _____

City/Province _____

Phone _____

Email _____

☐ This is a Personal Contribution

☐ This is a Firm Contribution

☐ I would like my contribution to remain anonymous

Thank You

Yes, I will contribute ◯ A monthly gift ◯ A one time donation

◯ $1,000 ◯ $500 ◯ $250

◯ $100 ◯ $50 ◯ $ Other _____

◯ My cheque is enclosed

Charge to: ◯ Visa ◯ Mastercard ◯ Amex

Name on Card _____

Card Number _____ Exp. _____

Signature _____

Please make your cheque payable to TLABC PAC Fund and mail to:

Trial Lawyers Association of BC
380 - 2608 Granville Street
Vancouver, BC V6H 3V3

In a hurry? Click on the QR Code to go directly to the Contribution Form on our website.

integra Advise. Assess. Support.

As an organization that leads with our values, Integra is proud to support the TLABC Public Affairs Committee.

The PAC represents our values of embracing equality and upholding honesty. They are an important legal force driving intelligent and thoughtful reaction (whether support or opposition) to pending legislation. The PAC works to prevent harm to the community, and uphold the choices, freedoms and rights of individuals in BC.

They give BC lawyers a voice to promote and preserve the positive aspects of the system while opposing restrictive legislation to protect access to a fair justice system for all.

~ Erica Enstrom, Founder & President

PAC FUND
Champions of Justice!

WE SUPPORT PAC.
DO YOU?

Thank you, Integra. We appreciate you!

PAC PROTECTS YOUR PRACTICE

The Public Affairs Committee (PAC) is a division of TLABC and funds public affairs and advocacy projects to protect the rights of all British Columbians. This work comes at a cost, and is not part of the Association's regular operating expenses. To learn more about PAC and how you or your firm can contribute, contact us today at 236-317-1919.

8 QUESTIONS FOR...

Chris Dyson

Principal at Dyson Law Firm & Champion of Justice PAC Contributor

1 Tell us a little bit about your firm.

We are a three-lawyer litigation firm plus one senior associate counsel.

We practice personal injury on the plaintiff side, commercial litigation, general plaintiff-side insurance law, employment law and estate litigation.

Using contingency fees for a high portion of our work, we are proud to offer high quality legal services for our clients representing the entire economic scale including homeless persons, the working poor, middle class homeowners, successful professionals, small and medium sized corporations and wealthy entrepreneurs.

The leading policy makers in BC might disagree, but contingency legal fees are a powerful tool to give our clients and the public access to justice.

Access to justice for the public was never a problem at our firm, at least until the no-fault motor vehicle regime came about. ICBC no-fault will change the way we do business going forward.

That said, I am pleased that we still can offer contingency fee arrangements for our estate, employment, non MVA personal injury cases and even the occasional commercial litigation matter.

2 What led you to choose law as a profession?

I always was planning to become a lawyer since an early age. I always believed in standing up for the right cause and helping individuals who were facing disagreements with powerful authorities.

Being a lawyer has not disappointed and I really enjoy the work.

3 What do you know now, that you wish you had known as a new lawyer?

It's not enough to put yourself in "the shoes" of your audience as we are often told.

You have to think about how the person you are talking to is taking what you are saying, keeping in mind that individual's unique background and maybe entirely different perspective than your own.

Treat everyone as a unique individual because that's who we all are. This applies whether you are helping a client or making oral submissions to a judge.

4 What are the most rewarding aspects of your career?

By far the most rewarding part of being a lawyer is successfully helping clients through difficult situations.

We are truly a "helping profession" and getting a hug, compliment or card at the end of a case is always a treat.

5 How has your TLABC membership enhanced your practice?

TLABC has been a tremendous asset to our practice. On the micro level, the excellent seminars, publications, listserv are essential resources for day to day practice and professional development.

On a macro level, TLABC helps us advocate for our clients through their public affairs and litigation projects.

6 What would you say to members who haven't yet contributed to PAC?

Who will stand up for your ability to represent your clients when that ability is under attack by very powerful institutions?

Who will stand up for you when your profession is used as a scapegoat for the failings of the top officials in the BC Government?

Even lawyers working for that same government can be targeted as scapegoats for difficult problems faced by that government. If you recall, in December of 2022 the decisions of prosecutors were being blamed by elected officials as somehow contributing to the social ills of the Downtown Eastside.

Right now, our legal profession is under attack as is indirectly the judicial branch of government. For example, over the last four years, lawyers helping the most vulnerable have been made into scapegoats for the failings at ICBC and everything has been done to attempt to prevent lawyers from helping injured motor vehicle accident victims.

And if you don't stand up against the mass stripping of civil rights through no-fault, who will stand up for you when other areas of practice are affected?

Contributing to the PAC fund is one of the best ways to protect you and your clients.

Thank you Chris. We appreciate you!

7 Thank you for being an active PAC contributor. Why is TLABC's advocacy work important to you?

We are fortunate in Canada to have one of the best judicial systems in the world. At the same time, legislative and regulatory barriers to the public's ability to access our world class judicial branch of government are being put in place by elected and non-elected policy makers of the executive branch of the provincial government.

Furthermore, these very same policy leaders forcefully lecture the profession and the judiciary about access to justice while themselves putting up barriers to the public's ability to access independent courts and legal counsel.

In some cases, these barriers are formidable and all-encompassing such as the vehicle insurance no-fault scheme. The no-fault insurance scheme is particularly egregious in that it targets for oppression some of the most vulnerable people in this Province. On top of that, no-fault was sold as "care" for those vulnerable people when, in fact, it stripped them of multiple legal rights, remedies and avenues for help.

I have clients from around the world coming to Canada to escape undemocratic regimes who cannot believe that something like the new no-fault scheme (aka Enhanced Care) could be imposed on British Columbians.

A common comment from my clients about the ICBC no-fault scheme is: "I left my former country to escape nonsense like that from overbearing governments and here I am again facing it."

8 What motivates you to contribute to PAC?

As a great believer and everyday practitioner helping the public to access justice, I feel I have a professional duty to resist these measures restricting access to justice.

As part of that duty, I enjoy contributing to the TLABC Public Affairs Committee on a regular basis.

Indeed, I will be leaving in my will, a legacy gift that will go towards TLABC projects aiming to push back on BC policy makers' attempts to limit access to justice.

It's that important of a cause and no other organization in BC is so focused on this issue as TLABC.

TLABC's Criminal Defence Listserv

Do you wish you had a large group of criminal defence colleagues with whom you could brainstorm, consult and network? Send ONE email to the Criminal Defence listserv and within moments your message will land in the inboxes of criminal defence lawyers across BC!

TRIAL LAWYERS ASSOCIATION of BC

For more information, contact Karen St.Aubin, Director of Membership & Education at karen@tlabc.org or 604-696-6523 today.

CRIMINAL LAW ▸

BY **JONATHAN DESBARATS**
TLABC Member

TLABC COMMITTEE
- Criminal Defence Committee

Jonathan Desbarats works primarily in criminal defence and has acted in a number of high profile, large and complex criminal prosecutions. He has also represented clients in regulatory matters, and in civil forfeiture cases at all levels of court in British Columbia and in various provinces across the country, in both English and French. Prior to being called to the bar he worked as a journalist and documentary filmmaker. He is a member of the Board of the Association of Legal Aid Lawyers (ALL).

Tug-of-War Over Sentencing Continues in the SCC's *Sharma* Decision

In recent years the rules around sentencing have changed so frequently it is hard to keep pace. Every few months, it seems, another mandatory minimum sentence is repealed or ruled unconstitutional by the courts. Similarly, the availability of conditional sentences as an alternative to jail has waxed and waned. The shifting sands have dissolved into an ocean of uncertainty. It is not uncommon for counsel in criminal cases to go into a case with one sentencing regime in mind, only to face a new reality by the time sentencing rolls around.

The SCC's decision in *Sharma* is the latest chapter in the ongoing sentencing saga.

The case, a close 5-4 decision of the Supreme Court of Canada, focused on the provisions that create exceptions to the availability of a conditional sentence, and in particular the tension between those provisions and the principles set down in *R. v. Gladue*, as reflected in section 718.2(e)—that "all available sanctions, other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

The facts in *Sharma* were extremely sympathetic and engaged many of the factors contemplated in *Gladue*. Ms. Sharma is of Ojibwa ancestry and her grandfather was a residential school survivor. Her father was convicted of murder when she was five years old and deported. She suffered from addiction and was the victim of abuse as a teenager. Before the age of 20 she was trapped in a cycle of poverty and addiction. She had a daughter at 17. At the time of the offence, she had no employment, no support of any kind, and was in dire financial straits. At her partner's suggestion, she agreed to take a suitcase from Suriname into Canada for $20,000. The suitcase contained 1.97 kilograms of cocaine. She had no criminal record and had made some positive changes in her life before being sentenced.

Notwithstanding the personal circumstances of Ms. Sharma, a conditional sentence was not an available sanction in her case by virtue of an amendments to the Criminal Code brought in by the Harper government in 2012 which barred the availability of a conditional sentence in cases prosecuted by indictment where the maximum term of imprisonment is 10 years and involving the import, export, trafficking, or production of drugs under section 742.1(e)(ii).

The case raised the interesting dilemma of how to assess the constitutionality of one provision of the *Criminal Code* (section 742.1(e)(ii) which appears to be at odds with another (s. 718.2(e)).

Ms. Sharma, who was sentenced at trial to 18 months in jail, appealed her sentence and challenged s. 742.1(e)(ii) in two ways—first by alleging the legislation was overbroad,

contrary to s. 7 of the *Charter;* and second, by arguing that the legislation violated s. 15, which guarantees the right to equality under the law without discrimination, because of its disproportionate impact on Indigenous individuals. While Ms. Sharma succeeded in the Ontario Court of Appeal, the decision was then appealed to the Supreme Court of Canada. There, the majority rejected both arguments, while the minority held the impugned provision to violate both ss. 7 and 15 of the *Charter*.

Ms. Sharma's argument on the s. 7 analysis was that the law was disconnected from its purpose as it would lead to imprisonment for the least serious offenders as well as the most serious offenders. The majority and minority judges clashed on this point.

In the majority view, the maximum sentence for an offence is routinely used to gauge of the seriousness of a particular offence. In contrast, the minority held that the maximum sentence available for a particular offence cannot be equated with "seriousness" as maximum sentences are reserved for only the most serious offenders and will be imposed only in very rare circumstances. In practice, the typical sentence imposed for a particular offence will often be poles apart from the maximum, even for offenders with a criminal record. By way of example, the minority noted the offence of breaking and entering a dwelling house under s. 348(1) carries a maximum sentence of life imprisonment; however, the average sentence for that offence is less than one year in custody.

Another key to the differing results of the majority and minority in assessing the s. 7 challenge lay in the way in which they framed the purpose of the legislation. The majority framed the purpose of the legislation as the enhancement of "consistency" in sentencing, whereas the minority saw Parliament's purpose as intending to jail the most serious offenders.

However, the greatest controversy in the case related to the s. 15 argument. While the majority purported to clarify the s. 15 jurisprudence, judging by the reaction to the decision, a great deal of uncertainty remains over the correct analysis to apply in s. 15 cases. Of particular concern is the correct evidentiary burden imposed on a claimant to show the disproportionate effect of an impugned law in a s. 15 challenge.

In Ms. Sharma's case, the majority held that was no evidence before the trial judge that the bar to the availability of a conditional sentence under s. 742.1(e)(ii) disproportionately affected Indigenous offenders as compared to non-Indigenous offenders (the majority acknowledged that some fresh evidence was tendered by interveners on appeal but was critical of that practice). The Court noted that Ms. Sharma could have presented some statistical evidence showing Indigenous offenders were disproportionately imprisoned for offences targeted by the impugned provisions.

As Karakatsanis J. for the minority pointed out, this is an unnecessarily onerous burden for a defendant where a law so plainly impacts one group disproportionately, likening the impairment of s. 718.2(e) to a "web of instinct": "It reflects a reality long-recognized through our Gladue jurisprudence: removing conditional sentences for many offences has particular impact on Indigenous offenders. The distinction on the basis of race is apparent."

Another sticking point was the question of whether holding s. 742.1(e)(ii) to be unconstitutional would lead to "profound and far-reaching" consequences—namely, preventing Parliament from repealing or amending existing ameliorative policies. This was a concern held by the dissenting judge at the Ontario Court of Appeal. The minority rejected this concern, arguing that policy reasons for upholding unconstitutional legislation should be considered under the s. 1 analysis.

While the majority purported to clarify the s. 15 jurisprudence, judging by the reaction to the decision, a great deal of uncertainty remains over the correct analysis to apply in s. 15 cases. Of particular concern is the correct evidentiary burden imposed on a claimant to show the disproportionate effect of an impugned law in a s. 15 challenge.

There is a sense of frustration apparent in the minority judgement over the failure of the criminal justice system to address appallingly high rates of incarceration of Indigenous people in Canada, and in particular Indigenous women. Quoting from the Truth and Reconciliation Commission of Canada's 2015 Final Report, the minority compared the experiences of Indigenous people in prisons to those of their parents and grandparents in residential schools in that they are isolated and removed from their communities and subjected to persistent racism, which is pervasive in correctional institutions. Indigenous individuals also fare much worse once in custody, as they are much more likely to end up in segregation or to return to prison for a parole violation.

It worth noting that on the heels of the *Sharma* decision, Bill C-5 came into effect. The direct purpose of that legislation in removing several mandatory minimum sentences was to address the problem of overincarceration of offenders from marginalized communities. The result in Sharma seemed at cross-purposes with that legislation and unsurprisingly has left many with the view that con-

sistency in the sentencing regime remains as elusive as ever. Many consider that Bill C-5 fell short of the mark as it failed to include an amendment which would allow judges to impose conditional sentences in exceptional circumstances akin to those in Sharma.

Leaving aside the controversy, from a practical perspective, criminal defence lawyers will no doubt latch on to comments from the majority relating to the availability of other non-custodial sentences such as a suspended sentence or intermittent sentence to give effect to Gladue principles and s. 718.2(e).

As the majority notes, the *Criminal Code* provides judges "broad discretion to craft a proportionate sentence, given the offender's degree of responsibility, the gravity of the offence and the specific circumstances of each case." Although they fell short of stating that a suspended sentence would be appropriate in Ms. Sharma's case, the majority did comment that suspended sentences "are not irrelevant to applying s. 718.2(e),» notwithstanding that suspended sentences are generally thought to be primarily a rehabilitative tool.

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 continues in its third sitting of the 42nd Parliament. It has extended sitting hours into the late evening as the government feverishly passes legislation with 2022 rapidly coming to an end, along with the winter session. Below I have featured the pieces of legislation I expect to be of greatest import to my fellow trial lawyers.

Mortgage Services Act

This recently passed legislation aims to improve the regulation of mortgage brokers, lenders and administrators by replacing the outdated *Mortgage Brokers Act*. It empowers the BC Financial Services Authority (BCFSA) to develop rules for licensing and licensee conduct and strengthens its ability to set standards of conduct and enhance disclosure and reporting obligations, as well as greatly increases the potential penalties faced for contraventions. The introduction of modernized legislation was recommended by the Commission of Inquiry into Money Laundering in BC which produced its report in June 2022.

While this Act gives BCFSA the authority to develop rules and standards, the regulatory scheme is not yet set and is not expected until late 2023. There will be ongoing opportunities for industry members to provide input. If your practice includes advising mortgage brokers, lenders or administrators, it will be important to keep an eye on the changes introduced by the BCFSA over the coming year(s).

Health Professions and Occupations Act

This recently adopted legislation replaces the *Health Professions Act* and significantly changes how BC regulates its health professions and occupations. On top of reducing the number of health regulatory colleges from 15 to 6 and streamlining the process for regulating new professions, the legislation reforms complaint processes and creates an independent discipline tribunal within the superintendent's office.

The shift to investigative and disciplinary processes outside of the self-regulated bodies is purportedly to enhance the focus on public protection. While colleges can investigate complaints about their own members, discipline will be governed by the Discipline Tribunal. For each complaint leading to a discipline hearing, the tribunal is to establish an independent panel containing at least one member licensed in the same health profession as the member who is the subject of the hearing. The *Health Professions and Occupations Act* also creates a new oversight body that is empowered to set or adopt performance standards and provide guidance on best practices; it also may perform audits of the colleges and generally oversee their governance.

We can expect the same argument will be used in relation to the legal profession and a similar structure will be proposed for oversight and discipline in the future.

Indigenous Self-Government in Child and Family Services Amendment Act

The ratification of this legislation on November 24, 2022 makes BC the first jurisdiction in Canada to recognize an inherent right of Indigenous self-government in provincial

legislation. It allows for Indigenous governing bodies to exercise direct responsibility for their children and youth under Indigenous laws in matters relating to child protection, custody, guardianship and care. The express goal is empowering Indigenous communities to provide their own child and family services and supporting Indigenous child to remain connected to their cultures and their communities.

The changes enacted by this Act impact both the *Adoption Act* and the *Child, Family and Community Service Act;* in general each piece of legislation must be administered in accordance with the principle that Indigenous peoples have the inherent right to self-government. More specifically, section 7 of the *Adoption Act* now outlines additional considerations for the best interests of Indigenous children before placing an Indigenous child for adoption. Section 13 now requires if a child is in the continuing custody or guardianship of a director of child protection, the consent of the applicable Indigenous governing body is required. Section 37 was amended to make clear an adoption does not affect any rights the child has as an Indigenous child.

There are numerous amendments that have also been enacted to the *Child, Family and Community Service Act*. These include the requirement to consult and cooperate with Indigenous peoples and Indigenous governing bodies in relation to the planning and delivery of services to Indigenous children and families. Services are also required to be planned and provided in ways that prevent discrimination under the *Human Rights Code* and to promote substantive equality, respect for rights and culture and, in the case of Indigenous children, cultural continuity. Services to Indigenous children and families are to be provided in a coordinated manner to the services provided by Indigenous authorities.

The changes collectively elevate Indigenous identity as a key element for consideration in child protection cases and a recognition that Indigenous law is a separate but equal process. If there is an inconsistency between this Act Indigenous law in a circumstance where an Indigenous authority is providing, or intending to provide, Indigenous child and family services under Indigenous law, the Indigenous law prevails to the extent of the conflict or inconsistency. The Director must also withdraw if an Indigenous authority confirms it is or will be providing Indigenous child and family services in accordance with an Indigenous law. Another important change is that a child is not deemed to need protection if the circumstances are caused solely by socioeconomic conditions, including poverty, lack of adequate housing or infrastructure, or the state of health of a parent or child.

If you practice in the areas of child protection, Family Law and/or adoptions, you will want to review the new obligations to obtain consent or an Indigenous authority, notify an Indigenous authority and understand when Indigenous laws may be applied.

Workers Compensation Amendment Act (No. 2), 2022

More changes! Bill 41 was introduced on October 31, 2022 and passed through the committee and 3rd reading stage on November 23, 2022. That's pretty speedy for some substantial changes.

Employers and employees now have a duty to cooperate in the early and safe return to or continuation of work. The Workers Compensation Board also now has the ability to reduce or suspend compensation if worker fails to comply. Employers are required to re-employ injury workers and make necessary accommodation to the point of undue hardship. It is now deemed that if a worker is terminated within six months of returning then the employer has failed to comply with this requirement unless the employer can establish the termination is unrelated to the worker's injury; this provision only applies to workers who were employed at least 12 months prior to the injury. Workers must also be accommodated to the point of undue hardship in attempting to return them to work. Obligations regarding duties to cooperate end on the 2nd anniversary of the date of the injury if the worker has not returned by that date.

Other changes include new hearing loss provisions and increasing compensation for non-traumatic hearing loss, establishing of a Fair Practices Commissioner to handle complaints involving WorkSafeBC, expanding access to independent health professionals at the appeal stage with the Workers' Compensation Appeal Tribunal, explicitly prohibiting employers from dissuading workers from filing claims with WorkSafeBC, and indexing compensation benefits to the rate of annual percentage changes in the Canadian Consumer Price Index.

As obligations regarding return to work apply to unionized workplaces also to the extent that the provisions provide a greater benefit to the employee, labour and employment lawyers will want to review the new provisions carefully.

Stata Property Act

It is no secret that BC has faced a housing shortage for years. Day three on the job, Premier Eby decided to make a mark introducing substantial changes. Some have praised the bold action, while others have serious concern over whether it will have the desired impact. The changes were introduced in the Legislature on November 21, 2022 and received Royal Assent on November 24, 2022. No one will be accusing the government of bogging it down with such things like careful consideration or due investigative process.

On the minor side, the government made temporary regulations permitting annual and special general meetings to be conducted electronically into permanent legislation. On the major side, the government removed long-term rental bans in strata buildings and removed age restrictions.

The government's goal is for less units to sit vacant, increasing the supply available to rent. We will have to wait to see how this impacts the market. Rental units tend to be more attractive for pur-

chasing, which may mean less inventory and more speculation by rental investors. So while there may be more rentals available, this could also have the adverse impact of driving up prices for the first-time home-buyers the government also theoretically wants to assist to get into the market. Notably, short-term rentals restrictions remain and the ban on bylaws prohibiting long-term rentals was already in place for strata corporations that formed since January 1, 2010.

As for age and other factors, the government has essentially made it more difficult to control who you are living "with." Age limits are invalid aside from buildings with a 55+ restriction to preserve senior housing; the restriction does not apply to a caregiver who resides in the strata lot. There are provisions to grandfather individuals who at the time the law was passed were living in accordance with the by-laws in their building at the time.

Other changes include that strata councils are no longer required to disclose to an owner or purchaser the number of strata lots in a building that are rented and owner developers who rent or intend to rent strata lots no longer need to prepare a Rental Disclosure Statement. Stata is also no longer able to restrict rentals via a screening process; strata councils are no longer permitted to restrict rentals through a screening process whereby they are entitled to approve of tenants or otherwise restrict the rental of a strata lot.

Strata council members are either saints or tyrants (you know who you are). While clearly seeing their power diminished in terms of controlling who is in the strata lots, strata council members have also voiced concern over increasing demands on their time with rentals and the long-term impact on building. Investors do not have the same incentive to pay into upgrades for a building that they do not live in and absentee landlords result in more day-to-day issues going to strata. The thankless task may get just get worse.

What can be said for certain is the Civil Resolution Tribunal should buckle up for an influx of claims.

Concluding Remarks

The interpretation and commentary on this government report and court 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.

ADVERTORIAL ▸

BY **CHRISTY PRATT**
RCR RPR, Vice President
Veritext Canada

The Contemporary Court Reporter

The art of stenography dates to the mid 4th Century BC when Roman scribes used Tironian shorthand to record Cicero's speeches. Like all technology, stenography has seen its share of modernization since those ancient times, having undergone significant transformations in 1877 (first shorthand machine), in 1970 (first computer-aided transcription software) and in 1992 (adoption of realtime reporting).

When I first began working as a reporter in 1997, I was fortunate to have learned realtime theory at Langara College, which meant I didn't have to type my notes from scratch like many of my colleagues had been doing for years. And although an elaborate system of cables and plugs enabled my shorthand machine to write directly to my roughly 10-pound laptop, I still amassed quite the collection of those traditional paper steno notes we've all seen pooled around a reporter's feet in classic TV shows and movies (spoiler alert: that's done entirely for dramatic effect; no competent reporter would ever allow that to happen). I used the quintessential cassette-tape-BIC-pen combo for my audio backup/playback system, and I edited my transcripts using an MS-DOS word processing program. And while the internet was gaining global popularity at that time, I still referred to phonebooks, my trusty OED and various encyclopedias and technical manuals for my spelling research. On any given day I was easily lugging around 75 pounds of gear and accoutrements.

Court reporting used to be an industry that enjoyed relatively few technological advancements for years – sometimes decades – at a stretch, but over the past 30 years our systems have transformed at a swift pace. Paper notes and cassette tapes are a thing of the past. Realtime reporters haven't used cables and comm ports for years, and the days of using dialup internet for remote realtime are (thankfully) well in the rear-view mirror. Cloud-based browsers constantly refresh the realtime text, giving counsel and the court the benefit of the reporter's edits throughout the day. Digital audio record-

ings automatically sync with the reporter's transcript files, and artificial intelligence is now used to flag mismatches between audio and transcript text. Proofreaders provide simultaneous transcript editing, working in tandem with reporters to produce same-day certifieds. Exhibits are presented and marked digitally, with many lawyers foregoing physical document binders altogether. Digital exhibits are now linked to transcripts, creating a single searchable PDF file (and paper copies of transcripts are typically only requested just before trial).

The way we used to work is almost unrecognizable to the contemporary court reporter, and perhaps the biggest transformation has been the shift to virtual and hybrid proceedings with a blended workforce of traditional stenographers, voice writers and digital reporters. One of the silver linings all industry stakeholders have enjoyed these past three years is the ability of court reporters to cover work virtually from anywhere. With a very real court reporter shortage on our hands across not just Canada but throughout North America, removing travel time and setup from the equation has afforded everyone better access to reporting services and, therefore, better access to justice. Reporters can quickly hop into a second – sometimes even a third – job in a day, which takes pressure off schedulers and LAAs, who are typically the ones scrambling to get jobs covered.

In other Canadian regions, alternate forms of capture have been in place for decades due to the paucity of steno reporters, with provinces like Ontario, Manitoba and Saskatchewan using voice writers and digital reporters to cover questionings, examinations and the like. BC and Alberta have yet to adopt non-steno approaches for these types of jobs (though they are often used in quasi-judicial tribunal and disciplinary hearings and other non-court proceedings), which makes the option to utilize reporters from all corners of the province that much more critical. And while AI is gaining an impressive momentum both in terms of accuracy and ubiquity, multiple speakers, strong accents and language nuance may preclude it from ever becoming a trusted standalone guardian of the record.

Over the years you have trusted your court reporters – whether individually or through a firm – to adapt and evolve not just with the times but also with the increased demand for service. We learned so much at the outset of the pandemic, particularly how resourceful we can be when we are highly motivated to adapt and innovate. The key to any innovation or new technology is to create purpose-fit, intuitive solutions for end users, which is exactly what the leaders in this industry are doing.

The gold standard remains as it's always been, regardless of the method of capture – there is a necessary human element.

Whether it's a stenographer or a voice writer or a digital reporter, the necessity of engaging a reputable, professionally trained reporter is essential for overseeing and taking control of the proceedings to ensure that all speakers are carefully captured. And as long as we support this fundamental tenet with smart, innovative tools and technologies, we can trust that the method of capture will reflect this principle, that the record will remain in excellent hands for years to come and that our essential contribution to the pursuit of access to justice will be preserved.

Protecting the record is a court reporter's sole objective, and it's just as important now as it's always been to engage a professionally trained reporter to achieve this goal to the highest possible standard. Innovation is key to sustaining the future of our industry, and provided you choose to work with contemporary industry leaders who are committed to preserving this objective, you can continue to trust that your court reporter – regardless of the equipment they use – will be an intrepid guardian of the record.

FROM PAGE 31

Regulation. Once received, the mediator distributes a party's statement of facts and issues to the other parties.

The parties must also complete a Fee Declaration in the prescribed form, attesting to the agreed fee for the mediation. The Fee Declaration must be completed prior to the pre-mediation conference if one is held. Otherwise, the Fee Declaration must be completed prior to mediation.

The Regulation leaves procedure at the mediation largely to the discretion of the mediator and the parties themselves, specifying that *"the mediator may conduct a pre-mediation conference and the mediation at the location and in any manner the mediator considers appropriate to assist the participants to reach a resolution that is fair, timely and cost-effective."*

The mediation is concluded either when all issues are resolved or when the mediator terminates the mediation. After the mediation is concluded, the mediator must deliver a certificate of completed mediation to any party which requests one.

Information shared through the mediation process is confidential and generally non-compellable in any proceeding. Information pertaining to a party's failure to comply with the Regulation may be disclosed to the court, but only to the extent needed for the court to make an order on the non-compliance.

Exemptions From Mediation

No party is required to attend a subsequent mediation in the same action. Parties are also not required to attend a mediation in one proceeding if they already have attended a mediation in another proceeding between the same parties respecting the same matters at issue.

Otherwise, parties must attend in person, at a pre-mediation conference or mediation session, except in limited circumstances.

At a pre-mediation conference, any party's lawyer may attend on their behalf.

Per section 16 of the Regulation, a party may also have a representative attend a pre-mediation conference or mediation on their behalf if the following applies:

a. The party is under legal disability and the representative is their litigation guardian;
b. The party is "suffering from a mental or physical injury or impairment sufficient to limit the party's effective participation in mediation;"
c. The party is non-resident in BC and will not be in BC at the time of mediation or the pre-mediation conference; or
d. The party is not an individual

In all cases, the representative must know the facts on which their party intends to rely. The representative must also have full authority to settle or must have access, at the earliest practicable opportunity, to the person or persons with such authority.

Enforcement

The Regulation places the parties under mandatory obligations to mediate outside of the court process. However, the Regulation does not establish any enforcement mechanism or non-consensus-based dispute resolution procedure, other than the process for having a mediator appointed. If the parties are unable to resolve any other issues amongst themselves, their only recourse is application to the courts.

Section 23 of the Regulation provides for application to the Court for direction on how mediation should proceed. Section 23(a) permits parties to apply for direction as to the time, place, terms and conditions of the mediation. Section 23(b) permits parties to apply to postpone the mediation. Section 23(c) permits parties to apply to have one or more parties exempted from attending the mediation or pre-mediation conference "if in the court's opinion it is materially impracticable or unfair to require a party to attend."

Sections 33 and 34 permit parties to apply to court where another party has not complied with the Regulation. Before applying, the applicant must serve on each other party an Allegation of Default in the prescribed form. The party must also serve all affidavits supporting its application.

On an application under section 34, the court has broad discretion to make orders it deems appropriate. These may include ordering the mediation to proceed, ordering a party to comply with the Regulation, or striking the pleadings of the non-compliant party and granting judgement.

The court may make any cost order it deems appropriate on a non-compliance application. The court may further consider an Allegation of Default in making final cost orders after trial.

Case Law

In *0116064 B.C. Ltd v. Alio Gold Inc., 2022 BCSC 1700*, the court noted that *"Applications under s. 23 of the Regulation are rare. In the more than two decades since its enactment, there have only been a handful of reported cases."* Applications under section 34 appear to be even more rare.

Still, the few reported decisions give rise to general principles as to how the Courts interpret the Regulation.

The first decision addressing the court's discretion under section 23 was *Le Soleil Hotel & Suites v. Le Soleil Management,* 2008 BCSC 953.

Le Soleil arose from a dispute between unit owners regarding management of a strata-title hotel. Multiple actions resulted, which the parties agreed would be tried together.

The Defendants in *Le Soleil* were mostly resident in southeast Asia. The Plaintiffs issued Notices seeking mediations in each matter to be held together in Singapore, where the greatest number of Defendants resided.

The Defendants opposed the application on three grounds.

First, the defendants argued that because the Regulation expressly defined "Date of Trial," by the date specified on the Notice of Trial, the Plaintiffs served their Notice too late, even though as a result of prior rescheduling trial was more than 120 days away on the date the Notice was served.

The court readily dismissed the late service argument. Under section 5, the court had discretion to modify the time for serving a Notice, provided such modification allowed sufficient time for the mediation process to unfold fairly prior to trial.

As parties could serve a notice to mediate up to 120 days before trial without approval, the court held that 120 days was *prima facie*, sufficient time for the mediation process to unfold fairly. The court further held there was no reason 120 days' notice was insufficient in the present matter.

The Defendants' second argument was that the Regulation did not contemplate multiple matters being mediated together. The court rejected this argument holding that section 23 afforded the court broad discretion to dictate the time, place, terms and conditions of mediation. The parties had previously agreed it was expedient to try the different actions together. The same considerations supported the matters being mediated together.

The Defendants' third, and most substantial argument, was that the Regulation only permitted mediation to be held in BC. This argument was premised largely on the wording of section 16 of the Regulation which permitted non-BC resident parties to attend remotely if they were not in BC at the time of mediation. The Defendants argued this section presupposed that mediations under the Regulation were required to occur in BC.

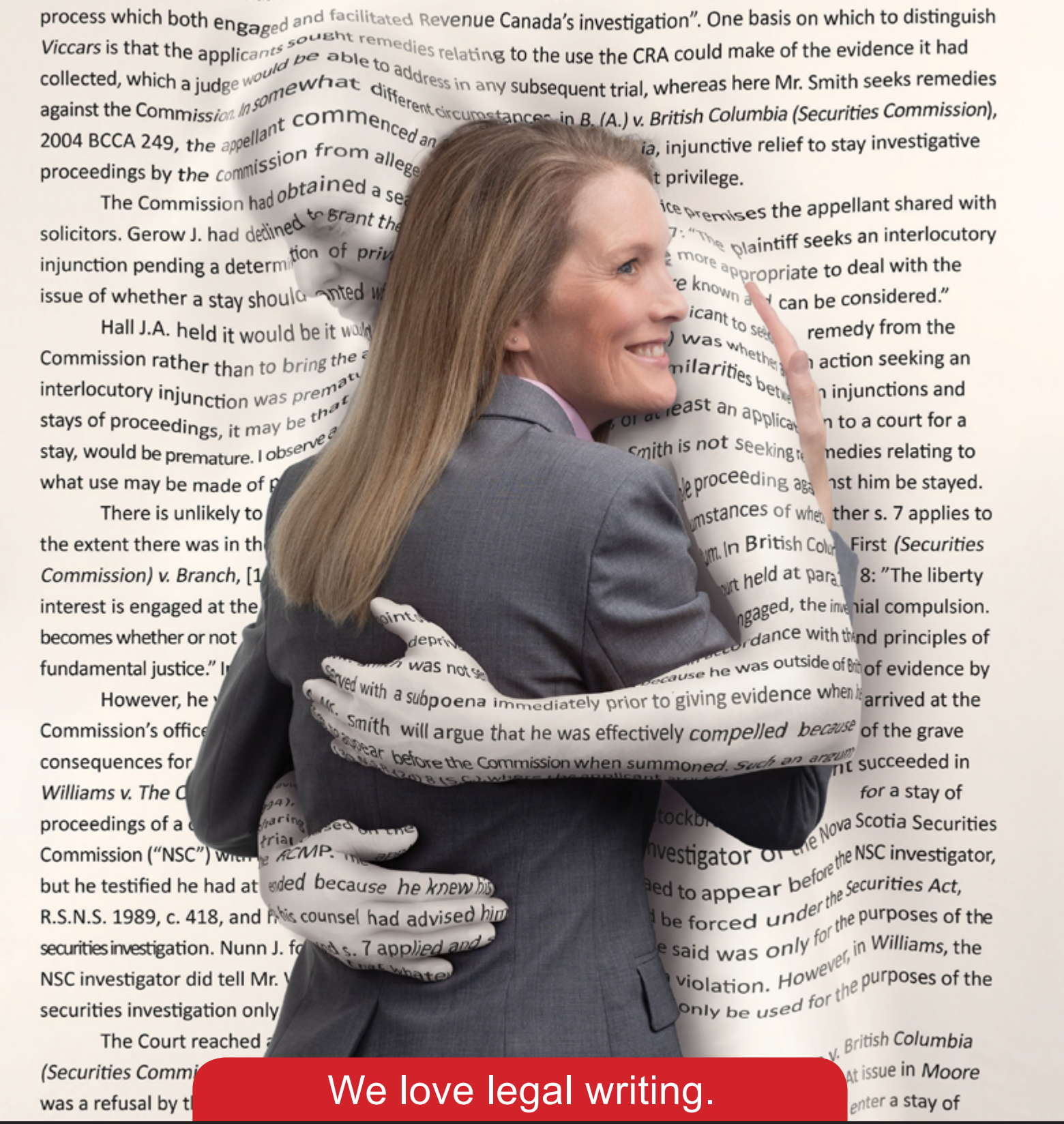
Information shared through the mediation process is confidential and generally non-compellable in any proceeding. Information pertaining to a party's failure to comply with the Regulation may be disclosed to the court, but only to the extent needed for the court to make an order on the non-compliance.

Further, or in the alternative, since non-resident parties were permitted to attend by representative if they were not in BC at the time of mediation, the Defendants should also be permitted to attend mediation in Singapore by representative.

The court accepted the Defendants' position that the wording of section 16 suggested mediations would generally take place in BC. However, the court did not agree that this wording prohibited it from ordering mediation to take place outside BC.

Again, the court relied on its authority under section 23 to set terms and conditions of the mediation and held that the Regulation's purpose of promoting settlement would be served by ordering mediation take place in Singapore.

Finally, the court held that section 16(b)(iv), which permits parties non-resident in BC to attend mediation by representative, did not prohibit the court from ordering pursuant to section 23 that parties attend mediation in Singapore in person. In the circum-



stances, the court held the purpose of the Regulation would be served by compelling the parties' attendance in person and directed accordingly.

The Defendants appealed the orders made in *Le Soleil* in *Executive Inn Inc. v. Tan,* 2008 BCCA 93. Their argument on appeal was that the Chambers' judge's analysis put sections 16 and 23 of the Regulation in conflict.

In dismissing the appeal, the Court of Appeal held that the two sections applied to different factual circumstances. Section 16 was *"normally applicable when the process of mediation is triggered by the actions of a party who deliver a Notice to Mediate." Conversely, section 23 "may be viewed as applicable to a mediation proceeding in a situation in which the court has been requested to intervene and give directions."*

Given the two sections applied to different situations, any restrictions which section 16 might be read as imposing on the mediation process were inapplicable to an application on section 23. Instead, on hearing an application under section 23, the court had "broad jurisdiction to make the orders necessary to ensure the mediation process is both effective and fair."

The Court of Appeal maintained further that such interpretation of the Regulation as conferring broad residual power on the courts was consistent with the fact that mediation under the Regulation arises from the litigation process for which the courts are ultimately responsible.

In *Matsqui First Nation v. Canada (Attorney General)*, 2015 BCSC 1409, at issue was the circumstances which would justify a party being exempted from a mediation.

This application arose from aboriginal title and fishing right litigation. The Plaintiffs served the Notice. Pursuant to section 23(c), the Crown applied to be exempted from the mediation on the basis that the Crown's participation would be materially impracticable.

In support of its application, the Crown advised that it viewed the litigation as a "test case" which would help clarify constitutional issues. The Crown's interest in a ruling on these issues was greater than its interest in the resolution of the matters in dispute, and so it was disincentivized from settling at mediation.

The Crown further argued that it would be impossible to obtain authority to settle the matter at mediation.

> **Settlement required approvals from the "highest levels of government."**

Unfortunately, an election was underway, and the persons whose approval was needed would not be confirmed until after both the mediation and the trial dates passed.

The court however, held the requirements of "material impracticability" were not made out.

The court noted that BC's standard of "material impracticability" appeared to be unique in Canada as a standard for exempting parties from mediation. Further, the standard had received little prior consideration – though the decision in *Le Soleil*, suggested that the logistics of international travel (and the parties' contentious history) had not given rise to material impracticability.

The Court in *Matsqui* cited as persuasive the Alberta Court of King's Bench's ruling in *IBM Canada Limited v. Kossovan*, 2011 ABKB 621. In *Kossovan*, the court noted that parties often enter into litigation believing their position to be entirely correct and believing no compromise from their position would be feasible. Despite litigants' views, litigation overwhelmingly settles. Mediations, whether voluntary or mandatory, have particularly high success rates (as cited in Matsqui, approximately 80% of mediations in BC produce settlements).

When aided by a skilled mediator, parties come to accept that weaknesses in the cases which they would have to present to trial, or the general uncertainty of litigation, justify settlement.

Further, even where mediation does not achieve settlement, it benefits the litigation process by compelling the parties to define legal issues, plan procedural steps and hopefully reach agreements which reduce trial times.

Returning to the matter before it, the court held that at very worst the *"case will simply proceed to trial in a couple month's time with an interim 'loss' of one or two days' effort"* and dismissed the Crown's application.

Most recently, in *0116064 B.C. Ltd v. Alio Gold Inc.*, 2022 BCSC 1700, the court addressed an application to have mediation postponed until further procedural steps had taken place.

Alio Gold concerned class proceedings. The Plaintiff served a notice to mediate prior to certification. Accordingly, no document or oral discovery had taken place. Further, the Plaintiff was prohibited from obtaining certification until they complied with the Court of Appeal's direction that they reformulate their common issues.

Upon receipt of the Notice, the Defendant applied to court for an order postponing mediation until the proceedings were certified and document disclosure had taken place.

Considering what standard to apply to the postponement application, the court returned to the decision in *Executive Inn* and held the Defendant must establish that postponement was necessary to ensure the mediation process was effective and fair.

The court found the Defendant had not met this onus.

Proceeding to mediation prior to certification would not render the process ineffective. Parties regularly reached settlements in class actions which were contingent on subsequent certification. The parties could do the same here.

Further, the Defendant had sufficient knowledge of the issues in the matter, and the likely form of the Plaintiff's reformulated common issues might take, that proceeding to mediation before such reformulation would not be unfair.

Finally, the court noted that the relevant disclosure in the proceeding flowed entirely from the Defendant to the Plaintiff. The Defendant had not even argued on its application that it required documents from the Plaintiff in order to participate in mediation.

Thus, if the Plaintiff wished to proceed to mediation before obtaining the Defendant's documents that created no unfairness for the Defendant.

Accordingly, the court dismissed the Defendant's application and ordered it to comply with the process under the Regulation.

Conclusion

While there has been limited judicial consideration of the Regulation to date, certain principles can be discerned.

While mediation is an "alternative [to litigation] dispute resolution" process, the BC Courts since Executive Inn have considered mediation under the Regulation to be adjunct to the litigation process which the courts control. While the Regulation on its face suggests a predominantly party-driven process, should the parties disagree their recourse is to apply to court.

When hearing an application under the Regulation, courts have interpreted section 23 in particular as granting them significant discretion to make orders as they find appropriate. Such discretion permits orders which do not follow other sections of the Regulation which might otherwise have been assumed to apply.

Further, courts are predisposed to compel parties to participate in mediation even when those parties have advanced credible reasons why settlement at mediation is unlikely.

In support of ordering attendance, courts have relied on the fact that mediation overall has a high rate of effecting settlement.

Moreover, even if settlement is not reached, the ancillary benefits of attending a mediation will also need to be addressed and overcome by parties seeking an order respecting exemption from, or postponement of, mediation.

Finally, the Court of Appeal has suggested that parties in most cases will conduct mediation under the Regulation without involving the courts. There is no clear precedent however, of a court refusing an application under section 23 because the applicant has not made sufficient efforts to participate in the mediation process, but is not actually in default.

Particularly where litigation involves parties not resident in BC, it appears open to a party at the outset to apply to court for an order that the mediation be held outside BC or that parties be compelled to attend personally. With *Le Soleil* being the leading case on the matter, such orders may be difficult to resist for parties hoping to rely on section 16.

Kids in the Car? Family Law Considerations in Impaired Driving Investigations

BY **KYLA LEE**
TLABC Governor
TLABC Member
PAC Contributor

TLABC COMMITTEES
- Criminal Defence Committee
- *the Verdict* Editorial Board
- PAC Committee

Kyla Lee is a partner at Acumen Law Corporation, with a focus on impaired driving offences. She has appeared at all levels of court in British Columbia, and before the Supreme Court of Canada. She is a mainstay in BC Supreme Court conducting judicial reviews of Immediate Roadside Prohibition review decisions and is recognized as an authority on the subject of impaired driving.

Impaired driving investigations can happen in a variety of circumstances, some of which involve the presence of children in the car. When the police stop a vehicle and kids are in the car, there are important considerations for counsel in advising the client.

In all circumstances where children are present in a vehicle with an impaired driver, police are obligated to report the incident to the Ministry of Children and Family Development. The advice given to a client in the circumstances of an investigation involving children in the car must take into account the involvement of the Ministry.

Considerations in Immediate Roadside Prohibition Cases

In Immediate Roadside Prohibition investigations — where criminal charges are not being pursued and police issue an immediate license suspension roadside — police will typically ensure the children are taken home to a parent or guardian that is not intoxicated. Following this, a report is made to the Ministry.

From this point, the Ministry will typically arrange with the subject of the police investigation for an interview and often a home visit. Clients in this situation must cooperate with the Ministry investigation or they will face consequences.

Under the provisions of the *Child, Family and Community Service Act*, police have a duty to report any incident that leads them to conclude that a child may be or may have been in danger by the parent.

> **The enforcement of the ability to conduct these investigations can also lead to children being apprehended.**

Section 17 of the *Child, Family and Community Service Act* permits a director to remove a child and to enter a premises without warrant to search for a child if a parent refuses to allow the director access to the child. The police are also obligated to assist in this process if requested.

The obligation on police to assist in the process may also make the officer inadvertently a witness to the child protection proceedings and may permit the police to have access to information that otherwise would have required a warrant. This again increases the risks for a client who is involved in an impaired driving incident with children in the car.

Other than responding to the requests for assistance, the police do not follow up with the Ministry for the purposes of an Immediate Roadside Prohibition to gather evidence or reports from the Ministry for use in the review hearing. As a result, when your client participates in the Ministry investigation after receiving an Immediate Roadside Prohibition there is little jeopardy to the prohibition dispute in being honest and forthright in response to the Ministry's questioning.

As there is no power to compel disclosure through production order or search warrants for an Immediate Roadside Prohibition, and as the police have only seven days to prepare and submit their report, any evidence generated through the Ministry investigation is not even likely to be available at the time the Immediate Roadside Prohibition review hearing takes place.

Considerations in Criminal Cases

While the same general actions are also undertaken in a criminal investigation where children are in the vehicle, the considerations are different for advising a client. This is because a criminal investigation is an ongoing process, and one for which the police have a great deal of power to gather and collect evidence.

In a case where your client has received a *Criminal Code* impaired driving charge and the Ministry wishes to conduct an investigation as a result, your client should be advised of the potential jeopardy that anything they tell the Ministry may be compellable against them in a criminal prosecution.

Pursuant to Section 33(3)(d) of the *Freedom of Information and Protection of Privacy Act*, a public body may disclose personal information about an individual to law enforcement for the purposes of a specific investigation where a law enforcement proceeding is likely to arise. This would include an impaired driving investigation. "Public Body" is defined in in the Act as including any Ministry of the Province of British Columbia.

Pursuant to Section 74(2)(e) of the *Child, Family and Community Service Act*, however, the scope of Section 33 as it relates to records of a director does not include disclosure to law enforcement. Any social worker conducting the investigation would therefore be prohibited from disclosing the fruits of the investigation to police.

As a result, the information that is collected in the child welfare investigation cannot be compelled by police for disclosure without a warrant or production order, for the purposes of the impaired driving investigation.

Additionally, there is an obligation on the social worker to advise police if the children are placed in danger by an ongoing pattern of criminal behaviour, such as impaired driving. A compliant or statement that a parent is a habitual drunk driver is likely not enough to trigger this obligation but if the investigation resulted in that conclusion the police could be alerted.

While that information would likely not be relevant to a specific criminal investigation, it could result in additional police scrutiny of the client that leads to more traffic stops and police intervention, which then in turn leads to greater and more significant family law consequences.

This does not mean that clients should not cooperate with the Ministry. However, statements should either be provided through counsel wherever possible, and clients should be advised on the procedure to invoke the protections of the Canada Evidence Act due to their compulsion to give a statement and participate in the process.

Impaired Driving Collateral Consequences to Family Law Cases

In cases where the issue of access and parenting time are under dispute in the court, a criminal impaired driving charge or an Immediate Roadside Prohibition may also pose a hurdle to your client in resolving the issues in their favour, particularly in circumstances where children are in the vehicle.

It surely comes as no surprise that difficult relationships between parents are fertile ground for one parent to point to another's risk-taking behaviour with the child in the car as a basis to limit access to the children or to restrict parenting time.

In *B.H.C. v. F.G.J.P.*, 2017 BCPC 378, the issuance of an Immediate Roadside Prohibition was not characterized as a form of family violence, but the case does not foreclose the possibility. In that case, a protection order was sought for children in a relationship that was marked with instances of family violence from a parent who struggled with alcohol addiction.

The father's struggles with alcohol had resulted in back-to-back Immediate Roadside Prohibitions that had left the family without a vehicle. It does not appear that the children were in the car on either occasion, and thus the court did not find that family violence had occurred directly as a result of the impaired driving.

However, the court's commentary on family violence is relevant. The court notes that the provisions of the *Family Law Act* related to family violence are designed to address actual harm or danger which arise from a parent. Arguably, this could include a risk that was posed to children in the course of an impaired driving investigation. Moreover, in cases where there is an accident and the children suffer physical or psychological harm, the family violence argument does not seem difficult to make out.

Family violence, the Court notes in *B.H.C. v. F.G.J.P.* does not just include actual violence but can include circumstances where children suffer emotional harm.

Even the act of watching a parent be arrested and having the family vehicle impounded may cause emotional harm in some children — thus exposing the parent to a protection order following an Immediate Roadside Prohibition.

The Court does note that there must be actual evidence of emotional harm.

The court in *B.H.C. v. F.G.J.P.* also comments that protection orders should not be imposed if they would serve no purpose in mitigating a real risk. Thus, there would likely need to be more than just an allegation of impaired driving with the children in the car in order to meet the burden for a protection order. Of course, in acrimonious proceedings this does not stop an estranged spouse or co-parent from bringing the application or from placing heavy reliance on the prohibition or impaired driving charge as evidence of a more substantial substance abuse issue.

The protection order provisions of the *Family Law Act* can have devastating consequences on a parent, including removal of that parent from the family home. This means that in cases where an impaired driving charge or Immediate Roadside Prohibition is issued and the client is involved in family law proceedings that include a dispute over parenting time, clients should be advised of the risk of the protection order.

Because family violence is defined broadly in light of social issues including impaired driving allegations, even under the narrow scope of when a protection order is granted a parent always faces a risk that these provisions may be used.

The existence of the Immediate Roadside Prohibition or a criminal conviction for impaired driving may also be a relevant factor that the court considers in determining the best interest of the child in the allocation of parenting time. A good example of this is *T.B. v. S.S.*, 2017 BCPC 217, in which the existence of impaired driving incidents and driving prohibitions were part of the factual matrix upon which the court drew conclusions about how parenting time was to be resolved, in addition to whether a protection order was to be granted.

PARALEGAL PERSPECTIVE ▸

BY **MICHÈLE ROSS**
TLABC Member

Michèle Ross is a designated paralegal at Virgin Hickman. She is the past President of the BC Paralegal Association and sits on the British Columbia Supreme Court Civil and Family Rules Committee. She was a member of the Law Society's Licensed Paralegal Task force in 2019 and 2020. On March 14, 2022, Michèle was appointed by the Provincial Government as a bencher for the Law Society of BC. She is a member of the Law Society's Discipline Committee, the Innovation Sandbox Advisory Group, and the Trust Review Task Force.

Modernization of Regulatory Framework for Legal Professionals

– What Does this Mean for Paralegals?

Editor's note: The views expressed here are those of the writer and should not be inferred as those of the Law Society of BC.

In the fall of 2022, the legal profession was focused on considering what it would mean to the profession, or more accurately, the professions, to be regulated by a single legal regulator. From my perspective, I thought – what does a single legal regulator really mean for paralegals in BC?

March 3, 2022 was a pivotal day in BC. The Ministry of Attorney General (the "Ministry") announced its intention to pursue modernization of the regulatory framework for legal professionals including lawyers, notaries, and paralegals to better protect the public in accessing legal services and help improve access to justice.

The announcement included that a legislative proposal will be developed that involves:

- regulating all legal professionals in British Columbia under a single statute and by a single regulator;
- establishing a mandate for the regulator that clarifies its duty to protect the public, including the public's interest in accessing legal services and advice;
- establishing a modern regulatory framework that is consistent with best practices in professional regulatory governance; and
- establishing clearly defined scopes of practice for each regulated profession with procedures to allow for expanded scopes as needed.[1]

Over the months that followed, the Ministry collaborated with the Law Society of British Columbia, the Society of Notaries Public of BC, and the BC Paralegal Association. On September 14, 2022, the Ministry released the Intentions Paper and sought feedback from the public and key organizations by way of an online survey and/or written submissions which were accepted until November 18, 2022. Various organizations provided written submissions including the Law Society of BC, the Society of Notaries Public of BC, the BC Paralegal Association, the Canadian Bar Association, BC Branch, FACL BC, and Capilano University to name a few.

Single Legal Regulator

The announcement of a single legal regulator should not come as a surprise to the legal profession. The 'Final Report of the Legal Service Providers Task Force' (LSPTF) dated December 6, 2013[2] examined the public interest considerations concerning regulation of non-lawyer legal service providers and whether the Law Society should take steps to implement that regulation. The LSPTF concluded that it was in the public interest that legal service providers other than lawyers and notaries should be regulated unless operating under the supervision of a lawyer or other regulated legal service provider such as a notary public, and that a single regulator of legal services was the preferred

model. The recommendations from that report included that the Law Society seek to merge with the Society of Notaries Public of British Columbia and that the Law Society become the regulator of both lawyers and notaries in the province. Although both Societies made efforts to implement those recommendations, in the end the two Societies did not reach agreement on a merger.

While the Ministry has not suggested in the Intentions Paper that the Law Society of BC become the regulator, the Ministry's intentions are clear that, "The statute should establish a single regulator, responsible for the regulation of all current and future regulated legal service providers."[3]

Regulation of Paralegals

Similar to the idea of a single regulator, regulation of paralegals is not a new concept to the legal industry in BC.

My research indicates that the Law Society of BC has had various committees and task forces look at certification and regulation of paralegals in different ways going back 30+ years, which is the entire time I have been in the legal profession.

Consideration has been given to certifying paralegals who met prescribed educational and practical standards. Exploration of a regulatory regime has also been considered including the recommendation to create a committee to deal with accreditation issues. In the early 1990s, the Law Society of BC asked that amendment be included to allow it to certify and regulate paralegals, but the request was not granted by the Government at the time.[4]

After all the reports, considerations, recommendations, consultations and debate, fast forward to December of 2014 when the Legal Services Regulatory Framework Task Force recommended that the Benchers seek an amendment to the *Legal Profession Act* that would allow the Law Society to establish "new classes of legal service providers to engage in the practice of law, set the credentialing requirements for such individuals, and regulate their legal practice."[5] The recommendation was unanimously approved by the Benchers and the Law Society sought legislative amendment.

Finally, after almost four years, on November 27, 2018, came the Attorney General Statutes Amendments Act (Bill 57). This outlined changes to the Legal Profession Act (which would become the *Legal Professions Act*) to provide for a class of licensed paralegals and included provisions that would allow the Law Society to authorize licensed paralegals to provide independent legal services and gave the Benchers the authority to determine what licensed paralegals could do. Were paralegals finally getting somewhere in being regulated to be able to offer services directly to the public?

Regrettably, despite having taken a step forward, the legal profession took a step backward. On December 4, 2018, the Law Society of BC held its annual general meeting with about 1,700 lawyers in attendance (both online and in-person). An amended resolution was submitted requesting that the Benchers ask the BC government to refrain from forming any regulations relating to licensed paralegals until the Benchers had more time to consult on the issue and secondly asking the Benchers not to proceed with licensing in the area of family law.[6] Lawyers wanted the Benchers to do more consultation.

I had the opportunity to attend the 2018 annual general meeting, and unfortunately saw that lawyers voted in favour of the amended resolution despite arguments having been made against it.

As a paralegal who has dedicated my career to family law, it was frustrating to see that one of the areas of law, which by various reports has the most unmet legal need, was the area over which lawyers wanted to retain exclusivity.

I appreciate that there are complexities to family law. But would it not have been in the public interest to allow the regulator to consider appropriate guardrails to be put into place, while at the same time putting the public interest at the forefront and allowing licensed paralegals to provide *some* family law services? The outcome of the Law Society's annual general meeting was a definite setback to the public and the paralegal profession. The amendments to the *Legal Professions Act* have yet to be proclaimed.

But strides were made, and a significant step was taken on September 25, 2020, when the Benchers considered the report of the Licensed Paralegal Task Force[7] and unanimously approved the recommendations proposed by the task force to create a regulatory sandbox allowing individuals, businesses, or organizations to apply to the Law Society to provide legal advice or services to address the public's unmet legal needs.

The innovation sandbox is not restricted in terms of practice areas or scope. It provides an opportunity for legal service providers (including paralegals) to make a proposal to the Law Society in areas in which they are competent, and, if approved, receive a "no-action" letter to provide services to the public.

Public Interest

The Ministry proposed in its Intentions Paper that "Licensees should not have the authority to bring forward resolutions that purport to direct the actions of the regulator's board." To prevent a repeat of what happened at the 2018 Law Society of BC's AGM, I

agree with the Ministry's intention in this regard. To allow members of the Law Society to bring forward resolutions that direct the actions of the regulator when such actions conflict with the mandate to regulate in the public interest, one needs to ask, whose interests are being favoured, lawyers or the public.

Occupational Title Protection

Given that paralegals are not currently regulated, there are various types of paralegals who make up the landscape of paralegals in BC. Many paralegals have completed paralegal programs at Capilano University, University of the Fraser Valley, Vancouver Community College, or some of the smaller community colleges. Some paralegals have completed paralegal programs in other provinces and now work in BC. And it should not be overlooked that some individuals are paralegals because of their many years of job experience which has allowed them to become trained professionals working under the supervision of a lawyer.

The BC Paralegal Association ("BCPA") promotes the growth and professional development, continuing education, and networking of paralegals. Unlike the Law Society of BC and the Society of Notaries Public of BC, the BCPA is not a regulatory body.

The BCPA recognizes paralegals who have successfully completed programs at Capilano University, Vancouver Community College, and University of the Fraser Valley and who are currently working as a paralegal to be eligible for voting membership in the Association. They also recognize those individuals who have not attended one of those schools, but who are currently employed as a paralegal with a minimum of five years of experience to be voting members of the Association, provided their supervising lawyer signs a declaration confirming years of employment.

Throughout the years, the BCPA has worked to advance the recognition of paralegals in BC through certification and/or occupational title protection to help clarify the role and increase the profile of paralegals.

I had the opportunity to attend a town hall hosted by the BCPA on November 9, 2022. This was an opportunity for the directors of the Association to engage with its members regarding questions members had about the Ministry's Intentions Paper. It was interesting to note that some members were focused on the ability to use the title 'paralegal' and title protection.

The Ministry's Intentions Paper does not propose to license paralegals as a way to regulate who can call themselves a 'paralegal'. As noted in the introduction of the Intentions Paper, the announcement of modernizing the framework is to "help make it easier for the public to access legal services and advice." While I appreciate that there continues to be, at times, uncertainty in the industry about what a 'paralegal' is, I am concerned that some paralegals are confused about the objective behind the Ministry's announcement of a single legal regulator. I urge paralegals to read (or perhaps re-read) the Intentions Paper to better understand that the Ministry is looking at a single legal regulator from an access to justice perspective and not for the purposes of title protection for paralegals. This is about providing the public with more options to access legal services.

Scope

Currently, paralegals in BC work in all different practice areas and there is no limit as to what areas of law they can work in provided they do so under the supervision of a lawyer. Further, for those paralegals that have been approved in the innovation sandbox, they can provide the services independent of lawyers as set out in their proposal approved by the Law Society.

It is worth considering the only Canadian jurisdiction that has paralegals who are regulated. Paralegals in Ontario are regulated by the Law Society of Ontario and are permitted to practice in defined areas, including traffic court, small claims court, tribunal work (landlord-tenant cases, human rights cases, Workplace Safety & Insurance Board claims to name a few) and certain criminal matters. And most recently, Ontario has recently seen an expansion in the scope for paralegals. At convocation on December 1, 2022, the Benchers in Ontario approved a motion for the Family Legal Service Provider ("FLSP") license which will allow paralegals to provide a limited scope of service in family law matters after completion of a training program.[8] It has taken Ontario 15 years to expand the area in which paralegals can practice.

The Intentions Paper suggests licensed paralegals should have a "common scope or scopes of practice in specific areas, such

as family and/or corporate law, and/or certain litigation matters." The Intentions Paper also sets out that the Ministry is exploring a minimum scope (or scopes) of practice for licensed paralegals in the new statute, while also suggesting permitting the regulator to expand on scopes or create new ones. Another option considered by the Ministry is to permit the regulator to establish a minimum scope for licensed paralegals within a specific time.

In their written submissions to the Intentions Paper, the BCPA proposes that an initial scope of practice be set by the regulator in its regulations within a prescribed period of time (i.e., no more than nine months).

I would suggest that paralegals give scope the most consideration when looking at the Intentions Paper. I do not believe that practice areas should be limited to specific areas such as family and/or corporate law and/or certain litigation matters. Given the landscape of paralegals in BC, limiting practice areas would create a barrier to paralegals who wish to be licensed paralegals, which would reduce options for the public to access legal services and legal advice. Further, if the Ministry were to embark on a debate as to what areas should be included in the statute for licensed paralegals, there is concern is that such debate will simply protract the process of licensing paralegals.

Hasn't this process been protracted long enough? How many more years will BC consider and debate the regulation of paralegals?

How is further delay in the public interest?

Similarly, setting out a scope of practice in the legislation has the potential be too restrictive. Consideration should be given to what happened in Washington State. In June of 2012, the Washington Supreme Court authorized the creation of the Limited License Legal Technician (LLLT) role. LLLTs are licensed by the Washington Supreme Court to advise and assist people going through divorce, child custody, and other family law matters in Washington. LLLTs are limited to family law. They are permitted to consult with and advise clients, complete and file necessary court documents, assist unrepresented clients at certain types of hearings and settlement conferences, help with court scheduling and support clients in navigating the legal system.

The first LLLT candidates entered their practice-area education classes in 2014. In 2015, the first LLLTs were licensed by the Washington Supreme Court. By March 2017, there were only 15 certified LLLTs.[9] On June 4, 2020, the Washington Supreme Court decided to sunset the LLLT program. The result is that all requirements for an LLLT license must have been completed by July 31, 2023, and no new licenses will be issued after that date. At present, there are 26,719 active attorneys and only 76 active LLLTs in Washington.

In my view, the scope of LLLT program was too restrictive. Understandably, it took several years to design the training and regulations and develop the program framework. However, because it was only in family law, it eliminated those from other practice areas from becoming licensed. Given the landscape of paralegals in BC, restricting practice area and scope could potentially eliminate a large number of paralegals, who are already practicing in areas in which they have been for years, from being licensed. This obstacle would seem to have the opposite effect of the Ministry's intention of facilitating better access to legal services for the public. Is it in the public interest to limit the number of legal service providers?

To me, modernization of the regulatory framework means a more modern and flexible licensing approach for paralegals based on competency. The regulator (whoever that will be) should be given the authority to recognize the education, skills, and experience that paralegals have and be given the broad authority to regulate. This will allow for paralegals that wish to be regulated to apply to the regulator and make representations as to what services they can provide to the public in a competent manner.

Conclusion

As referenced by the Ministry in the Intentions Paper, "The rationale for change is simple. Far too many people in BC cannot afford the cost of a lawyer." Because of the types of paralegals in BC, I do not think paralegals will all want the same thing in terms of regulation. There will be paralegals who want to be regulated to work on their own independent of lawyers. There will be paralegals who want to be regulated to work as licensed paralegals within a law firm and provide services directly to the public. There will be paralegals who want to be regulated to be part of a recognized profession. And there will be paralegals that want to continue the status quo and who do not want to be subject to regulation. But for those that want to provide legal advice and legal assistance without supervision by a lawyer, a flexible licensing approach should be taken because that will provide the public with more options to access legal services. And the regulator should regulate to ensure protection of the public. I doubt that British Columbians are prepared to wait for years while the legal profession continues to debate this issue. Hasn't it been long enough?

1 https://news.gov.bc.ca/releases/2022AG0029-000285
2 https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/legalservicesproviderstf_final_2013.pdf
3 Paragraph 1.2 of Ministry of Attorney General Intentions Paper, page 9
4 https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports legalservicesproviderstf_final_2013.pdf, paragraph 31
5 https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/legalservicesregulatoryframeworktf.pdf
6 https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2018/2018-agm-notice-december-4,-2018/#resolutions
7 https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/2020LicensedParalegalTaskForceReport.pdf
8 https://s3.amazonaws.com/tld-documents.llnassets.com/0041000/41720/convocation-december-2022-treasurers-report-flsp-en.pdf
9 https://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf

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.

Regulation and Employment Law: The Wrongful Dismissal Context

The proposed new regulatory framework for legal services will not have any direct impact on lawyers practicing in employment law. However, regulation in general, and the regulatory framework that is imposed on any profession or industry, has potential implications for the determinations that are made in a wrongful dismissal case.

This is particularly so for a determination of whether just cause for a termination exists. While the regulatory body will be determining an issue separate from the issues that are dealt with in a wrongful dismissal case, the evidence that is created in the regulatory proceeding and the facts underlying the regulatory proceeding may be relevant, and even determinative, of the wrongful dismissal claim. The findings of the regulatory body provide the court with a measure of standards of conduct and the seriousness with which the consequences of that conduct may be viewed, both of which are considerations in a determination of whether just cause exists.

It has long been recognized that in certain circumstances, the right to summarily dismiss an employee exists. The Supreme Court of Canada has called summary dismissal the "capital punishment" of employment law. Termination for cause should be viewed as an option of last resort. The test for just cause was described by the Ontario Court of Appeal as follows:

If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial the employer's business, or if he has been guilty of willful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right to summarily to dismiss the delinquent employee.[1]

Just cause can be found if an employee engages in conduct which is "incompatible with the faithful discharge of his or her duty to the employer". If the employee acts in a manner which is inconsistent with the faithful discharge of his duty, that conduct is misconduct and may justify immediate dismissal.

One of the factors considered in a determination of whether just cause exists, is whether the conduct is prejudicial to or is likely to be prejudicial to the interests or reputation of the employer.[2] Whether or not the misconduct will justify dismissal turns upon the facts and misconduct in each particular case.[3] Determination of whether a single act of misconduct will justify summary dismissal is different than consideration of whether ongoing misconduct will justify dismissal.

> **A single act of misconduct can be sufficient grounds for termination if it is such that it has the potential to interfere with and to prejudice the safe and proper conduct of the business of the employer.**[4]

When an employee has committed misconduct that amounts to just cause, the employer is entitled to summarily dismiss them.

Just cause exists when the employee's misconduct gives rise to a breakdown of the employment relationship. There is no line in the sand for the degree of misconduct required to justify a with cause dismissal, rather the degree of misconduct required varies with the facts and the particular employment context. Regardless of the factual background to constitute just cause, the misconduct must be to such a degree that it either:

- violates an essential condition of the employment contract;
- breaches the trust/faith that is inherent in the working relationship; or
- is fundamentally or directly inconsistent with the employee's obligations to the employer.[5]

To determine whether there is just cause for termination, the core question is whether the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. It has been described in the following terms:

> **Just cause is conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.[6]**

In determining the seriousness of the misconduct, the Court must consider the consequences of the wrongful act or omission.

> **In circumstances where the employee's misconduct interferes with and prejudices the safe and proper conduct of the business of the employer, and has serious consequences, this constitutes serious misconduct, and a single incident is sufficient to justify dismissal.**[7]

Regulatory proceedings and the evidence garnered in those proceedings can be used to help the court come to a determination of whether the misconduct of the employee is such that summary dismissal is justified.

An example of the role that regulatory proceedings can play in a wrongful dismissal case can be found in the case of *Harrop v. Markham Stouffville Hospital*.[8] In this case the plaintiff nurse was terminated for cause after it was discovered that she had a social relationship with an ex-patient. A large part of the judgment considers the evidence that was generated in the regulatory proceeding before the College of Nurses. A complaint was lodged with the College against the plaintiff of professional misconduct for entering into the relationship with the ex-patient. A finding of professional misconduct was made the by the College of Nurses but the plaintiff continued to maintain that her dismissal was not justified.

The plaintiff was a psychiatric nurse. She had developed a relationship with a patient after their discharge from the hospital. The establishment of a social relationship with an ex-patient in these circumstances was viewed by the hospital as fundamentally wrong and a decision was made to terminate the plaintiff's employment. The receipt of the information about the relationship also triggered a requirement to report to the College of Nurses. The letter to the College of Nurses included a complaint by the hospital of professional misconduct but the hospital was not involved in the discipline proceedings at the College of Nurses, other than the initial provision of information.

The matter proceeded to the Discipline Committee of the College of Nurses, 11 months after the plaintiff had been terminated. The plaintiff was represented by the same legal counsel at the College of Nurses complaint as in her wrongful dismissal complaint. The hearing at the College of Nurses proceeded on the basis of an Agreed Statement of Facts, with the plaintiff admitting that the College could prove the following:

a. Psychiatric nursing is a specialized area of nursing and differs from other domains of nursing by reason of its emphasis on the therapeutic relationship;
b. The nurse-client relationship is a therapeutic relationship and not a social relationship. Psychiatric nurses are taught about the dangers of crossing professional boundaries and entering into a social or non-therapeutic relationship. A loss of boundaries by the blending of the therapeutic and social roles is confusing to the patient, both for current and future therapeutic encounters;
c. Nurses at an institution are identified with that institution so that nurses are perceived by patients as part of the total set of health care professionals who look after them. This is particularly true in a small community hospital unit such as the Markham Stouffville Hospital. Nurses are the main contact people, unlike teaching hospitals where there are many professionals involved in the care or each patient; and
d. d) Some centres specify rules and guidelines for mental health professionals concerning social contact post-discharge. In other settings it is simply understood that, as part of the professional role, social contact does not occur.

The plaintiff conceded that the evidence at the hearing met the burden of proving the charge of professional misconduct. The Discipline Committee found the plaintiff guilty of misconduct and issued an oral reprimand.

At the wrongful dismissal trial, the plaintiff adopted the statements from the Agreed Statement of Facts in the College of Nurses proceeding, but still alleged that the termination was wrongful.

The agreed facts provided the factual foundation for the trial judge to determine whether just cause existed. The trial judge disagreed with the Plaintiff concluding:

> **74 I am of the opinion that the conduct of the plaintiff while an employee of the Markham Stouffville Hospital, breached reasonable standards of conduct expected of a highly experienced psychiatric nurse, jeopardizing the treatment of D.W., creating an apprehension of harm to the future treatment needs of D.W. and threatening the integrity of the treatment Unit. Her conduct was too serious a breach of standards to accept. It was evidence that she had no intention of ceasing her long, secret, social relationship with D.W. and was unable, notwithstanding her professed worry about losing her job if the facts became known, to acknowledge that what she was doing was wrong.**

This decision demonstrates that counsel in employment law cases, whether acting for the employer or the employee, must be mindful of the regulatory proceedings. The evidence that is considered in response to a complaint, and the findings of the regulatory body, may have implications for the findings and conclusions that are reached in the wrongful dismissal case.

1 *Port Arthur Shipbuilding Co. v. Arthurs*, 1967 CarswellOnt 135 (Ont. C.A.)
2 *Pearce v. Foster* (1886), 17 Q.B.D. 536 (C.A.)
3 *Charlton . British Columbia Sugar Refining Co.*, [1924] 1 D.L.R. 570 (B.C.S.C.)
4 *Stillwell v. Audio Pictures Ltd.*,
5 *McKinley v. BC Tel, 2001* CarswellBC 1335 (S.C.C.)
6 *Leung v. Doppler Industries Inc.*, 1995 CarswellBC 2557 (B.CS.C.), affirmed 1997 CarswellBC 294 (B.C.C.A.)
7 *Murphy v. Sealand Helicopters Ltd.* (1988), 72 Nfld & PE.I.R. 9 (Nfld. T.D.)
8 1995 CarswellOnt 1034, [1995] O.J. No. 4018, 16 C.C.E.L. (2d) 214

WELCOME NEW MEMBERS

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

Naajia Ali, Victoria
Knowren Ansari, Victoria
Abby Banerjee, Victoria
Taylor Bornhold, Victoria
Averi Brailey, Victoria
Hannah Breckenridge, Vancouver
Aislynn Brown, Vancouver
Madison Burt, Victoria
Sarah Cairns, Victoria
Emma Camicioli, Victoria
Anthony Carlino, Victoria
Alison Carter, Victoria
Marcella Chan, Vancouver
Carter Chen, Richmond
Brian Cheong, Victoria
Joseph Chien, Richmond
Annie Chochla, Victoria
Shermaine Chua, Victoria
Layne Clarke, Victoria
Jacqueline DeSantis, Victoria
Lauren Dohler, Victoria
Nick Downer, Victoria
Autumn D'Souza, Victoria
Mursal Emami, Victoria
Matisse Emanuele, Victoria
Maddie England, Victoria
Colin Ferguson, North Vancouver
Tom Garvey, Lantzville
Benjamin Gelfand, Victoria
Mandeep Gill, Vancouver
Jeenat Gill, Victoria
Dilan Gill, Victoria
Max Gross, Victoria
Janet Helm, Delta
Sarah Hentschel, Vancouver
Josh Hoenisch, Victoria
Mallory Hogan, Vancouver
Sara Hosaini, Victoria
William Huang, Vancouver
Kirstin Jamison, Vancouver
Albert Karczewski, Victoria
Avneet Khosa, Victoria
Parveen Khtaria, Vancouver
Deanna Klassen, Abbotsford
Donna Krakowec, Victoria
Brenna Krause, Victoria
Kaylea Kray-Domingo, Victoria
Donna Kroker, Victoria
Zosia Larrivee, Vancouver
Ji Hye Lee, New Westminster
Jacob Leinburd, Victoria
Rachel Lewis, Victoria
Delaney Long, Kelowna
Hailey Lonsdale, Vancouver
Tanner Lorenson, Victoria
Hapin Lyu, Victoria
Chance MacKay-Topley, Victoria
Juliana Malara, Victoria
Jaspreet Mann, Victoria
Chloe Manthorne, Victoria
Gabriel Martz, Victoria
Aivrey Mckinley, Victoria
Taylor McLean, Victoria
Bradley McQueen, Victoria
Lukas Milne, Vancouver
Grant Morrison, Port Moody
Liam Morrison, Victoria
Alex Myrie, Kamloops
Deborah Olatunbosun, Surrey
Anna Pachal, Victoria
Sydney Patterson, Victoria
Kai Peetoom, Victoria
Stephanie Piper Arroliga, Victoria
Sean Price, Victoria
Virginia Richards, Vancouver
Haley Richardson, Victoria
Brittany Rousseau, Port Alberni
Nico Rullmann, Victoria
Ammin Sahdra, Victoria
Declan Sakuls, Victoria
Arsh Sarkaria, Surrey
Jack Scanlon, Victoria
Makayla Scharf, Victoria
G.C. (Scottie) Scott, Surrey
Sara Sebti, Victoria
Vicky Shah, Oakville
Eric Shapiro, Victoria
Nick Sheffield, Victoria
Jasmine Shivji, Burnaby
Ana Simeon, Victoria
Sabrina Sinclair, Surrey
Suman Singh, Victoria
Gage Smith, Victoria
Oliver Spinks, Vancouver
Grace Stanyer, Victoria
Kassie Starnes, Victoria
Liam Su, Vancouver
Emma Sullivan, Victoria
Jenissa Sunderji, Victoria
Melika Tashakor, West Vancouver
Paymon Tavakoli, Victoria
Robyn Trevorrow, Victoria
Merel Veldhuis, Vancouver
Alana Ward, Victoria
Jack Welsh, Victoria
Tara-Lynn Wilson, Kamloops
Caitlin Wright, Victoria
Min Su Yang, Coquitlam
K.C. Yen, Victoria
Megan Young, Vancouver
Tigerson Young, Richmond
Linting Zhang, Surrey

* ALL MEMBERSHIP INFORMATION AS AT 5 JANUARY 2023

THANK YOU FROM TLABC

Our sincere appreciation and thanks to the following TLABC Members:

HONOURARY MEMBERS

Linda Atkinson
Adrian Chaster
John Noel Laxton KC
Ronald F. MacIsaac
Robert W. Mackay
Donald W. Maskall
Richard L. Middleton
Thomas J. Murray
Darrell W. Roberts KC
Terrence L. Robertson KC
Arthur Vertlieb KC

BENEFACTOR MEMBERS

Shelly Avram
Giuseppe Battista KC
Christopher Dyson
John Green
Thomas Harding
Azool Jaffer-Jeraj
John Kennedy
David Allan Klein
Andreas Kuntze
Douglas Lester KC
Jeffrey Logan
Conrad Margolis
Paul McMurray
A.W. McGarvey
Joseph Murphy KC
Kerri Priddle
Joseph Prodor
Michael Slater KC
David Sliman
Jennifer Tater
Peter Unruh
Anthony Vecchio KC
James Vilvang KC
Barbara Webster-Evans
Michael Yawney KC
Patrick Yearwood

SUSTAINING MEMBERS

Renee Aldana
Marsha Bishop
James Buckley
Dick Byl
Robert Cameron
Morgyn Chandler
Richard Chang
Douglas Chiu
Matthew Cleary
Daniel Corrin
Rajwant Dewar
Ian Donaldson KC
Diane Drummond
Jon Duncan
Glenn Einfeld
Megan Ellis KC
Kevin Filkow
Robert Gibbens KC
Edward Patrick Good
David Grunder
Brent Hambrook
John Hemmerling
Michael Hoogbruin
Agnes Huang
Vahan Ishkanian
Gary Jackson
Joseph Jacoe
Jaimie Kidston
Krishan Klear
Irina Kordic
William Rory Lambert
Georgialee Lang
William (Bill) MacLeod
Duncan Magnus
Barri Marlatt
Daniel McDonagh
Robin McFee KC
Dale McGregor
Richard McMullan
Joseph McStravick
Edward Montague
Ronald Nairne
Dan Parlow
A.C. Richard Parsons
Bableen Rana
James Richards
John Richter
Krista Simon
Michael Steven
Khushpal Taunk
Jeremy Thom
Garry Thomas
E. Anthony Thomas
R. Trevor Todd
Perminder Tung
Meghan Wallace
Morris Warren
Jeffrey Witten

PAST PRESIDENTS

2022 - Bill Dick KC
2021 - Kevin Gourlay
2020 - John Rice KC
2019 - Ronald Nairne
2018 - Sonny Parhar
2017 - Keri Grenier
2016 - Aseem Dosanjh
2015 - Krista Simon
2014 - A.C. Richard Parsons
2013 - Hon. Dennis Hori
2012 - Marc Kazimirski
2011 - Azool Jaffer-Jeraj
2009-10 - Robert Holmes KC
2008 - Stephen Frame
2007 - Rose Keith KC
2006 - Hon. Gary Weatherill
2005 - Jeffrey Witten
2004 - Rick Gambrel
2003-04 - David Osborne
2002-03 - Hon. Maris McMillan
2001-02 - Donald Renaud
2000-01 - Anthony Vecchio KC
1999-2000 - Noreen Collins
1998-99 - David Klein
1997-98 - Edward Montague
1996-97 - James Murphy
1994-96 - Hon. Nathan Smith
1993-94 - James Vilvang KC
1992-93 - Joseph Murphy KC
1991-92 - Robert Deering
1990-91 - Adrian Chaster
1988-90 - David Stuart
1987-88 - Kenneth Price
1986-87 - R. Trevor Todd
1984-86 - Humphrey Waldock
1983-84 - Ian Sisett
1981-83 - Arthur Vertlieb KC
1980-81 - Bob Mackay

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 5 JANUARY 2023

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.

Why Non-Lawyer Mediators Will Not Be Included in the New Regulatory Framework

In March 2022 the Ministry of the Attorney General put forward a proposal to modernize the regulatory framework for legal services with the overarching goal of improving access to legal services and better protecting the public interest. As mediators are providing legal services, the question arises as to whether all mediators, including non-lawyer mediators, will be included within the regulatory framework.

While many mediators are practicing lawyers, many are non-lawyers. The lawyer mediators are bound by their professional obligations as lawyers, along with the regulatory framework that provides for governance, standards of practice and oversight. Non-lawyer mediators are not bound by the professional obligations of lawyers and it is not contemplated that with the modernization of the regulatory framework, they will come under its umbrella

The proposal put forward by the Ministry of Attorney General involves legislation that would regulate all legal service providers under a single statute and a single regulator. The mandate for the regulator is to protect the public and the public's interest in accessing legal services and advice. The legislation would regulate lawyers, notaries and paralegals.

Notaries are currently regulated under the *Notaries Act* rather than the *Legal Profession Act* while paralegals are not currently directly regulated in BC, although the 2018 amendment to the *Legal Profession Act* gave the Law Society the authority to regulate licensed paralegals in BC.

The Attorney General's rationale for the proposed regulatory change centers in large part on the inability of people in BC to afford the cost of a lawyer. It is recognized that the rules around who is able to provide what legal services bears directly on the availability and cost of those services.

> **The reason for the proposals is to improve access to legal services, enhance focus on public interest protection and improve efficiency, effectiveness and flexibility of the regulatory framework.**

The two key identified objectives of the proposed changes are to facilitate better access to legal service and to modernize the governance framework for all legal service providers.

There are several benefits identified by the Attorney General to having a single statute governing all legal professionals and a single regulator. Those benefits include:

- Consistent expectation of professional accountability regardless of the specific professional

- Better capacity to identify gaps in underserved areas and to regulate in a manner that addresses those gaps
- Elimination of the need for coordination amongst regulators
- Ease of identifying what kind of legal help is available by the public when faced with a problem and who to contact with concerns about service
- Increased public confidence that the regulator is regulating in the public's interest and not in the interest of any one particular profession

The Regulator would have the authority to regulate the competence and integrity of all those providing legal services in BC and to promote the rule of law. The core responsibilities would include establishing conditions of registration, establishing and enforcing standards of practice as well as continuing competency requirements and maintaining a publicly-available register of licensees.

While the current proposal only covers lawyers, notaries and licensed paralegals, the proposal includes provision for additional categories of legal services providers to be included in the future. Non-lawyer mediators clearly provide legal services, and there is a clear interest and benefit in having registration, standards of practice and continuing competency requirements. The proposed regulatory framework provides that the level/extent of regulation will be proportional to the risk/to the need to protect the public.

If the provision of legal information and law-related assistance does not require regulation to protect the public, then those individuals should not be regulated. Similarly, if only some level of oversight is required, the regulation should be only with respect to that area where it is required, with regulation occurring in a manner that is proportionate to the risk.

Mediators are not decision-makers and they are not hired to provide legal advice. Rather, mediators are hired to facilitate negotiation. While mediators can be evaluative in their approach, they cannot unilaterally affect the outcome. Furthermore, the rosters in which mediators are registered have establish standards of practice and continuing competency requirements, which enable the public to access information about the mediators. These factors make it unnecessary to layer on a further level of regulation and have led to the result that non-lawyer mediators will not be captured by the proposed new regulatory framework.

FROM PAGE 10

COSTS — Matrimonial proceedings — Outcome of litigation • Offer to settle — Court finding claimant the more substantially successful party at trial and entitled to costs under SCFR 16-1(7), but also finding that she ought to have accepted respondent's offer to settle made shortly before trial — Considering that the offer was reasonable but not as favourable as or better than the award made after trial, claimant awarded costs up to date of offer, with parties to bear their own costs after that date. Following trial the court made orders regarding a number of issues relating to family property and child and spousal support. The claimant sought costs of the action on the basis that she was either entirely or substantially successful on the most significant and time-consuming issues. The respondent sought costs as of February 2022 based on his offer to settle made shortly before trial. Held, costs to claimant up to date of offer; parties to bear own costs after that date. Overall, the claimant was the substantially successful party at trial, particularly in regard to the respondent's Guidelines income and her compensation for her interest in a company. The respondent was more successful in regard to the parenting schedule, and the parties had divided success on a number of more minor issues. Therefore, pursuant to SCFR 16-1(7), the claimant was entitled to costs. However, the claimant ought to have accepted the respondent's offer to settle. The offer was very similar to the orders the court made, in regard to the respondent's Guidelines income, child support, spousal support, parenting schedules, and compensation payments over time. The respondent's offer was reasonable, but viewed globally, it was not as favorable as or more favourable than the award made after trial. Rule 11-1(5)(a) applied and the claimant ought to be deprived of some or all of her costs and disbursements after the date of the offer. The fairest outcome was an award of costs to the claimant up to the date of the offer, with the parties to bear their own costs and disbursements after that date. Z. (D.) v. Z. (M.) (https://www.bccourts.ca/jdb-txt/sc/22/15/2022BCSC1510.htm) S.C., D. MacDonald J., 2022 BCSC 1510, Vancouver E202457, August 29, 2022 , 14pp., [CLE No. 78021] • Supplementary to 2022 BCSC 706, [2022] C.D.C. 77169 (CLE) and 2022 BCSC 1462, [2022] C.D.C. 77975 (CLE) • M. Henricksen, for claimant wife; J. Lewis, for respondents. Principal case authorities: M. (S.A.) v. M. (J.A.), 2017 BCSC 2348, [2018] C.D.C. 65845 (CLE) — considered. Sampley v. Burns, [2018] C.D.C. 66873 (CLE), 2018 BCCA 178— considered. Wafler v. Trinh, [2014] C.D.C. 55326 (CLE), 2014 BCCA 95 — considered.

COSTS — Offer to settle — Time-limited offers •In personal injury action in which defendant admitted liability at start of trial, plaintiff making pre-trial offer to settle for $400,000, offer being open for acceptance within 3 days — Following trial, plaintiff awarded global damages in the amount of $546,500 — Court awarding plaintiff costs at Scale B until date of settlement offer and double costs thereafter — Offer was one defendant ought reasonably to have accepted — When offer was made, both parties were well aware of the facts of the case and the anticipated evidence at trial and timeline for acceptance, albeit tight, was not unreasonable in the circumstances. Gatti v. Savin (https://www.bccourts.ca/jdb-txt/sc/22/13/2022BCSC1306.htm) S.C., Hardwick J., 2022 BCSC 1306, Penticton M44509, August 5, 2022 , 8pp., [CLE No. 77830] • See also [2022] C.D.C. 77807 (CLE), 2022 BCSC 1304 • M.D. Brooke, for plaintiff; R. Goldstong and H.E. B. de Loi, for defendant. Principal case authorities: Aujila v. Kaila, 2011 BCSC 466, [2022] C.D.C. 47775 (CLE) — considered. Hartshorne v. Hartshorne, [2011] C.D.C. 47174 (CLE), 2011 BCCA 29 — considered. Sauer v. Scales, [2012] C.D.C. 45895 (CLE), 2012 BCSC 1883 — considered. Smith v. Tedford, [2010] C.D.C. 45724 (CLE), 2010 BCCA 302 — considered.

COSTS — Offer to settle — Conduct of parties • At summary trial, plaintiff succeeding in obtaining order for payment of $250,000 — Plaintiff seeking order for double costs, saying it had offered to settle for that amount — Trial judge finding that it was reasonable for the defendants to have refused the offer to settle in the circumstances, where the discovery of the plaintiff had not concluded at the time of the offer — Court rejecting defendants' request for parties to bear their own costs, finding no misconduct that would deprive the successful plaintiff of costs — Judge taking the view that what might be described as "imperfect or less than optimal" litigation conduct does not generally attract a costs sanction — Plaintiff entitled to Scale B costs. Han-Earl Consulting Ltd. v. 1048661 BC Ltd. (https://www.bccourts.ca/jdbtxt/sc/22/12/2022BCSC1238.htm) S.C., Stephens J., 2022 BCSC 1238, Vancouver S1911460, July 20, 2022 , 5pp., [CLE No. 77739] • See also 2022 BCSC 1073, [2022] C.D.C. 77537 (CLE) • K. Tirmandi, for plaintiff; L.M.A. Kotler, for defendants. Principal case authorities: LeClair v. Mibrella Inc., [2011] C.D.C. 47883 (CLE), 2011 BCSC 533 — applied.

COSTS — Outcome of litigation — Divided success •In personal injury action, court finding plaintiff 65% at fault — Plaintiff awarded 80% of his costs at scale B — Court finding application of s. 3(1) of Negligence Act, requiring defendant to pay only 35% plaintiff's costs, would result in an injustice — Plaintiff's injuries were serious and likely to impair his ability to work for the rest of his life; the plaintiff faced significant hurdles establishing liability given the circumstances of the accident; plaintiff had no other option but to proceed to trial to obtain recovery; trial was of moderate difficulty and liability, causation and damages were all in issue; if costs award were limited to 35%, plaintiff would be faced with a $32,000 shortfall in his trial costs and disbursements, an amount representing 13% of the damages awarded; and damages awarded were more than 14 times higher than the amount urged by the defendant and less than a quarter of that sought by the plaintiff. Carrero v. Park (https://www.bccourts.ca/jdb-txt/sc/22/15/2022BCSC1523.htm) S.C., Milman J., 2022 BCSC 1523, Vancouver M188454, August 30, 2022 , 7pp., [CLE No. 78032] • See also 2022 BCSC 582, [2022] C.D.C. 77031(CLE) • S. Wheeldon, for plaintiff; R.V. Gunnarsson, for defendant. Principal case authorities: Cornish v. Khunkhun, [2015] C.D.C. 58826 (CLE), 2015 BCSC 832 — considered. Ekman v. Cook, 2015 BCSC 1863, [2015] C.D.C. 59972 (CLE) — considered. Elima v. DhaliwaL, 2018 BCSC 115, [2018] C.D.C. 66084 (CLE) — considered. Moses v. Kim, [2008] C.D.C. 39340 (CLE), 2007 BCSC 1820 — considered. Spence v. Yellow Cab Co. Ltd., [2019] C.D.C. 73055 (CLE), 2019 BCSC 1540 — considered.

EMPLOYMENT — Constructive dismissal • Contract of employment — Terms — Defendant employer implementing mandatory COVID vaccination policy to which plaintiff objected — Plaintiff thus placed on initial 3-month unpaid leave of absence in accordance with policy — Plaintiff resigning 2 months later — Court finding the policy a reasonable and lawful response to COVID-19 pandemic, that defendant acted reasonably in placing plaintiff on

unpaid leave, and that plaintiff was not constructively dismissed — Action dismissed. The plaintiff alleged that she was constructively dismissed from her employment with the defendant when she was placed on an unpaid leave of absence after refusing to comply with defendant's mandatory COVID vaccination policy. The defendant's business was providing condominium management services. It had approximately 220 employees. Its property managers interacted with strata council members, residents, and strata employees. The plaintiff was an accounting professional. She had signed an employment agreement in which she agreed, inter alia, that she was required to comply with all policies "as amended from time to time by [the defendant] in its discretion". After BC declared a state of emergency in respect of the COVID-19 pandemic in 2020, the employer developed a plan to respond to the pandemic. In October 2021the defendant instituted the mandatory vaccination policy which required all employees to be fully vaccinated by November 24, 2021. The policy provided for medical or religious exemptions. For those employees who, for personal reasons, wished to remain unvaccinated, the policy provided that they be placed on an unpaid leave of absence. Only the plaintiff and one other employee did not comply. The plaintiff was placed on an initial three-month unpaid leave of absence effective December 1. On January 26, 2022 she emailed the defendant to say that she was resigning, considering herself to have been constructively dismissed. She found alternative employment just over two months later with a higher compensation package. On the summary trial of the constructive dismissal claim, Held, action dismissed. Given that the defendant's vaccination policy was reasonable and the plaintiff chose not to get vaccinated, she was not constructively dismissed. The employment contract expressly allowed the defendant to implement and amend workplace policies and obliged the plaintiff to comply with them. The only implied qualification was that any such policy would be reasonable and lawful. The vaccination policy was a lawful and reasonable approach when implemented, given the uncertainties then presented by the pandemic, the state of knowledge about COVID-19 at the time, and the defendant's obligation to protect the health and safety of its employees, clients, and the residents in the buildings to which it provided property management services. The surrounding circumstances included the declared state of emergency; orders requiring wear face coverings in public places, and proof of vaccination as a precondition to attending or participating in most public events and restaurants, pubs and bars; requirements that all federal employees, BC employees employed in the health care sector and public service be vaccinated against COVID-19; and that employers in the private sector were strongly encouraged to adopt and implement policies that aligned with government directives. The court would take judicial notice of the facts that COVID-19 is a potentially deadly virus that is easily transmissible; that symptoms of the virus may vary from person to person, and asymptomatic carriers can infect others; that the virus can mutate; there is no known immunity to contracting the virus and no verifiable evidence of natural immunity to contracting it, or a known mutation, a second or more time; and that vaccines work in reducing the severity of symptoms and bad outcomes. Many private sector employers had implemented mandatory vaccination policies. The defendant's policy reflected the prevailing approach at the time, and struck an appropriate balance between the defendant's business interests, the rights of its employees to a safe work environment, its clients' interests, and the interests of the residents in the properties it serviced. It satisfied its responsibility as a corporate citizen. It ensured that individuals like the plaintiff could maintain a principled stance against vaccination without losing their employment by being put on a leave of absence. It reflected its statutory obligation under s. 21 of the Workers Compensation Act to ensure the health and safety of its employees. It was clear that the defendant intended to review the policy as information was gathered and more was learned about COVID-19. If the pandemic subsided, the plaintiff would have been able to return to productive work with the defendant. The plaintiff's entitlement to her beliefs did not entitle her to impact other employees or, potentially, the thousands of residents in buildings to which the defendant provided property management services. The plaintiff's choice did not result in the termination of her employment contract. It was clear that the defendant wanted the employment relationship to continue. It was the plaintiff who resigned, taking the position that she had been constructively dismissed. Her refusal to comply with the policy was a repudiation of her contract of employment which the defendant did not accept. She was not constructively dismissed. Parmar v. Tribe Management Inc. (https://www.bccourts.ca/jdbtxt/sc/22/16/2022BCSC1675cor1.htm) S.C., MacNaughton J., 2022 BCSC 1675, Vancouver S220954, September 26, 2022 , 37pp., [CLE No. 78203] • J.G. Howard and S. Chern, for plaintiff; L. Robinson and M. Mackoff, for defendant. Case authorities: Benke v. Loblaw Companies Ltd., 2022 ABQB 461 — considered. Communications, Energy & Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34 — considered. Devlin v. NEMI Northern Energy & Mining Inc., [2011] C.D.C. 46978 (CLE), 2010 BCSC 1822 — applied. Lewis v. Alberta Health Services, 2022 ABQB 479 — considered. Lumber & Sawmill Workers' Union,

Local 2537, and KVP Co. Re (1965), 16 L.A.C. 73 (O.N.L.A.) — considered. Maddock v. British Columbia, 2022 BCSC 1065 — considered. Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10 — applied. Reininger v. Unique Personnel Canada Inc. (2002), 21 C.C.E.L. (3d) 278 (Ont. S.C.J.) — distinguished.

FAMILY LAW — Common law spouses — Nature of relationship • Property — Characterization — Trial judge finding parties were in a marriage-like relationship from 2001 to May 2015 — Properties they acquired in that time found to be family property, including property that had originally been respondent's excluded property — Judge finding large personal injury settlement losing excluded characterization as result of respondent depositing it in joint accounts with donative intent — Judge finding no reason to depart from presumption of equal division — Judge allowing claimant's equal division claim with respect to total assets of about $2 million — Court of Appeal dismissing respondent's application to adduce fresh evidence and dismissing his appeal. The parties were both born and raised in the United Kingdom. They met in Scotland in the mid-1990s and lived together in Manchester in the 2000s. Prior to commencement of the relationship, the respondent purchased an apartment in Manchester ["Grand"]. The parties purchased a second apartment in Manchester, ["Church"], in 2003, but registered it in the claimant's name. The respondent was a pilot and worked in various locations both within and outside of the United Kingdom. He worked as a pilot in Vancouver for six months, starting in late 2003. The claimant came to Vancouver to visit him and they discussed immigrating to Canada. In 2004, they applied for permanent residency and the respondent signed an agreement to purchase an apartment ["Yaletown"]. The purchase was completed in 2006. For most of their relationship, Yaletown generated rental income. In 2012, having obtained permanent residency, the parties moved to British Columbia, although the respondent continued to spend time abroad. They rented an apartment in Sechelt and began looking for a home to purchase. In 2014, they purchased a house ["Gibsons"]. It was initially purchased in the respondent's name but it was transferred into joint tenancy in May 2015. The next day, the parties separated following an argument. During their relationship, the respondent experienced two medical conditions that impacted his ability to work as a pilot. He suffered from anxiety, which was at times severe and required him to take anti-depressant medication, and at times, to take medical leave from employment. He was required to report his use of medication to the UK Civil Aviation Authority. However, he did not do so, and when his failure to disclose was discovered in 2006, he was dismissed from his employment. In 2002, he underwent surgery in his left eye to improve his vision. The surgery was not successful. In 2008, he commenced a malpractice lawsuit against the surgeon, alleging that he was unable to work as a pilot as a result of continuing problems with the vision in that eye. In December 2010, he accepted a settlement offer of £600,000. After receiving the settlement, he underwent corrective eye surgery in 2011, and was able to regain his pilot's license. The judge found that as of trial, his vision was not a fetter on his ability to work. The judge found it probable that the settlement funds represented non-pecuniary damages and compensation for loss of future income, and that none of it represented compensation for past income loss. As a result, the full amount was excluded property when received. However, the respondent placed the funds into joint accounts that the parties used to support themselves in the years following the settlement. The judge inferred that the respondent intended a gift of the funds to the claimant and accordingly found that the funds became family property. The result was that, although Gibsons was largely purchased using funds derived from the settlement, it was family property. The respondent commenced the family proceeding in November 2015. The respondent filed a response and counterclaim. The claimant sought unequal division of family property and debt, or alternatively, that it be divided equally. In his counterclaim, the respondent sought unequal division of family property and debt alleging significant unfairness because, among other claims: (i) he was lured to British Columbia by the claimant so as to impose on him a "community property regime which the parties had, at all material times prior, never sought, never discussed, never been subject to and never agreed upon"; (ii) when Yaletown was purchased in his sole name, "neither party had any right under any applicable system of law, to make property claims as against the other"; and (iii) the claimant made no financial contribution of any kind to the purchase of any of the properties. The trial judge examined the circumstances and determined that the respondent intended the transfer of the settlement funds into joint accounts to be a gift to the claimant. She also concluded that none of the funds used to purchase Yaletown were derived from the respondent's excluded property. As a result, the judge found that Gibsons and Yaletown were family property. After rejecting the respondent's arguments regarding excluded property, the judge considered whether it would be significantly unfair to divide the family property equally. The judge considered the respondent's strongest argument for unequal division to be that a significant portion of the family property had its origins in the settlement funds which were formerly excluded property. She recognized that the origin of family property as formerly-excluded property "is a factor that may cause an equal division of family property to be significantly unfair". The judge found no significant unfairness. Having decided that the family property should be divided equally, the judge determined that Gibson should be transferred to the claimant and that the respondent would retain Yaletown. She divided the other assets and ordered the respondent to make a compensation payment of $72,414 to equalize the division of family property. Six months later, the respondent applied to reopen the trial. The judge permitted him to reopen to lead evidence on capital gains taxes that could impact on the need for, or size of, the compensation payment. However, before they proceeded to the reopening of trial,

the parties entered into a settlement by means of a consent order. The respondent appealed the trial judgment. He also applied to adduce fresh evidence in the form of an expert report (the "Nguyen Report") on his latent income tax liability arising from the rental income received from Yaletown. He said the evidence could not have been discovered by reasonable diligence during trial as he did not know he had a latent tax liability. Held, application to adduce fresh evidence dismissed; appeal dismissed. The proposed fresh evidence was relevant and, if it were found to be credible and had it been adduced at trial, it might reasonably be expected to have affected the result. However, the respondent was unable to satisfy either the due diligence or credibility requirements. Even if the court accepted that the withholding tax liability could not have been discovered with due diligence on the part of the respondent or his counsel prior to trial (something that was not at all certain), it was clear that it was discoverable prior to the hearing of the application to reopen the trial. As well, the Nguyen Report was prepared based on facts, assumptions and representations provided by the respondent, not all of which were proven and some of which were controversial. Given the concerns about due diligence and credibility, the fresh evidence would not be admitted. As for the trial judge's analysis under s. 95(2) of the Family Law Act (FLA), the judge did not err in her treatment of the settlement funds for the s. 95(2) analysis. It was apparent that the judge described the settlement as a "windfall" because the respondent did not ultimately require the settlement funds to replace future losses of income arising as a consequence of the vision impairment occasioned by the negligent surgery. Characterizing the settlement as a windfall did not further the s. 95 analysis and, for that reason, the court would not endorse that characterization. However, the characterization of the settlement as a windfall was not, on its own, objectionable unless it led the judge into error in her s. 95(2) analysis. The judge did not err in taking into account the purpose for which the settlement funds were paid in exercising her discretion under s. 95(2). In the circumstances, that consideration was relevant to the economic characteristics of the spousal relationship. That brought the court to the respondent's primary position: that the judge erred in the s. 95(2) analysis by considering the financial advantage conferred on him as a result of his receipt of the settlement funds and the fact that his vision impairment was subsequently resolved through corrective surgery. While the respondent's argument did not focus on the contribution he made through the gift of the settlement funds to the claimant and their use for family purposes, it appeared that the real gist of his argument was that it was significantly unfair to divide the family property equally because of his contribution of those funds. There was no merit to the submission that the judge erred by failing to accept, "at face value", that the settlement funds were excluded property or that she ignored the principle that it is presumptively fair for a spouse to retain excluded property on separation. As the claimant pointed out, that submission effectively asked the court to ignore the judge's finding that the settlement funds were gifted to the claimant and that the property to be divided on separation was family property. In essence, the respondent was inviting the court to find that his formerly-excluded property—the settlement funds—retained some of its character as such even after it had been gifted to the claimant. It is the nature and extent of a spouse's contribution of formerly-excluded property, considered in light of all of the relevant circumstances(along with the specified factors under s. 95(2)), that is relevant to a decision as to whether it would be significantly unfair to divide family property equally. The fact that formerly-excluded property became family property does not, by itself, mean that it would be unfair, let alone significantly unfair, to divide family property equally. Rather, as with any kind of contribution to the family property and finances, a judge must consider the extent of the spouse's contribution of formerly-excluded property in light of the relevant circumstances and factors to decide whether equal division would result in significant unfairness. Here, that was precisely the approach taken by the judge. The judge accurately set out the legal principles applicable to the consideration of whether an equal division of property would be significantly unfair in accordance with s. 95. She properly described the principles applicable to consideration of "any other factor" under s. 95(2)(i) and proceeded to examine the legitimate economic expectations of the parties when they lived under a different legal regime and when they moved to British Columbia and became subject to the FLA regime with the presumption of equal division of family property. Having found that the financial contributions the parties made to the spousal relationship were relatively similar, she found that they did not have any legitimate expectations of keeping property separate. There was no principled reason for the judge to consider the differences between the legal regimes given her conclusion about the absence of any legitimate expectation that the parties would keep their property separate. Hannon v. Hopson (https://www.bccourts.ca/jdb-txt/ca/22/03/2022BCCA0314.htm) C.A., Butler, DeWitt-Van Oosten & Marchand JJ.A., 2022 BCCA 314, Vancouver CA47422, September 14, 2022 , 43pp., [CLE No. 78129] • Appeal from Warren J., 2020 BCSC 794, [2020] C.D.C. 72136 (CLE) • C.E. Hunter, KC, and S. Penney, for appellant; J.F. Brown and E. Gondo, for respondent. Principal case authorities: F. (V.J.) v. W. (S.K.), [2016] C.D.C. 61539 (CLE), 2016 BCCA 186 — applied. Palmer v. The Queen, [1980] 1 S.C.R. 759, 50 C.C.C. (2d) 193 — applied. S. (B.L.) v. S. (D.J.), 2021 BCSC 1311, [2021] C.D.C. 74985 (CLE) — applied. Singh v. Singh, [2020] C.D.C. 71275 (CLE), 2020 BCCA 21 — applied. Venables v. Venables, 2019 BCCA 281, [2019] C.D.C. 70060 (CLE) — distinguished.

LAW PROFESSION — Solicitor's fees — Contingency fee agreements — Interpretation • Lawyer and client entering 2 contingency fee agreements ("CFAs") related to 2 motor vehicle personal injury claims — One providing for a fee of "25% of my settlement or judgement, plus disbursements and taxes" — Other CFA pro-

viding for a fee of "25% of my settlement or judgement, plus disbursements, file charges, and taxes. Interest on disbursements and file charges will be calculated at 10% per annum" — On review, registrar finding the lawyer entitled to 25% of the trial judge's full award of $966,778, without the deductions allowed by the judge under the Insurance (Vehicle) Act, s. 83 of $123,770 for past wage loss and homemaking expenses already paid and $135,189 for future care costs — Registrar disallowing interest charge of $25,067 on disbursements, finding the lawyer did not fully explain to the client the interest provision. The client was injured in two motor vehicle accidents. One was a rear end collision and the other was an accident that involved the client suffering serious injuries while a transit bus passenger. The driver braked hard and she was thrown from her seat. She retained the law firm under two contingency fee agreements("CFAs"), one in April 2013, the other in June 2013. The term governing payment of the fee in the first CFA provided for a fee of "25% of my settlement or judgement, plus disbursements and taxes." The term in the second CFA was slightly different. The fee was to be "25% of my settlement or judgement, plus disbursements, file charges, and taxes. Interest on disbursements and file charges will be calculated at 10% per annum." The 15-day trial relating to both accidents took place in 2020. The trial judge awarded the client total damages of $966,778. The trial judge made the following deductions from the total award under s. 83 of the Insurance (Vehicle) Act: (a) $123,770 as having been paid for past wage loss and homemaking expenses in advance; and (b) $135,189 as the present value amount for future Pt. 7 benefits. The client sought a review of the legal fees. Two points were argued at the hearing: (a) Do the CFAs entitle the lawyer to 25% of the amount assessed at trial or to 25% of the judgment net of [IVA, s. 83] deductions? and (b) Is the provision in the second CFA that "interest on disbursements and file charges will be calculated at 10% per annum" fair and reasonable in the circumstances? Held, for lawyer on the first issue; for client on the second issue. The object of s. 83 deductions is to avoid double recovery. The CFAs were clearly intended to apply to the full judgment—i.e., the full amount recovered for the client. The purpose for s. 83 deductions being made is not engaged on an analysis of a contingency fee agreement. Indeed, making such deductions would deprive the lawyer of fees for significant work undertaken for the client. The court would conclude that the 25% contingent fee attached to the full trial judgment—the total award of $966,778. The law firm charged the client interest on disbursements funded by them from the time they were incurred until the cheque was received from ICBC in payment of the judgment. The amount of interest charged was $25,067. The onus was on the lawyer to show that the client was fully and fairly advised regarding the terms of the second CFA. The interest clause in the second CFA was not clear. There was no indication of when interest charges would begin to run. The "man on the Clapham omni-

bus" would be forgiven for assuming that interest would begin to run only after he, the "man", had been invoiced and the invoice remained unpaid. In the circumstance, the provision regarding interest in the second CFA could not be said to be fair. The most appropriate solution was to simply sever that term from the second CFA. Thus, there being no basis for interest to be charged on disbursements, the charge of $25,067 would be disallowed. The fees, disbursements, and taxes allowed to the law firm would be a total of $402,912. McIntosh v. Zhang (https://www.bccourts.ca/jdb-txt/sc/22/12/2022BCSC1232.htm) S.C., Master Muir as Registrar, 2022 BCSC 1232, Vancouver S217359, July 20, 2022 , 15pp., [CLE No. 77736] • See also 2020 BCSC 1521, [2021] C.D.C. 72873 (CLE), indexed as Zhang v. 328633 B.C. Ltd. • B.A. McIntosh, for law firm; A.J. Winstanley and L.J. Mackoff, for client. Principal case authorities: Klein Lyons v. Aduna, 2013 BCSC 1250, [2013] C.D.C. 53602 (CLE) — considered. Russell v. Parks, [2012] C.D.C. 51998 (CLE), 2012 BCSC 1962 — considered. Waldock v. Bissett (1992), 1992 CanLII 1002 (BC CA), 67 B.C.L.R. (2d) 389 — applied.

MEDICAL MALPRACTICE — Nurses • Hospitals and related institutions • PERSONAL INJURY QUANTUM — Hip • Elderly plaintiff — Nursing staff at defendant VGH breaching duty of care owed to elderly patient in failing to regularly reassess his risk of falling — Court finding failure to assign him one-on-one supervision causative of a fall in which he fractured his hip — Taking into account restrictions on plaintiff's mobility from the hip fracture and his unenviable health both before and after the fall, court assessing non-pecuniary damages of $75,000. The plaintiff sued for damages as a result of a fracture of his right hip sustained when he was a patient at the defendant Vancouver General Hospital [VGH] in September 2016. His daughter, Z, had taken the plaintiff, who was more than 80 years old, to VGH emergency with a complaint of a low heart rate. He was admitted to the cardiac care unit [CCU] at 0930 hours, and assessed by a registered nurse, VC. She recorded that the plaintiff had no cognitive issues, and no issues with his functional mobility. At 1500 hours Z advised the nurses that the plaintiff was acting strangely, and VC reassessed him. VC noted Z's report of confusion and hallucination "at times" but found the plaintiff alert and oriented. When Z left the hospital at 1800 she advised two other nurses that the plaintiff was not acting normally, was restless and hallucinating, and asked them to keep an eye on him. At 1900 the plaintiff fell and suffered a fracture of his right hip which required surgery. There was expert evidence from a registered nurse in regard to assessment protocols, which she said should be done on admission and every four hours. She also said that the perpetuation of the plaintiff's symptoms should have triggered a review at 1800. Z said that the plaintiff was never able to regain his pre-fall strength, and that he had deteriorated over the last two years. She agreed that by August 2018 he could walk 1.5 kilometres on a good day but said that he could now only walk 200 to 300 metres, needed help to shower, and could not do any basic tasks of daily living. He walked very slowly with a cane. Before the accident, the plaintiff had heart issues which required a pacemaker. He had sustained an injury to his left knee, was diagnosed with bladder cancer in Spring 2016, and was diagnosed with type-II diabetes. He also had a fall in February 2017. There was conflicting orthopaedic evidence as to whether the 2016 fall caused an L2 vertebra fracture. The plaintiff sued VGH in negligence. VGH conceded the duty of care, and its vicarious liability. The issues were whether the standard of care was breached by the nursing staff; if so, whether the breach caused the plaintiff's injuries; and damages. Held, judgment for plaintiff for $75,000. Nurses must exercise the care and skill that is reasonably expected of a prudent and careful nurse in similar circumstances. Given Z's communications with the nurses at 1800, a prudent nurse would have been reasonably expected to check in on the plaintiff at that time and reassess him. The reasonable conduct of a prudent and careful nurse would have been to: have assessed the plaintiff's risk of falling upon admission and about every four hours thereafter; have reassessed him at 1500 and 1800 hours and find that he was a fall risk given the new information communicated by Z; and have taken precautions at 1500 and 1800 hours to reduce the risk of his falling. The nursing staff breached their standard of care by: failing to regularly reassess the plaintiff; failing to reaswsess the plaintiff at 1800 hours; and failing to take any measures to reduce the plaintiff's risk of falling, specifically, by not assigning one-to-one supervision. The failure to assign one-on-one supervision to him was the breach of the standard of care that was causative of the plaintiff's fall. The other measures that could have been taken (reassessing him after 1500, a bed alarm, bed rails, moving him closer to the nursing station) would not have prevented the fall. After the fall, the plaintiff's mobility decreased, and he consistently used a cane to get around because of the hip fracture. The fracture to his L2 vertebrae was not shown to be related to the hip fracture given that a December 2017 CT scan did not show features of an acute, traumatic L2 vertebral body fracture, and that the trajectory of the plaintiff's improved mobility after the fall without specific concerns was evident in his clinical records, and his doctor observed him in October 2017 to be ambulating better without pain. Taking into account the plaintiff's rather unenviable general health condition both before and after his hip fracture, his general damages would be assessed at $75,000. Zheng v. Vancouver General Hospital (https://www.bccourts.ca/jdbtxt/sc/22/17/2022BCSC1794.htm) S.C., Hinkson C.J.S.C., 2022 BCSC 1794, Vancouver S186731, October 13, 2022 , 31pp., [CLE No. 78328] • D. Shane, for plaintiff; A. Mizrahi, for defendant. Principal case authorities: 1688782 Ontario Inc. v. Maple Leaf Foods Inc., 2020 SCC 35 — applied. Etson v. Loblaw Companies Ltd., [2011] C.D.C. 47017 (CLE), 2010 BCSC 1865 — distinguished. Irvine v. CARA Operations Ltd., [2002] Civ. L.D. 820; [2002] P. Inj. L.D. 207; [2002] C.D.C. 25198 (CLE); 2002 BCSC 1581 — distinguished. Jackson v. Kelowna General Hospital, [2007] Civ. L.D. 226; [2007] P. Inj. L.D. 48; [2007] C.D.C. 37151 (CLE) (B.C.C.A.); 2007 BCCA 129 — distinguished. Snell v. Farrell,

[1990] 2 S.C.R. 311 — considered. Verjee v. Dunbrak, [2019] C.D.C. 70524 (CLE), 2019 BCSC 1696 — distinguished. Wiebe v. Fraser Health Authority, [2019] C.D.C. 67957 (CLE), 2018 BCSC 1710 — applied. Wong v. South Coast British Columbia Transportation Authority, [2013] C.D.C. 53449 (CLE), 2013 BCSC 1118— distinguished. Expert evidence: Dr. J. Hummel, orthopaedic surgeon — considered. Nurse Murray, registered nurse — considered. Dr. Sloan, family physician — considered. Dr. J. Thompson, orthopaedic surgeon — accepted.

MOTOR VEHICLE LIABILITY — Bicycles • Bicycles •Intersections — Trial judge finding the plaintiff cyclist was riding on a sidewalk, approaching defendant's left turning car at an intersection — Judge finding plaintiff 100% at fault for resulting collision — Appeal court allowing appeal and ordering new trial, finding the judge erred in not admitting, as hearsay evidence, a written eyewitness statement taken by a retired police officer and in failing to consider objective and independent evidence tendered at trial. • PRACTICE — Evidence — Hearsay — Witness to motor vehicle accident providing statement to plaintiff's investigator, C., about a month after the accident and signing and returning the typed statement to the investigator, with some changes, about 2 months later — Plaintiff providing no information about the witness to the defence until trial, by which time the witness had left Canada and could not be contacted — Trial judge ruling statement inadmissible as not meeting test of reliability — Appeal court finding the judge erred in focusing on the reliability of C. as the narrator rather than the threshold reliability of the statement itself. The plaintiff claimed that he was injured in a motor vehicle accidents that occurred at a Vancouver intersection in July 2011. After he was knocked from his bicycle by the defendant's car, according to him, I., a taxi driver, handed him a piece of paper with the driver's name, saying he had seen the accident. The plaintiff only produced that note to his counsel during the trial in May 2019. The parties agreed that the defendants paid the plaintiff several hundred dollars for a new bicycle right after the accident, when they took him to a bicycle shop. The defendant driver said he was waiting to make a left turn. Once it was all clear, as he proceeded into the turn, he saw a cyclist coming along the East Broadway Avenue sidewalk. He testified that his speed was approximately 5 km/h as he started the turn. He stopped when he saw the cyclist and came to a stop just before the pedestrian walk area across the side street. He hoped that the cyclist would continue on and pass him; instead, the cyclist jumped off his bicycle and pushed his bicycle into the vehicle. He testified that the cyclist did not need to jump off his bike, but he did. The cyclist landed

on his feet although he was unsure exactly where. In August 2011, plaintiff's counsel hired C., a retired police officer, to investigate the accident. C. interviewed I. at a Yellow Cab parking lot just over a month after the accident. He believed that he recorded the interview, although he could not locate the tape recording. At trial he did, however, produce a one page "rough" handwritten note that he said he created during the interview with I. He typed up a statement for I. to sign and received it back two months later with some handwritten changes. In general, in the statement, I. said he saw the plaintiff knocked down by the defendant's car. In February 2019, as the trial date approached, plaintiff's counsel's made efforts to contact I. He had returned to his native Somalia some years before. The admissibility of I.'s statement, except for some non-controversial passages, was in issue on a voir dire. The trial judge concluded that the evidence failed to meet the reliability threshold and excluded the contentious portions of the statement. The judge dismissed the action and the plaintiff appealed. Held, appeal allowed; new trial ordered. An out-of-court statement tendered for the truth of its contents is presumptively inadmissible as hearsay evidence. The rationale for that rule of evidence is that the declarant's evidence cannot be subjected to cross-examination or otherwise tested for its truth or reliability. Hearsay evidence may be admitted when it meets the principled exception, governed by the tests of necessity and threshold reliability. Here, necessity was conceded: I. had left the country and could not be located despite extensive efforts conducted by the plaintiff's lawyers. Threshold reliability may be established in two ways. The first is the presence of adequate substitutes for testing truth or accuracy —in other words, procedural reliability. Some examples include the taking of the statement under oath, video- or audio-taping the statement, and warnings about the importance of truth-telling when giving the statement. The second is where the circumstances in which the statement was made demonstrate that the statement was inherently trustworthy—in other words, substantive reliability. The elements of procedural and substantive reliability are not necessarily siloed. Either may establish threshold reliability, or they may work in tandem to reach that level. Here, C., a retired police officer, was a professional statement-taker. I. was an adult, with no disabilities or vulnerabilities that would affect his ability to give a statement. While C.'s failings, as perceived by the judge, were relevant to the issue of ultimate reliability, she erred when she considered them in assessing threshold reliability. The judge focused on the reliability of C. as the narrator rather than the threshold reliability of the statement itself. The trial judge had to determine two significant facts: (1) whether the defendant actually struck the plaintiff and (2) whether the plaintiff was riding his bicycle on the sidewalk—a finding that would affect his liability for the collision, if one occurred at all. The judge treated the evidence as a "he said, he said" contest, in the sense that she did not consider the objective and independent evidence that was tendered at trial. A number of experts testified, and most—including the defendant's experts—gave evidence regarding injuries caused by the accident. While the judge may have had reason to give certain evidence less weight, she did not even refer to it, so it was impossible to determine whether she accepted or rejected that evidence. Davis v. Jeyaratnam (https://www.bccourts.ca/jdb-txt/ca/22/02/2022BCCA0273.htm) C.A., Bennett, Fenlon & Grauer JJ.A., 2022 BCCA 273, Vancouver CA46485, August 5, 2022 , 20pp., [CLE No. 77814] • Appeal from Fitzpatrick J., 2019 BCSC 1698, [2019] C.D.C. 70529 (CLE) • R.D.W. Dalziel, KC, C.W. Ehman and J.M. Cameron, for appellant; R.C. Brun, KC, and M. Dorner, for re. Principal case authorities: Housen v. Nikolaisen, [2002] 2 S.C.R. 235 — applied. R. v. Blackman, 2008 SCC 37, [2008] 2 S.C.R. 298— considered. R. v. Humaid (2006), 81 O.R. (3d) 456 (C.A.), 210 O.A.C. 68, leave to appeal to SCC refused, 31501 (9 November 2006) — applied.

PERSONAL INJURY QUANTUM — Back • Head • Psychological injury •In-trust awards — In July 2016 accident, plaintiff, 72, suffering burst T12 fracture, fractures of 9 ribs, neck pain, mild traumatic brain injury, major depressive disorder, and mild neurocognitive disorder, with effects of most ongoing at trial in 2022 — Plaintiff failing to use hearing aids as recommended but extent of benefit had she done so largely speculative and not supporting reduction for failure to mitigate — Nonpecuniary damages assessed at $215,000, and costs of future care at $85,000 — Intrust award for plaintiff's son, who gave up his job to provide care and assistance to her, assessed at $60,000. The plaintiff sued for damages for personal injuries suffered in a motor vehicle collision in July 2016 when she was 72 years old. She suffered a burst fracture of the T12 vertebral body with associated narrowing of the spinal canal and compromise of the spinal cord, and fractures of the fourth to seventh ribs on the left side and the third to seventh ribs on the right, as well as neck pain and a mild traumatic brain injury. After she was discharged from hospital she was initially bedridden and required homecare assistance, home aids and bathroom modifications. At trial in 2022, her whole back continued to be painful; both sides of her upper abdomen were painful to the touch; and she had continued pain in her neck. She also experienced memory and concentration problems since the accident. Her hearing had deteriorated. The medical evidence confirmed the permanent effects of the injuries. A psychiatrist diagnosed a major depressive disorder, post-traumatic stress disorder which had resolved, and a continuing mild neurocognitive disorder. The opinion of the otolaryngologist was that the hearing loss was probably caused by the accident. She had recommended hearing aids, but the plaintiff had not acted on that recommendation. An occupational therapist recommended ongoing treatment and therapies, including occupational therapy, physiotherapy, massage therapy, psychological counseling and kinesiology. An economist calculated the total present value of those recommendations at $105,573. The plaintiff's son gave up his job in order to provide assistance to her and his father who was also injured in the accident. On the assessment of damages, the issues were the

quantum of non-pecuniary damages, mitigation, and the amount of the in-trust award for the son. Held, judgment for plaintiff for $368,750. The physical injuries the plaintiff suffered in the accident resulted in severe, constant and likely permanent pain which in itself would have a devastating impact on her enjoyment of life. She also suffered significant depression. Her pre-accident stresses did not contribute to her current psychological symptoms. She suffered a decline in her memory, concentration and cognitive ability, and the persistence of symptoms for six years did not bode well for complete recovery. Her stubborn resistance to the use of hearing aids led to unnecessary persistence of her hearing loss, which in turn could have played some contributing role in depression and cognitive difficulties, but any disability that attributable to hearing loss was a relatively minor contributor to her overall condition. While the plaintiff was at an age where she was at some risk for physical and cognitive decline in any event, there was no evidence that that would have occurred as suddenly or severely asit did as a result of the accident. There was no evidence of any significant age-related deterioration prior to the accident, other than arthritic knees. Though the plaintiff's refusal to date to use hearing aids was unreasonable, the likely extent of improvement from doing so was largely speculative, and there would be no specific deduction for failure to mitigate. The award for non-pecuniary damages would be $215,000. In regard to cost of future care, many of the recommendations would likely continue for the plaintiff's life. Some, such as the need for housekeeping assistance, might have become necessary in any event as she aged. Various therapies might be discontinued early or reduced. The award for cost of future care, including some replacement housekeeping, would be $85,000. Considering the plaintiff's previously manifested knee pain and the general effects of aging, she failed to show a real and substantial possibility of future income loss. For the care provided by the plaintiff's son, there would be an in-trust award of $60,000. The care he provided her was above and beyond, and he gave up hisjob in order to provide extensive care, including transportation to and assistance with medical appointments and help with housekeeping and shopping. Kim v. Basi (https://www.bccourts.ca/jdb-txt/sc/22/17/2022BCSC1793.htm) S.C., N. Smith J., 2022 BCSC 1793, Vancouver M185936, October 13, 2022 , 20pp., [CLE No. 78327] • R.B. McNeney, for plaintiff; D. Madani and K.E.S. Ashton, for defendant. Selected case authorities: Caf rey v. Davies, [2020] C.D.C. 72133 (CLE), 2020 BCSC 792 — considered. Fata v. Heinonen, [2010] C.D.C. 45053 (CLE), 2010 BCSC 385 — considered. Kim v. Lin, 2018 BCCA 77, [2018] C.D.C. 66376 (CLE) — applied. Lewis v. Worth, 2020 BCSC 57, [2020] C.D.C. 72071 (CLE) — considered. Mofazeli v. Johnson, [2021] C.D.C. 74702 (CLE), 2021 BCSC 1061 — distinguished. O'Mara v. Insurance Corp. of British Columbia, [2020] C.D.C. 71106 (CLE), 2019 BCSC 222 — considered. Riley v. Ritsco, [2018] C.D.C. 67883 (CLE), 2018 BCCA 366 — applied. Expert evidence: Dr. H. Finlayson, physical medicine & rehabilitation — considered. Dr. Kelly French, geriatric psychiatrist — accepted. Matthew Gregson, occupational therapist — considered. Jennifer Lane, occupational therapist — accepted. Dr. Paul Latimer, psychiatrist — considered. Dr. Bassam Masri, orthopaedic surgeon — accepted. Kevin Turnbull, economist — considered. Dr. Lillian Wong, otolaryngologist — considered.

PERSONAL INJURY QUANTUM — Neck and back — Loss of future earnings • 31 year old plaintiff working full time at musical instrument store and aspiring to a music career suffering soft tissue injuries in 2017 MVA — Plaintiff developing initially severe and later chronic back and neck pain, headaches, sleep disturbance, depression, PTSD and anxiety, significantly impairing his ability to discharge the physical demands of his job or to work in a high-paced environment — Symptoms also limiting his drum-playing ability and rendering him vulnerable to disc injury and degeneration — Prognosis for improvement was poor — Court awarding global damages of $792,898, including general damages of $150,000 and $500,000 for loss of future earning capacity. In 2017, the plaintiff, then age 31, suffered soft tissue injuries to his neck and lower and mid back in an extremely high-impact, violent MVA. Liability for the accident was admitted. As a result of his injuries, the plaintiff developed near constant pain in his neck and back, cervicogenic headaches, sleep disturbance, depression, PTSD and anxiety. His physical symptoms were particularly severe until December 2018 when he underwent a steroid injection that relieved his back pain for about six months; his psychological symptoms worsened with the death of his mother in May 2019 but had since improved. At the time of trial, he continued to suffer pain of varying intensity and functional limitations. The prognosis for further recovery was poor. The medical consensus was that the plaintiff would continue to experience back and neck pain and functional imitations even if he followed all treatment recommendations(which would provide only temporary relief) and was vulnerable to disc degeneration and mobility restrictions. The plaintiff was a passionate musician. At the time of the MVA, he was working full time in retail sales at a large musical instrument store earning $15.55 an hour and in the midst of recording an album with a band headed by a former member of commercially successful band. He also worked part time at a musical rehearsal studio moving heavy equipment and instruments. The plaintiff attempted a gradual return to work, but his pain prevented him from managing physically demanding tasks. He left his sales job in June 2018. He returned to the rehearsal studio and performed modified tasks, eventually working up to a few five-hour shifts per week, until the studio closed because of COVID. He was also unable to play the drums as he used to and lost his spot in his band. At the time of trial, the plaintiff was not working. In an action to determine quantum, Held, judgment for plaintiff in the amount of $792,898. Having regard to the plaintiff's relatively young age, the severity of his initial physical and psychological symptoms, the guarded prognosis for improvement and likely permanent impact of his condition on his recreational and social life, partic-

ularly the very considerable restriction in his ability to pursue his passion of drumming, and his inability to work in a physically demanding job, his "fallback" position should a music career prove unattainable, the court assessed general damages at $150,000. Past loss of income was assessed at $92,700. Future loss of income earning capacity was assessed at $500,000. The plaintiff's injuries limited his functional capacity, likely permanently, and prevented him from working in any job with a significant physical component, as he was more than able to do preaccident. He was restricted from prolonged sitting and other fixed positions, and his psychological condition limited him from working in fast-paced stressful environments, all of which precluded him from a large class of potential employment opportunities. Costs of future care ($3,600 for one-time cognitive behavioral therapy; $1,125 for one-time vocational rehabilitation counseling, and $40,000 for ongoing medication and physical therapy) were assessed at $44,725. Special damages were allowed in the amount of $5,473. Amer v. Geoghegan (https://www.bccourts.ca/jdbtxt/sc/22/13/2022BCSC1311.htm) S.C., Warren J., 2022 BCSC 1311, Vancouver M183814, August 5, 2022 , 54pp., [CLE No. 77831] • M. Huot and D. Gomel, for plaintiff; M. von Antal, for defendant. Principal case authorities: Borgfjord v. Boizard, 2016 BCCA 317, [2016] C.D.C. 62180 (CLE) — considered. Bradshaw v. Stenner, 2010 BCSC 1398, [2010] C.D.C. 46396 (CLE) af 'd 2012 BCCA 296, [2012] C.D.C. 50781 (CLE) — considered. Faryna v. Chorny (1951), 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354 (B.C.C.A.) — considered. Fletcher v. Biu, 2020 BCSC 1304, [2020] C.D.C. 72651 (CLE) — distinguished. Forghani-Esfahani v. Lester, [2019] C.D.C. 69050 (CLE), 2019 BCSC 332 — considered. Gill v. Apeldoorn, [2019] C.D.C. 69576 (CLE), 2019 BCSC 798— considered. Kallstrom v. Yip, [2016] C.D.C. 61632 (CLE), 2016 BCSC 829 — considered. Martin v. Steunenberg, 2021 BCSC 1411, [2021] C.D.C. 75093 (CLE) — considered. Morgan v. Galbraith, [2013] C.D.C. 53465 (CLE), 2013 BCCA 305 — considered. Picco v. British Columbia (Attorney General), 2015 BCSC 1904, [2015] C.D.C. 60015 (CLE) — considered. Pololos v. Cinnamon-Lopez, [2016] C.D.C. 60758 (CLE), 2016 BCSC 81 — distinguished. Rab v. Prescott, [2021] C.D.C. 75563 (CLE), 2021 BCCA 345 — considered. Sebaa v. Ricci, [2015] C.D.C. 59605 (CLE), 2015 BCSC 1492 — considered. Stapley v. Hejslet, [2006] Civ. L.D. 109; [2006] P. Inj. L.D. 28; [2006] C.D.C. 34091 (CLE) (B.C.C.A.); 2006 BCSC 34 — considered. Steinlauf v. Deol, [2021] C.D.C. 74773 (CLE), 2021 BCSC 1118— considered. Tsalamandris v. McLeod, [2012] C.D.C. 50628 (CLE), 2012 BCCA 239 — considered. Experts: Dr. Tamil Ailon, neurosurgeon — considered. Dr. Paul B. Bishop, orthopaedic surgeon — considered. Dr. Colleen Quee Newell, clinical counsellor and vocational rehabilitation consultant — considered. Sergiv Pivnenko, economist — considered. Dr. Mitchell Spivak, psychiatrist — considered. Dr. A. Travlos, physical medicine & rehabilitation — considered. Dr. S. Wiseman, psychiatrist — considered.

PRACTICE — Class actions — Certification — Representative plaintiff • Plaintiff trust fund alleging defendant made misrepresentations in prospectus in breach of B.C. Securities Act and seeking to have action certified as class action — Defendant applying for order striking plaintiff's application for certification on basis it was not a resident of B.C. as required by CPA, s. 2(1) and order requiring defendant to amend its NOCC to reflect action was brought as an individual one — Defendant's application allowed — All lines of authority concerning meaning of "resident" lead to conclusion that plaintiff was resident of Ontario, the jurisdiction where the defendant was registered to do business and where its central management, control and trustee were located — While steps taken thus far in the action might amount to attornment for jurisdictional purposes, that did not obviate the residency requirement in s. 2(1). MM Fund v. Excelsior Mining Corp. (https://www.bccourts.ca/jdbtxt/sc/22/15/2022BCSC1541..htm) S.C., Fitzpatrick J., 2022 BCSC 1541, Vancouver S219385, September 1, 2022 , 20pp., [CLE No. 78054] • S. Nematollahi and P. Bates, for plaintiff; J. Sullivan, KC, R.L. Reinertson, and J. Hutchison, for defendants. October 10, 2022 • Issue No. 41 • Page 27 of 44 Principal case authorities: Araya v. Nevsun Resources Ltd., 2016 BCSC 1856, [2016] C.D.C. 62745 (CLE) — considered. B.C. Freedom of Information and Privacy Assoc. v. British Columbia (Attorney General), 2017 SCC 6, [2017] C.D.C. 63534 (CLE) — considered. Bhangu v. Honda Canada Inc., 2021 BCSC 794, [2021] C.D.C. 74455 (CLE) — considered. British Columbia (Attorney General) v. Brecknell, 2018 BCCA 5, [2018] C.D.C. 65938 (CLE) — considered. Ernewein v. General Motors of Canada Ltd., [2005] C.D.C. 33517 (CLE), 2005 BCCA 540 — considered. Ewert v. Canada (Attorney General), 2018 BCSC 147, [2018] C.D.C. 66135 (CLE) — considered. Fundy Settlement v. Canada, 2012 SCC 14 — considered. Jiang v. Peoples Trust Co., 2018 BCSC 299, [2018] C.D.C. 66351 (CLE) — considered.

PRACTICE — Class actions — Certification — Discovery of documents • CROWN — Proceedings against Crown — Plaintiffs seeking certification pursuant to Class Proceedings Act alleging various causes of action resulting from flooding in Lower Mainland and relying on expert reports — Defendant City applying for production of experts' files, despite expert reports setting out factual underpinnings for conclusions reached, sources, references, and qualifications — Court dismissing City's application for additional disclosure finding expert reports providing sufficient and reasonable amount of disclosure. In November 2021, certain regions of the Lower Mainland flooded. The plaintiffs brought an action against the City of Abbotsford, the Fraser Valley Regional District, and the Province, among others, alleging various causes of action and damages resulting from the floods. The plaintiffs applied for the action to be certified in accordance with the Class Proceedings Act ("CPA"), and tendered the expert evidence of Dr. W, a climate scientist, and L, an engineer. The City applied for the production of the experts' files to assess the question of whether

the expert reports were admissible, asserting that the admissibility of the reports would be central to the upcoming certification hearing. The plaintiffs contended that a certification hearing is not a trial, and that there was no obligation to disclose the requested information at an interlocutory hearing. Held, application for production of the experts' file dismissed. During a certification hearing, plaintiffs are obligated to show some basis in fact to support the certification order by way of evidence that is admissible, although the certification application is not based upon an assumption that the pleaded facts are true. To be admissible as evidence at trial, an expert report must comply with R. 11-6 of the Rules, including R. 11-6(8) which requires parties to disclose materials related to their expert's files. However, there is also the competing principle of efficiency. In this case, the expert reports in question set out the factual underpinnings that gave rise to the opinions contained therein, as well as sources, references, and their respective qualifications. Accordingly, there was sufficient and reasonable amount of disclosure in the reports for the City to make its assessments of the experts. Mostertman v. Abbotsford (City) (https://www.bccourts.ca/jdbtxt/sc/22/17/2022BCSC-1769cor1.htm) S.C., Dley J., 2022 BCSC 1769, Abbotsford S01697, September 23, 2022 , 9pp., [CLE No. 78366] • A.A.. Vecchio, KC, and J. Giovannetti, for plaintiffs; B. Reedjik and B. Olthuis, for defendant; N. Krueger, for defendant; L. Brasil, for defendant province. Principal case authorities: Araya v. Nevsun, 2016 BCSC 1856, [2016] C.D.C. 62745 (CLE) — considered. Ernewien v. General Motors of Canada Ltd., 2005 BCCA 540, [2005] C.D.C. 33517 (CLE) — considered. Sharp v. Royal Mutual FundsInc., [2020] C.D.C. 71586 (CLE), 2019 BCSC 2357 — considered.

PRACTICE — Discovery of documents — Documents held by non-parties • Documents subject to production — Plaintiff suing for damages arising out of 2016 motor vehicle accident (MVA) — Defendant's review of public court records revealing she had previously sued for damages arising out of a 2010 MVA, alleging very similar injuries to those claimed to have resulted from the 2016 MVA — Defendant seeking production of records regarding the 2010 MVA, including expert reports, medical and employment info and examination for discovery transcripts — Defendant also seeking third party production of MSP and Pharmanet printout from January 2010 to July 2014, and file materials from the plaintiff's previous counsel in respect of the 2010 MVA — As well, defendant seeking order for the plaintiff to provide an authorization to direct her previous general practitioner ("GP"), whose identity was unknown, to release his records for December 2010 to July 2014 — Plaintiff arguing there was nothing to take the case out of the usual one where 2 years of pre-accident records are producible — Master finding sufficient evidence to establish a connection beyond a "mere possibility" with respect to the 2010 MVA and the plaintiff's recovery from it, and the subject action — Master granting order sought, except for an order requiring plaintiff to direct her previous GP to produce records — Master noting the GP's identity was unknown because the defendant did not ask at discovery — Master finding that not a sufficient reason to depart from the available discovery processes. Stewner v. Sawires(https://www.bccourts.ca/jdb-txt/sc/22/14/2022BCSC1495.htm) S.C., Master Robertson, 2022 BCSC 1495, Vancouver M186846, July 7, 2022 , 13pp., [CLE No. 77984] • B. Therrien, for plaintiff; D. Machat, for defendants. AM Gold Inc. v. Kaizen Discovery Inc., 2021 BCCA 70, [2021] C.D.C. 73758 (CLE) — considered. Bains v. Hookstra, 2012 BCSC 1707, [2021] C.D.C. 51672 (CLE) — considered. Cochrane v. Heir, [2011] C.D.C. 47779 (CLE), 2011 BCSC 477 — considered. Global Pacific ConceptsInc. v. Strata Plan NW 141, [2012] C.D.C. 49422 (CLE), 2011 BCSC 1752 — considered. Nikolic v. Olson, [2011] C.D.C. 47222 (CLE), 2011 BCSC 125 — considered. Peel Financial Holdings Ltd. v. Western Delta Lands Partnership, [2003] C.D.C. 26214 (CLE), 2003 BCCA 180 — considered.

PRACTICE — Trial — Reopening • Plaintiff suffering serious head injury in 2016 single-vehicle motor vehicle accident, in which the defendant driver, S., was killed, while driving car owned by defendant G., also a passenger — Plaintiff's counsel closing case, mistakenly believing liability had been admitted — On realizing that error, plaintiff applying to reopen his case to call viva voce evidence from G. — Plaintiff not demonstrating potential miscarriage of justice or that G.'s evidence would probably change result — Application dismissed. The plaintiff, age 45 at trial in 2022, suffered serious injuries in a car accident in December 2016. He alleged that he was riding as a passenger in a vehicle owned by the defendant G. and driven by the defendant S., who died in the accident. ICBC was defending the claim against S. because it had denied insurance coverage for his negligence. G. was also a passenger in the vehicle at the time of the accident. The plaintiff suffered a significant head injury in the collision and had no memory of the events immediately before the accident or for weeks after December 2016. The trial commenced March 21, 2022 and both parties closed their cases by April 6, 2022. Counsel for the plaintiff mistakenly believed that liability was not in issue in the trial; accordingly, the plaintiff tendered no evidence concerning the liability S. for the accident, nor mentioned G.'s role in the accident. Before final argument began, the plaintiff applied to reopen his case because he had not tendered any evidence concerning the defendants' liability before closing his case. Initially, he applied to reopen his case and adduce evidence from G. by reading into the record examination for discovery evidence she had given earlier concerning details about the accident. He also wished to introduce expert testimony relating to the level of impairment of S. at the time of the accident. When the application was argued, it was narrowed to a request to reopen his case to call only viva voce evidence from G. Held, application dismissed. The overarching issue was whether a miscarriage of justice would probably occur without the proposed evidence from G., whether the evidence would probably change the outcome of the trial,

and whether counsel's error was a sufficient basis for reopening a trial to introduce evidence that was in his possession when the trial began. The plaintiff had pleaded that the negligence of S. caused the accident, and set out an itemized list of particulars. The plaintiff also pleaded particulars of G.'s negligence, including that she consented to operation of her vehicle by S., knowing the vehicle was in an unsafe state of repair, among other specific claims of negligence. Plaintiff's counsel made a serious error in assuming liability for the subject collision had been admitted without confirming that assumption either at the trial management conference, the opening of the trial, or the conclusion of the plaintiff's case. The magnitude of the lawyer's error was significant. In his opening statement to the court, he made comments indicating there would be evidence called on the liability question. It was almost beyond belief that he could have made those statements if he truly believed at that time liability had been admitted. In order for the plaintiff to succeed, the court had to be satisfied that the evidence expected from G. would probably justify an inference the defendant breached his duty of care to the plaintiff in driving the car. The narrow question was whether G.'s testimony contained some evidence to raise a prima facie case of negligence against the defendant. G. could not say how the accident happened. Her evidence on that point and others in her discovery were based on her "understanding" that S. was driving her vehicle at a point where the road curved to the right, and the vehicle went off the side of the road. The curve was sharp and intersected by another road. Just before the accident happened, she had no memory of the activities or condition of the occupants. All she could remember was S. saying "Oh shit", and then she remembered "coming to" while still in the vehicle. Her report of the incident did not disclose any facts that would prima facie establish either defendants' negligence. On the contrary, the utterance by S. was equally suggestive of something appearing on the roadway unexpectedly, some condition of the roadway causing the vehicle to leave the surface, an animal on the roadway, or excessive speed resulting in him losing control. The plaintiff had not met the obligation of establishing that admitting G.'s evidence "would probably" alter the result. Cox v. Swartz Estate (https://www.bccourts.ca/jdb-txt/sc/22/14/2022BCSC1494.htm) S.C., Armstrong J., 2022 BCSC 1494, Victoria 172469, August 26, 2022 , 31pp., [CLE No. 78012] • N.A. Mosky and T.C. Chiu, for plaintiff; B.L. Hoffmann, for defendant; C. Wydrzynski and B. Flanagan, for third party ICBC. Principal case authorities: AME Distribution Inc. Wang, 2019 BCSC 95, [2019] C.D.C. 68729 (CLE) — applied. Aquiline ResourcesInc. v. Wilson, [2005] C.D.C. 33458 (CLE), 2005 BCSC 1461 — applied. Benoit v. Farrell Estate, [2004] Civ. L.D. 536; [2004] P. Inj. L.D. 114; [2004] C.D.C. 29871 (CLE) (B.C.C.A.); 2004 BCCA 348— distinguished. Kostecki v. Li, 2013 BCSC 2451, [2014] C.D.C. 55113 (CLE) — considered. Mandzuk v. Viera (1983), 43 B.C.L.R. 347, 1983 CanLII 448 (BCSC) — considered. Moradkhan v. Mofidi, [2013] C.D.C. 52598 (CLE), 2013 BCCA 132 — considered. S. (T.) v. Gough, 2022 BCSC 264, [2022] C.D.C. 76645 (CLE) — considered. Seiler v. Mutual Fire Insurance Co. of British Columbia, 2003 BCCA 696; [2004] C.D.C. 28394 (CLE) — considered. Singh v. Chand, 2019 BCSC 932, [2019] C.D.C. 69728 (CLE) — applied.

REAL PROPERTY — Condominiums — Civil Resolution Tribunal • Longstanding conflict between respondent W. and 6 other owners in the petitioning strata corporation resulting in petitioner levying fines against W. arising from his disruptive conduct at meetings of the strata corporation and his video recording of strata meetings without consent of participants, then posting those videos on a public YouTube channel along with his comments highlighting his allegations of unlawful conduct of the strata council — Petitioner applying to the Civil Resolution Tribunal, seeking 8 orders related to the dispute, including an order for payment of outstanding bylaw contravention fines of $10,200 by W. and other respondents — Tribunal making orders that the respondents not video record meetings without consent and that W. remove his YouTube videos and comments — Tribunal dismissing all the other relief sought — Court dismissing petitioner's application for judicial review, finding the tribunal decision to decline to make the orders sought not patently unreasonable. Strata Plan LMS 2461 v. Wong (https://www.bccourts.ca/jdb-txt/sc/22/12/2022BCSC1222.htm) S.C., Edelmann J., 2022 BCSC 1222, Vancouver S210235, July 19, 2022 , 9pp., [CLE No. 77727] • P. Mendes and V. McArther, Articled Student, for petitioner; Respondent on his own behalf; Z. Rahman, for CRT.

STATUTES — Subordinate legislation • COSTS — Disbursements • CONSTITUTIONAL LAW — Principles — Access to justice — Court finding Disbursement and Expert Evidence Regulation, s. 5, which limited successful vehicle injury plaintiffs' disbursements to 6% of award or settlement, inconsistent with Evidence Act, s. 12.1, its enabling statute, and therefore of no force or effect — Inconsistency arising from Regulation's failure to recognize judicial discretion in the governing statute — Provision also unconstitutional as it compromises and dilutes the court's role of the court, and encroaches upon on a core area of the court's jurisdiction to control its process. In 2020 the Lieutenant Governor in Council [LGC] enacted the Disbursement and Expert Evidence Regulation ["the Regulation"] pursuant to s. 12.1 of the BC Evidence Act [EA], which provision came into force in August 2020. Under s. 12.1(9)(a)(i)(B) of the EA the LGC may make regulations respecting, inter alia, limits on disbursements payable as a percentage of the amount recovered in an action. Section 12.1(9)(a)(ii)(A) and (B)] authorize a court to make an order for the amount of disbursements payable to a party in a vehicle injury proceeding where limits established under subparagraph (i) do not apply, or determining whether to include or exclude prescribed disbursements when determining the application of a limit established under subparagraph (i). Section 4 of the Regulation sets limits for disbursements for experts reports to three reports. Section 5 of the Regulation caps the disbursements a successful plaintiff in a personal injury action may recover to six percent of the total damages award or set-

tlement amount, subject to specific exceptions. If a defendant is successful, the recovery of disbursements by the defendant is a matter for the court's discretion. The petitioners, two vehicle injury claimants and the Trial Lawyers of BC, sought a declaration that the Regulation was invalid. Held, petition allowed; Regulation, s. 5, of no force or effect. Regulations enacted by the LGC benefit from a presumption of validity and can be found to be ultra vires only if they are inconsistent with the objective of the enabling statute or the scope of the statutory mandate. The test of reasonableness of delegated legislation is limited to consideration of whether the subordinate legislation embodies a reasonable interpretation of the authority conferred by the governing statute. The test is a deferential one that recognizes the governing statute may be subject to a range of possible reasonable interpretations. The legislature gave the LGC broad discretion to limit the disbursements recoverable for expert evidence, and under the EA the LGC is specifically empowered to limit disbursements to an amount based on a percentage of the total award. Although that was exactly what the LGC did, that power and its exercise had to be viewed more broadly in the full context of the relevant sections of the EA and the private law litigation it governs. Section 12.1(2) of the EA creates a presumptive limit of three experts on damages for each party in vehicle injury cases. As part of the deemed proportionality, it gives the LGC broad discretion to define what it considers a reasonable and proportional amount of recoverable disbursements. However, ss. 12.1(5) and (6) of the EA allow the court to permit additional experts. The plain language of s. 12.1(6)(b) includes the legislature's recognition that additional costs will be involved in cases where the court exercises that discretion. However, the Regulation applies the same limit of six percent of total damages to all cases, without regard to the legislature's recognition of judicial discretion and the increased costs likely to flow from it. Because the Regulation failed to recognize the judicial discretion in the governing statute, it was inconsistent with the objective, language and purpose of the EA and was therefore not authorized by s. 12.1 of the EA. There was a further inconsistency in that s. 12.1 of the EA creates a limit that expressly applies to expert evidence on "vehicle injury damages", and in authorizing the LGC to enact regulations, it provides the LGC may do so "[f]or the purposes of [s. 12.1 of the EA]". It says nothing about experts needed to prove a defendant's liability, but s. 5(1) of the impugned Regulation also denies recovery of the cost of a liability expert's attendance at trial. That was a limitation on recovery not contemplated by the governing statute. The result was the same on constitutional grounds. The Regulation in its present form would prevent or discourage some plaintiffs from accessing the court for a decision on the merits because some plaintiffs would be unable to marshal all the evidence necessary to prove all aspects of their case without sacrificing other reasonable expenses or necessary portions of their compensatory damages; other plaintiffs may have the necessary expert reports but be unable to proceed to trial because of the additional costs and risks of having those experts testify. In the absence of a provision that preserves judicial discretion to relieve against the consequences of the Regulation in appropriate cases, the Regulation compromises and dilutes the role of the court, and encroaches upon on a core area of the court's jurisdiction to control its process. Le v. British Columbia (Attorney General) (https://www.bccourts.ca/jdbtxt/sc/22/11/2022BCSC1146.htm) S.C., N. Smith J., 2022 BCSC 1146, Vancouver S217361, July 8, 2022 , 25pp., [CLE No. 78293] • Ryan D.W. Dalziel, KC, and A. Calvert, for petitioners; Gareth J. Morleyand M.A. Witten, for respondent AGBC; Angus M. Gunn, Q.C., and R.W. Parsons, for attendees. Principal case authorities: Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 — considered. Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2, [2012] C.D.C. 49805 (CLE) — considered. Crowder v. British Columbia (Attorney General), [2019] C.D.C. 70645 (CLE), 2019 BCSC 1824 — considered. Green v. Law Society of Manitoba, 2017 SCC 20 — considered. Greenhouse Gas Pollution Pricing Act, Re, 2021 SCC 11 — considered. Katz Group Canada Inc. v. Ontario (Health & Long-Term Care), 2013 SCC 64 — considered. Meckic v. Chan, [2022] C.D.C. 76569 (CLE), 2022 BCSC 182 — considered. Portnov v. Canada (Attorney General), 2021 FCA 171 — applied. Trial Lawyers Assoc. of British Columbia v. British Columbia (Attorney General), [2014] C.D.C. 57184 (CLE), 2014 SCC 59 — considered. Trial Lawyers Assoc. of

British Columbia v. British Columbia (Attorney General), [2022] C.D.C. 77225 (CLE), 2022 BCCA 163 — considered. West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal), 2018 SCC 22, [2018] C.D.C. 67146 (CLE) — considered.

WILLS & ESTATES — Wills — Validity — Testamentary capacity • J., born in 1929, making will in 2001 leaving her estate in equal shares to her 2 sons — J.'s estate consisting mainly of her Vancouver house — In 2017, one month before her death, J. making new will, essentially disinheriting plaintiff son and leaving her house to defendant son — Evidence showing at time of making her 2017 will, J. was in a state of poor physical and mental health — Defendant failing to prove J. had testamentary capacity — Court finding the 2017 will invalid. J. was born in Vancouver in 1929, and had approximately a grade seven education. When her mother died, she left school to take care of her six siblings and assist in the family grocery store, and she had no further formal education. She married at age 20, and her two sons were born shortly after. Throughout her life she worked predominantly as a housewife and mother. Her husband died in 1998. In his will he left his wife everything (if she had predeceased him, his estate was to be divided equally between their two sons). After his death, J. made a will in 2001, appointing her son SJ as executor (and L. as alternate executor), and dividing her estate equally between the plaintiff SJ and the defendant son JJ. At one point she loaned $45,000 to JJ and, when she realized he would never be able to repay, she gifted $45,000 to SJ to keep things equal. SJ became a lawyer and married L., also a lawyer. He had significant long-term health issues and never made much money. JJ eventually became a high school teacher in Prince George. He and his wife separated in 2000. After separation he was on medical leave for a period, due to depression relating to his divorce, and then taught part time until his retirement in 2005. As a result of JJ's acrimonious divorce, J. executed a codicil to the 2001 will in 2002, leaving JJ's share of her estate in trust, with SJ as the trustee. JJ moved to Vancouver in 2005, and stayed with his mother for nine months before finding his own apartment. After SJ advised JJ that, because of his health, he could no longer assist JJ in his family law proceeding, JJ began to alienate himself from SJ and his family. By late 2016, J.'s health had deteriorated and she was physically frail, suffering from multiple orthopaedic issues, heart issues, renal dysfunction, ongoing breathing issues, depression and a history of syncope (a tendency to faint, which led to frequent falls). She had deteriorated to the point she needed her sons to assist with her care on a full time basis, and they alternated staying overnight with her. She was diagnosed with dementia in early 2017. Between late December 2016 and late March 2017 she was hospitalized on numerous occasions, and ultimately moved into a long term care facility. She made a will in July 2017. At that time, she owned a house in

Vancouver, her only asset of significance. In the will, she made a specific bequest of the house to JJ, and gave SJ the residue of her estate. Since shortly before J.'s death, JJ had been living at the property, and he continued to do so. SJ commenced an action alleging that J.'s will was invalid. SJ died in January 2021. His wife, L., was the executor of his estate and in that capacity became the plaintiff in the action challenging the will. She argued there were suspicious circumstances surrounding the will's creation and execution, and she said J. did not have the requisite testamentary capacity to execute the will, did not know and appreciate its contents and was unduly influenced by her son, the defendant JJ, in the making of the will. JJ. took the position that he had proven the will in solemn form of law and in his counterclaim sought a declaration to that effect. Held, for plaintiff. There were a number of inconsistencies in JJ's evidence which led the court to conclude that he was a poor historian. He acknowledged he had a poor memory, clearly struggled on occasion to answer questions clearly and succinctly, and was impeached on cross-examination a number of times. Further, the court could simply not accept that the totality of the evidence supported his assertion that he never provided any instructions o the lawyer who drew the will as to the terms of the will, and had no knowledge of the contents of the will prior to seeing a signed copy. JJ admitted that neither he nor his mother ever let SJ know that they were meeting with the lawyer. There were suspicious circumstances surrounding the creation and execution of the will which called into question J.'s testamentary capacity and her knowledge and approval of the contents of the will. Specifically, the court noted JJ's decisions at the time J. entered the care home to: (a)cease all communication with SJ (including not responding to repeated questions about her finances); (b) not recognize SJ's power of attorney (and specifically not furnish him with receipts, nor advise him of cheques being written or that JJ had arranged for her 2016 tax return to be prepared); and (c) make the arrangements in secret for J. to meet with a lawyer to update her estate planning (including changing her power of attorney). Those decisions raised a specific and focussed suspicion, particularly when viewed in light of J.'s vulnerability, her passive personality, her tendency to avoid conflict, her longstanding pattern of treating her sons equally, and her highly unusual and out of character frustration with, and estrangement from, JS for a critical period in June 2017. JJ had not proven, on a balance of probabilities, that J. had testamentary capacity at the time she made the will. The parties agreed that J. had limited formal education, her work experience was minimal, and the evidence was consistent that she was not good at mathematical calculations. Several witnesses testified that they observed a marked decline in J.'s mental functioning by late 2016. In the will, J. changed her long held estate plan, which provided for an equal distribution of her estate between her sons, and effectively disinherited SJ. JJ had to prove on a balance of probabilities that J. understood the nature and extent of her property, understood the testamentary provisions she was making, and that she was capable of appreciating those factors in relation to each other. The court was not satisfied that in July 2017 J. was capable of appreciating those factors in relation to each other, or that she appreciated that by bequeathing JJ the property she was effectively bequeathing nothing to JS. Given the determination that J. lacked testamentary capacity, it was unnecessary to determine whether she knew and approved the will's contents. In any event, it was clear that she did not. It was also unnecessary to consider undue influence, however, JJ had established that undue influence did not occur. The 2017 will was invalid and so the 2001 will and the 2002 codicil would govern the distribution of J.'s estate. Jung Estate v. Jung Estate (https://www.bccourts.ca/jdb-txt/sc/22/12/2022BCSC1298.htm) S.C., Blake J., 2022 BCSC 1298, Vancouver S179136, August 2, 2022 , 58pp., [CLE No. 77803] • G.T. Behan and J. Dorfmann, Articled Student, for plaintiff/defendant by counterclaim; K.E. Ducey, for defendant. Principal case authorities: Banks v. Goodfellow (1870), L.R. 5 Q.B. 549 — applied. Bradshaw v. Stenner, 2010 BCSC 1398, [2010] C.D.C. 46396 (CLE) af 'd 2012 BCCA 296, [2012] C.D.C. 50781 (CLE) — applied. Bull Estate v. Bull, [2015] C.D.C. 57958 (CLE), 2015 BCSC 136 — considered. Laszlo v. Lawton, [2013] C.D.C. 52429 (CLE), 2013 BCSC 305 — applied. Leung v. Chang, 2013 BCSC 976, [2013] C.D.C. 53257 (CLE) — considered. Schwartz v. Schwartz (1970), 10 D.L.R. (3d) 15 (ONCA) — applied. Experts: Dr. Michael Passmore, geriatric psychiatrist — considered. Dr. John P. Sloan, geriatric physician — considered

TLABC MEMBERSHIP PERKS ▸

TLABC has secured the below programs for the benefit of members. Check out the Membership Benefits page on the TLABC website or contact the individual providers for more information.

SAVINGS FOR MEMBERS

on various
national brands

Register now at
perkopolis.com

Use TLABC & your member ID number when prompted for a member ID code.

perkopolis

TLABC Extended Benefits Plan

Did you know TLABC offers all current members the chance to join its comprehensive health and dental plan? The plan offers exceptional life insurance, long-term disability and critical illness coverage that is impossible to match when shopping around the competitors.

TLABC members have the option of either a comprehensive benefits package or a basic benefits package:

Comprehensive Plan
Basic Dental — 100% covered
Major Dental — 50% covered
Extended Health — 100% covered

Basic Plan
Basic Dental — 80% covered
Extended Health — 80% covered

Both the Comprehensive and Basic packages include the same Group Life Insurance, Critical Illness and Long-Term Disability Coverage.

SPECTRUM
CONTINUITY PLANNING

Alan Leader
P: 604 681 6363
E: alan@spectrumcontinuity.com

Hertz

Rental Car Preferred Rates for TLABC Members

TLABC members can save **up to 30% off** the base rate* with Hertz. From value savings options like a compact car to a roomy full-size or luxury model, Hertz makes renting a vehicle easy and affordable.

* The CDP savings applies to Base Rental Rate only. Taxes, tax reimbursement, fees, surcharges and optional service charges, such as refueling, are not included. Discounts vary by rental date, location and vehicle type. Discounts in local currency upon redemption. Advance reservation is required. Age, driver, credit and qualifying rate restrictions for the renting location apply. Blackout periods may apply.

INDEX OF ADVERTISERS ▸

These advertisers make it possible for TLABC to distribute *the Verdict* to members without additional cost.
They will appreciate your consideration of their products and services. Please mention that you've seen their ad in *the Verdict*.

Beverli Barnes *Custom Design*

beverlibarnes.ca

Serving the Legal community for 30 years

Court Attire & Dress Shirts

Follow us
@notjustanotherstuffedshirt