

the Verdict

ISSUE 177 / SUMMER 2023

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Why Language Matters

When is a Place
a "Safe Place"?

The Rise of
ChatGPT
and Future of
Legal Writing

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CEO CORNER ►



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

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

As you, our dedicated readers, know, we typically theme our issues to provide a golden thread you can see passing through many of the articles and columns we present. Despite this issue being more “un-themely” than usual, we have a collection of great articles and columns, all interesting and valuable in their own right.

Gender Diversity in Legal Writing – Alison Wilkinson discusses the importance and impact of gender diversity in legal writing. “Words don’t just shape the law; they are the law,” she explains, and discusses how important it is not to write in binary terms to describe segments of the population who are anything but.

Equity, Diversity and Inclusion Committee – the TLABC Board of Governors recently struck a new committee to help guide the organization’s work on equity, diversity and inclusion. Committee Co-Chair, Douglas Chiu writes the first of what will be a regular column keeping members apprised of what the Association is doing to be more inclusive.

All of the columns this issue are excellent, but I would like to draw your attention to a few in particular. We have the first **President’s Message** by the new TLABC President, Elisabeth Sadowski, as well as Mark Virgin’s timely **Technology** column that explores how AI and ChatGPT could impact legal work such as client communication and research.

Legislative Watch – Jessie Legaree’s column explains new legislation introduced by the BC government, including the *Intimate Images Protection Act*, made to combat the unlawful distribution, or threat of distribution, of intimate images. Legaree also discusses new developments around LSBC: Paralegal Licensing and Private Member’s Bill M 215, *Non-Disclosure Agreements Act*, meant to prevent NDAs from being used to silence victims of abuse, harassment and discrimination.

Criminal Law – Joshua Krueger’s piece explores the legal concept of a “safe place” in the Supreme Court of Canada’s recent decision involving a hockey coach surreptitiously taking photos of children in a changing room.

Class Action – Aden Klein’s piece highlights a key aspect of the updated criminal provisions of the *Competition Act*, making “no poach agreements” between employers illegal.

Enjoy! 



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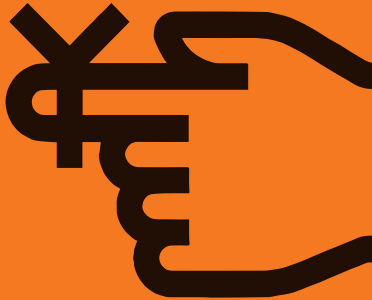
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PRESIDENT'S MESSAGE ►



BY **ELISABETH SADOWSKI**

TLABC President
TLABC Member

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

This marks my first message as president of TLABC. I must thank past president Bill Dick KC for his leadership in our first full year after no fault. As an advocate and past president, Bill has been unwaveringly committed to advancing the rights of British Columbians both in and outside the courthouse courtroom for the last three decades. I also thank my mentor and past president (2014) Richard Parsons whose example, among others, inspired me to first become involved with TLABC.

We have a lot to look forward to. This year (2023) sees the first woman criminal litigator to join leadership with the recent addition of our secretary treasurer Rebecca McConchie. Rebecca has been active in the criminal defence committee for over four years and recently joined the litigation oversight committee. In addition to Rebecca, I look forward to continuing to work with Greg Phillips serving as first vice-president. Greg has actively participated in our listservs and conferences, and our team is well served by Mike Elliott, our second vice-president, whose political connections are unparalleled.

This year also marks the first year of the Equity, Diversity & Inclusion (EDI) committee led by board members Doug Chiu, Kyla Lee and Elsa Wyllie. Although the committee is still in its infancy, I am excited for their input and integration into our other committees.

With respect to our active litigation, many of you know Justice Smith struck down the regulation that limited a successful plaintiff's disbursements recovery to 6% of the settlement or judgment amount on July 8, 2022. The appeal was heard on January 25-26, 2023 in front of Justices Newbury, Harris, and Voith. After Ryan Dalziel's passing in September of last year, Gib van Ert took over as lead counsel, along with Neil Abraham, and Aubin Calvert who had worked with Ryan. (Our past president Bill aptly commented that Ryan will not be "replaced" and will never be forgotten.) Our counsel provided exceptional advocacy on behalf of individual British Columbians and TLABC. "Unsurprisingly" (in the words of Justice Newbury), the Court reserved their decision on this matter. Hopefully we'll have some news by the time this issue of *the Verdict* is published! Now that the disbursements hearing is done, we will re-focus our energy towards advancing the no fault litigation.

Rebecca has already brought many important criminal cases to our attention. These have led us to intervening on some high-profile cases at the national level. Two recent cases have been led by counsel Mark Iyengar along with Tony Paisana on *Haevischer*, and Benjamin Reedijk on *Kruk*. The Supreme Court of Canada released their unanimous decision (written by Justice Sheilah L. Martin who did an amazing job as the keynote speaker at TLABC's Spring Soirée) in *R. v. Haevischer* on April 28, 2023 and ordered the matter back to BC Supreme Court for a full hearing on the misconduct. In *R. v. Kruk*, TLABC was granted leave to intervene by the Supreme Court of Canada on January 11, 2023. In *Kruk*, our argument is focused on the importance of a meaningful right to appeal in criminal cases involving credibility assessments. The right to appeal is the first line of defence against wrongful convictions, yet the ability to review convictions based on credibility assessments has been watered down in recent years. This is an issue in *Kruk*, and we will ask the Court to recognize the need to preserve the ability to challenge a trial judge's reasoning with respect to credibility assessments on appeal.

TLABC is continuing to develop in a positive direction, thanks to the efforts of our phenomenal board and staff. I look forward to seeing each of you at the various event receptions, and at our membership outreach events throughout this year across the province. **VI**

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FAMILY LAW ▶



BY **GEORGIALEE LANG**
TLABC Sustaining Member
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• Family Law Committee

Georgiale 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 FCI Arb 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.

Lawyering Up: The Representation of Children in Family Courts in BC

Children’s rights were first recognized in the Declaration of Geneva, adopted by the League of Nations in 1924, a document that came into being after the horrors of World War I when British social activist Eglantyne Jebb recognized the appalling effects of war on children. Along with establishing the “Save the Children Fund”, Ms. Jebb drafted a short document titled “Declaration of the Rights of the Child” which the League of Nations embraced.¹

The League of Nations was replaced in 1946 when the United Nations was established and in September 1990 the United Nations expanded the League of Nations Declaration and adopted the *Convention on the Rights of the Child*.

Article 12 (1) of the Convention provides that signatories will “assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12 (2) stipulates that to give effect to 12 (1) the child shall be provided the opportunity to be heard in any judicial or administrative proceeding affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Convention has been ratified by 195 countries, making it the most widely ratified human rights treaty in the world. While the United States has signed the Convention, it remains the only country that has not ratified it, a process that requires a two-thirds majority in the US Senate.² Canada quickly ratified the Convention and its importance and relevance is evidenced in its citation in hundreds of legal decisions since its ratification.

Section 203 of British Columbia’s *Family Law Act*, enacted in March 2013, authorizes the court to appoint a lawyer to represent the interests of a child if the court is satisfied

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that (a) the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child and (b) it is necessary to protect the best interests of the child.

In this article, I will review the relationship between the United Nations *Convention on the Rights of the Child* and section 203 of the *Family Law Act* and assess the Convention's significance to the interpretation of our domestic law. This exercise will include an exploration of the concepts of *amicus curiae* (friend of the court), and the superior courts' *parens patriae* authority.

THE CHILD'S VOICE BEFORE THE ENACTMENT OF THE FAMILY LAW ACT

The leading case on a child's right to be heard, prior to the enactment of the *Family Law Act* in March 2013, was Madam Justice Donna Martinson's decision in *BDJ v. DLG*, 2010 YKSC 44. Relying on the provisions of the Convention on the Rights of the Child but recognizing that Canada had chosen not to incorporate its provisions directly into its domestic law because our legislatures are presumed to respect the rights and values of the Convention, the court emphasized that all children have the right to be heard. The notion that specific circumstances, such as high conflict cases or cases of domestic violence or parental alienation were an exception to this rule was contrary to the Convention's clear language:

"The Convention is very clear; all children have the right to be heard...It does not give decision makers the discretion to disregard the legal rights contained in it because of particular circumstances or the view the decision maker may hold about children's participation."

Madam Justice Martinson noted that social science studies showed that excluding children from family law proceedings may lead to feelings of isolation, anxiety, and fear. Long term effects may include a loss of closeness in parent/child relationships, resentment, less compliance, and children "voting with their feet".

She referenced a chapter in "Evidence in Family Law" where Ontario authors Alfred Mamo and Joanna Harris described the many ways a child's voice could be heard, including through a neutral third party or a "views of the child" report, an affidavit from the child, evidence of the child's views from the child's parents, viva voce testimony of a child, audio or video tapes of the child, or an expert report.

Judicial interviews may also be necessary and appropriate, said Madam Justice Martinson. However, scholars Nicholas Bala and Rachel Birnbaum suggest that judicial interviews are not a replacement for child legal representation or assessment by a mental health professional, unless the case is urgent. Often, the only way for a child to be heard is through a judicial interview because of a lack of financial and other resources.³

In applying the foregoing legal principles to the facts in *BDJ v. DLG*, the court, having raised the issue of the 12-year-old child's

participation in the proceeding on its own accord, determined that the child's father's application to vary the existing custody order of week on/week off, which had been in place for less than one year, should be dismissed.

The evidence revealed that the child was content with the current schedule according to his mother, and that he declined to speak to the court. As well, both parents agreed that their son's involvement in the court process was not in his best interests. Madam Justice Martinson concluded that the father's application for custody was brought in an effort to reduce his child support obligations.

SECTION 203 OF THE FAMILY LAW ACT

The *Family Law Act*, which became law in March 2013, authorized the court to appoint counsel for a child in a family law proceeding. While it took a few years for counsel to engage this section of the Act, in the last few years a significant number of section 203 cases have been heard.

In *KSP v. JTP 2023*, BCSC 188, the court described the potential appointment of counsel under section 203 as an "intrusive instrument which should not be made lightly". The parties were the parents of an 11-year-old daughter and a nine-year-old son. The father, JTP, acting in person, brought an application mid-trial requesting orders that the children be permitted to speak with the judge and that independent counsel from the Children and Youth Legal Centre be appointed for the children.

Madam Justice McNaughton declined to make the orders sought, as drawing the children into the proceeding will "further damage all parties' relationships and would be antithetical to their best interests". She also noted that the children's views were already before the court in the form of a section 211 report and the oral testimony of the custody expert. Further, they had been interviewed by Ministry of Children social workers, and the court held that another interview had the potential to further disrupt their lives. The court was also concerned that the children were inappropriately privy to aspects of the litigation and their views may have been manipulated.

The judge also concluded that an application to have counsel represent the children should have occurred before the trial and not after four weeks of trial had taken place.

STC v. DJB, 2021 BCSC 1987 involved children ages 16 and 13-years old, who were residing with their mother pursuant to orders made after a 13-day trial in 2019. At the time of their mother's application for the appointment of counsel for the children, the children's father had parenting time with the children three days a week between 11 a.m. and 8 p.m. and while in school from after school to 8 p.m. on three days a week.

Prior to the application for the appointment of counsel, the children had a meeting with a representative from the Child and Youth Legal Centre. The representative advised the children's mother, STC, that the children wished to have counsel appointed

for them. The children's father, who was self-represented, resisted the appointment of counsel as he believed the children had been unduly influenced by their mother. He asked the court to implement that portion of the trial order that increased his parenting time to 50% of the time, based on the section 211 expert's recommendations at trial.

The court referred to the *Convention on the Rights of the Child* and Madam Justice Martinson's decision in *BJG v. DLG*, supra, where she espoused representation as the "most effective method of ensuring the participation rights of children."

The court noted that the section 211 report was now two years old and ought to be updated by the original expert with a view to determining whether a further adjustment in parenting time should be made or whether a shared parenting schedule was still appropriate. The court also ordered that counsel be appointed in accordance with the children's wishes and their maturity. Pending the appointment of counsel and an updated section 211 report, the court ordered the parties to retain a parenting coordinator.

REPRESENTING THE CHILD'S VOICE

In *JESD v. YEP* 2017 BCSC 495 the court considered the case of a 15-year-old British Columbia girl, SD. SD lived with her mother, who expressed a desire to "divorce" her father living in New York. Pro bono counsel sought an order that she be appointed to represent SD in the proceedings.

The girl's parents were separated after nine months of marriage and before their daughter was born in 2001. From birth to 2005, the child's father, YEP, exercised supervised access only, although there was no order or agreement requiring supervision. Between February 2005 and August 2009 five separate access orders were made.

YEP advised the court that his daughter was not aware that he was her father until February 2005 as JESD had forbidden him from letting his daughter know and he acceded to her wishes. In November 2005, SD told her father that her mother did not want to allow her to visit him in New York.

According to an earlier decision in these proceedings, *JESD v. YEP*, 2011 BCSC 1237, an expert report pursuant to section 15 of the Family Relations Act found that SD's apprehension of her father was "not alleviated" by her mother and that her mother "did not promote a close relationship between SD and her father". The court prophetically noted that it would be a tragedy if the father/daughter relationship would be irreparably damaged.

By 2015, approximately 21 separate court appearances and orders had been made (*JESD v. YEP*, 2015 BCSC 321). A second expert, Dr. Rebecca England, was retained, as the first expert report did not consider whether parental alienation was at play. The court noted that the second report by Dr. England seemed to have accelerated SD's growing concerns about her future and her belief that her voice needed to be heard.

Trial dates had been set for June 2017 which prompted the application for the appointment of counsel for SD. JESD was self-represented and YEP's counsel had a limited retainer.

AMICUS CURIAE AND PARENS PATRIAE

In considering the second expert report and the submissions of the proposed counsel for the child, Justice Armstrong concluded that the parties might be unrepresented at trial, and formed the view that the court would be greatly assisted by the appointment of amicus curiae for the upcoming trial. He invited the Attorney-General to appear and make submissions concerning the appointment and the funding of counsel. The AG took no position on the appointment of amicus curiae but vigorously resisted government funding of a lawyer.

The court cited Madam Justice Martinson's decision in *Dormer v. Thomas*, 1999 CanLII 5928, where she identified possible approaches to hearing the child's voice, including amicus curiae, litigation guardian, and child advocate.

The amicus curiae are a neutral officer of the court whose role is to facilitate an informed judicial decision in custody proceedings.

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¹ Sanborn, M. (2019, February 7). The Key To Sustainable Competitive Advantage: Hospitality. Forbes. <https://www.forbes.com/sites/marksanborn/2019/02/07/the-key-to-sustainable-competitive-advantage-hospitality/>



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FROM PAGE 11

A litigation guardian is appointed to protect the interests of a child and decide what is in the child's best interests. The litigation guardian's views need not align with the wishes of the child. In contrast, a child advocate assumes the more traditional role that lawyers undertake with an obligation to advance the child's wishes.

Justice Armstrong noted that while the former *Family Relations Act* provided authority for the Attorney General to appoint an advocate for the child, that section did not make its way into the current *Family Law Act*. However, section 204 of the *Family Law Act* permits the Attorney General to intervene in a proceeding where an issue in the proceeding may affect the public interest.

Ultimately, the court determined that an *amicus curiae* was necessary to ensure the orderly conduct of a complex custody proceeding, and an *amicus curiae* was appointed pursuant to the court's *parens patriae* jurisdiction, with reference to *E. (Mrs.) v. Eve*, 1986 CanLII 36 (SCC). The court found that without an *amicus curiae* serious questions raised in Dr. England's report may not be properly explored and examined.

Key principles from *E. (Mrs.) v. Eve* include that the *parens patriae* jurisdiction is founded on "the need to act for the protection of those who cannot care for themselves" and that "the situations under which it can be exercised are legion...but they...inexorably moved towards a broader discretion under the impact of changing social conditions and the weight of opinion...in other words, the categories under which the jurisdiction can be exercised are never closed."

With respect to SD's request to have counsel appointed for her pursuant to section 203 of the *Family Law Act*, Justice Armstrong was not convinced that SD's best interests would be advanced if counsel acted on her instructions, as Dr. England's report indicated that she lacked the insight, capacity and inclination to reflect on her own best interests, although she was a bright and capable girl.

SD also asked to be named as a party to the family litigation, but the court determined that it would not be appropriate as it would place her in the "invidious" position of having to cross-examine her parents and Dr. England. She also sought the appointment of a litigation guardian which was also dismissed.

The court adjourned the hearing with regards to the funding of the *amicus curiae* to await the outcome of an appeal in the Ontario case of *Morwald v. Morwald-Benevides*, 2015 ONCJ 532, where the funding of an *amicus curiae* by government was ordered.

Ultimately Justice Armstrong ordered the Attorney General to fund the *amicus*. His orders were appealed by SD and the Attorney General. The June 2017 trial did not take place.

CONVENTION ON THE RIGHTS OF THE CHILD AND S. 203 OF THE FAMILY LAW ACT

At the time of the appeal SD was 17-years old and the relationship between SD and her father had not changed, with SD wanting nothing to do with him. At the outset the appeal court queried what a court could do to resolve the situation given SD's position. SD appealed the denial of her application for counsel and the appointment of an *amicus*. The Attorney General appealed the funding order. (*JESD v. YEP* 2018 BCCA 286)

We learn in the appeal decision that the parties' marriage ended in a tumultuous way. While they were legally married in Japan in

December 2019, they planned a wedding ceremony for the summer of 2000 in Vancouver. The night before the ceremony YEP called it off, ended the relationship, and left Vancouver for New York, where he lived. JESD was pregnant and SD was born in April 2001. The parties entered into a separation agreement in March 2002, which gave JESD sole custody and guardianship with generous access to YEP.

On appeal SD was represented by counsel, YEP also had counsel and JESD was self-represented.

Counsel for SD argued that the chambers judge's interpretation of section 203 was in error and that the section should be interpreted as "providing a more expansive right of representation for children than is apparent on its wording", in accordance with the values of the *Charter of Rights and Freedoms*. However, the appeal court relied on *R. v. Rodgers*, 2006 SCC 15 where the high court held that "Charter values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation." The court found no ambiguity in section 203.

The court noted that SD had not challenged the constitutional validity of section 203 before the chambers judge and refused to permit SD to raise Charter arguments on appeal, based on the well-established principle that Charter challenges will not ordinarily be permitted to be made for the first time on appeal.

SD also placed considerable emphasis on the provisions of the Convention on the Rights of the Child, arguing that Canada's international obligations can inform the interpretation of domestic legislation, even when those obligations have not been implemented in the domestic law.

Often, the only way for a child to be heard is through a judicial interview because of a lack of financial and other resources.

However, the court pointed out that Article 12 of the Convention did not guarantee a right of representation in a legal dispute. Rather, it required that a child's voice be heard, a principle that was satisfied by the ability of the judge to interview the child as well as by multiple provisions in the *Family Law Act*, including section 37 (2) (b), requiring a court to consider a child's views in determining their best interests; section 199(2)(a), requiring a court to consider the impact of a proceeding on the child; section 202 (b), permitting other directions to receive a child's evidence; and section 211, providing for the appointment of a person to assess the needs and views of a child.

The court also considered official United Nations commentaries on the Convention and noted that the Convention does not mandate that a child have access to legal counsel, as suggested by SD's lawyer. Rather, General Comment 12 states that a "representative in Article 12 can be a parent, lawyer or other person."

Further, the court was referred to an article written by D.J. Martinson and C.E. Tempesta titled "Young People as Humans in Family Court Process: A Child Rights Approach to Legal Representation", where the authors suggest that "section 203 of the *Family Law Act* significantly limits the ability of courts to appoint lawyers for children as required by the Convention".

The appeal panel reasoned that nothing in the Convention allowed the court to ignore the clear limitations placed on the appointment of counsel by the legislature in the *Family Law Act*.

With respect to the appointment of an *amicus curiae*, the court held that making the appointment under the auspices of the *parents patriae* jurisdiction was misplaced, as the power to appoint an *amicus* has been recognized as an inherent power of superior courts to control its own process in order to administer justice fully and effectively.


An *amicus* appointment should be exercised sparingly, in response to specific and exceptional circumstances. The court found that the circumstances described by the chambers judge did not seem to serve to protect SD, but appeared to relate to the convenience of the court and the parties or the efficiency of the trial process, goals which do not invoke the "underlying principle" of the *parents patriae* jurisdiction.

In addition, the court affirmed that as a prerogative power, the *parents patriae* jurisdiction must yield to statutory provisions, as its utility is limited to cases where there is a gap in the legislation. It is not meant to be a statutory amendment and does not create substantive rights.

The court set aside the order that an *amicus* be appointed which made the Attorney General's appeal moot, however, the court took the opportunity to address the funding appeal, as the matter had been fully argued and provided a fulsome discussion of the principles applicable to the expenditure of public funds by court order.

CONCLUSION

The appeal decision in *JESD v. YEP* provides an important discussion on the ability of courts to appoint lawyers for children; *parents patriae* powers of the court; the criteria for the appointment of an *amicus curiae*; and the intersection of the Convention on the Rights of the Child with British Columbia's legislation. Section 203 undoubtedly advances protections for children despite its restrictions and academic commentary that it does not go far enough.

As mentioned earlier, the number of applications for the appointment of counsel for a child has accelerated in the last few years with very few cases prior to 2016. Query whether British Columbia's Child and Youth Legal Centre, with the mandate of "providing legal help for young people who are experiencing problems relating to family law" and inviting children to contact them, may be a factor in the increasing number of cases in our courts.⁴ In addition, my review of the cases points to litigants without counsel, who are invoking section 203 in order to ensure that their children's voices are heard. Undoubtedly, section 203 is a beacon of hope for parents and children who find themselves flailing in the adversarial waters of our family courts. 

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TECHNOLOGY ►



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.

The Rise of ChatGPT and the Future of Legal Writing

Much has been written recently about the transformative role AI is likely to have throughout the economy. With OpenAI's application ChatGPT now available to the public to try, it seems appropriate to take a look at how this innovation may impact the legal profession.

However, as I pride myself in being an earlier adopter, I thought that rather than giving you my own opinion, I would simply ask ChatGPT how it intended to assist (or replace) lawyers over the next few years:

The response it provided, in under 10 seconds, was promising. Among other benefits, ChatGPT suggested it could assist with the following:

“Legal research: ChatGPT can assist lawyers in conducting legal research by providing quick and accurate answers to legal questions. It can analyze case law and statutory provisions and provide summaries and explanations of legal concepts.

Contract drafting: ChatGPT can help lawyers in drafting contracts by generating clauses and provisions based on the specific requirements of the parties involved. It can also provide suggestions on the legal language to be used and identify potential issues and risks.

Legal writing: ChatGPT can assist lawyers in drafting legal documents, such as briefs and memoranda, by suggesting legal arguments and providing relevant case law and statutory provisions. It can also help in proofreading and editing legal writing for clarity and consistency.

Client communication: ChatGPT can be used by lawyers to communicate with clients by providing quick and accurate answers to legal questions and explaining legal concepts in simple language.”

Sensing the AI revolution was upon us, I asked ChatGPT to prepare the rest of the article. It opened with the following piece of self-promotion:

“Advancements in artificial intelligence (AI) have revolutionized the legal industry in recent years. Legal professionals are using AI-powered tools to streamline their work, automate repetitive tasks, and provide more efficient and effective legal services to clients. One such tool that has gained popularity is ChatGPT, an AI-based language model developed by OpenAI. ChatGPT uses natural language processing (NLP) and machine learning algorithms to analyze text and generate human-like responses to questions. In this article, we will explore the various ways in which ChatGPT can be used in the practice of law.”

However, despite passing along the word count for the article, ChatGPT stopped writing shortly after completing the above paragraph – possibly because I declined to upgrade my free account. Nevertheless, ChatGPT's initial response suggested numerous ways in which it could assist in legal practice.

I decided to run a few uncontrolled experiments. In the rest of this article, I will report on the results.

1. Legal Research

At times, it's spending hours researching an area of law you are unfamiliar with to arrive at an answer that, in retrospect, should have taken only five minutes. At other times, it's spending hours researching a familiar area of law to confirm that the answer you arrived at after five minutes was correct. In either case, legal research is an element of legal practice that calls for increased efficiency.

Eager to learn exactly how much time AI could free up, I asked ChatGPT the following question: "What range of non-pecuniary damages will the BC Supreme Court award to a 50-year-old high school teacher for chronic neck and shoulder pain that is unresolved after six years?"

Unfortunately, the AI's response began with a disclaimer: "As an AI language model, I cannot provide up-to-date information on legal cases or make legal predictions or interpretations... It is best to consult with a legal professional who can provide tailored advice based on the details of the case."

While this response is evidence that ChatGPT may have picked up some lessons from the legal writings it trained on, it is not entirely helpful when one is a legal professional hoping to provide AI-tailored advice based on the details of the case.

Considering that ChatGPT might perform better with a more concrete question, I asked it to "provide an outline of the three-part test for loss of income earning capacity, including appropriate case citations." I had in mind the test recently articulated by Justice Grauer in three 2021 Court of Appeal decisions. I did not specify a jurisdiction, though being a self-learning algorithm, ChatGPT surmised I was asking for the test applicable in BC:

ChatGPT promptly responded with the following information: "The three-part test for loss of income earning capacity in British Columbia involves determining (1) whether the plaintiff has suffered a loss or impairment of their earning capacity, (2) the extent of the loss or impairment, and (3) the amount that should be awarded to compensate the plaintiff for the loss or impairment."

For those who do not practice in personal injury, this is a poor answer. At paragraph 47 of the decision in *Rab v. Prescott*, 2021 BCCA 345, Mr. Justice Grauer sets out the test as follows:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity,..... The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury,

future surgery or risk of arthritis, giving rise to the sort of considerations discussed in [*Brown v. Golaj* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.)]). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring....

Hoping to point ChatGPT in the correct direction, I clarified that I was asking it to "outline the three part test for loss of income earning capacity as outlined by Grauer J. A. in 2021."

Again, ChatGPT stated the same three steps outlined in its original response. However, it further noted that this test was recently articulated by Justice Grauer in *Eshun v. Canada Line Rapid Transit Inc.*, 2021 BCCA 57.

On review, surprisingly the *Eshun* appeal appears to be a case ChatGPT invented.

Simplifying things further, I asked ChatGPT how a claimant in a BC Supreme Court Family proceeding could obtain a default judgment against a respondent who has not filed responsive pleadings in the past two years.

Unfortunately, despite specifying that this was a family proceeding, ChatGPT's initial response referred to the Supreme Court Civil Rules.

When I asked for appropriate statutory and case citations, ChatGPT found the Supreme Court Family Rules. However, it suggested that the appropriate process was to file and serve a notice of application under Rule 10-9, which provides procedures for obtaining an order on short notice. ChatGPT then confidently advised that *Adell v. Franck*, 2015 BCSC 1552 "provides a helpful example of a successful default order application in a family law matter."

Unfortunately, the process ChatGPT recommended would not be consistent with the requirements of Rule 10-10, which is the rule actually specifying how a party can obtain a final order in an undefended family law proceeding.

As well, *Adell v. Franck* does not appear to be a reported case. The neutral citation provided refers to a personal injury matter.

Overall, I do not foresee transitioning my firm's research functions to ChatGPT (at least this year). While its ability to quickly generate plausible-sounding answers is astounding, its current degree of accuracy is insufficient. In fact, the confidence with which it refers to incorrect legal principles as set down in non-existent cases may lengthen the time spent on research tasks rather than reducing it.

2. Contract Drafting

As a litigator, contract drafting is a relative rarity in my practice. One major exception is with respect to settlement agreements. I asked ChatGPT to provide a release and settlement agreement by which \$100,000 would be paid to the Plaintiff in full settlement of all claims arising from a slip and fall that took place on August 3, 2017. In about 5 seconds, ChatGPT provided a quite workable settlement agreement.

When identifying the fall at issue, the agreement noted the August 3, 2017 date and left a fillable blank where the fall's location would be specified (something I had omitted to specify). It specified that the release applied not only to the Defendant but also to its employees, officers, directors, etc. It also specified that the payment was not an admission of liability and included 'boilerplate' language addressing governing law, execution in counterpart, and specifying that the contract contained the "entire agreement" between the parties.

While I presumed the AI was simply reproducing terms it had commonly seen before, I queried why it had included the language specifying payment was not an admission of liability when I had not asked it to do so.

The AI responded, suggesting that it was common to include such language in releases. It provided a brief statement on the legal effect of the language, then suggested that such a clause benefited both parties. The Defendant would be able to protect its reputation and avoid setting a precedent, while it would enable the Plaintiff to obtain a resolution more readily than if they had to prove liability at trial.

I then asked ChatGPT to prepare a mediation agreement between Plaintiff, Defendant, and Mediator. Again, I was quite surprised by what the AI put together in about 10 seconds. The AI was able to lay out the basic details, including time, location, confidentiality of the mediation proceedings, and costs. The agreement specified that the mediator could not be called as a witness, and that the parties would attend with authority to settle the matter, and that any settlement agreement could be enforced in a court of competent jurisdiction.

My major critique would be that the AI seemed uncertain as to how it wanted to treat the mediator as a party. I had not provided any particular instructions in this regard. At times, it referred to the "parties" in a context which suggested the mediator was included. At other times, it referred to "the

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Mediator and the other party” with the implication that the mediator was subject to a different set of obligations.

Ultimately, I suspect that a mediator preparing such an agreement for use in their own practice would want to minimize their own liability more than ChatGPT’s first draft provided for. Repeating the request but specifying that the terms should be “favorable to the mediator,” prompted ChatGPT to include disclaimer of liability and hold harmless language.

Finally, I asked ChatGPT to provide some “strong indemnity language” for a hypothetical licensing agreement. I had anticipated a paragraph, but it provided me with 400 words of standard-looking indemnity language.

Overall, I was impressed by ChatGPT’s ability to draft simple agreements quickly and from minimal input. Of course, for simple agreements, my firm, and most firms, would have existing templates. For lawyers or other users looking to develop agreements starting without much more than a blank page though, relying on ChatGPT as a starting point could be invaluable.

3. Legal Writing

Hoping to build off ChatGPT’s success in drafting simple contracts, I tasked it with preparing another common document: a Notice of Application compelling production of medical records (in this case chiropractic records).

While the AI was clearly familiar with the form of the Notice of Application, the content of the notice was unsatisfactory.

Under relief sought, ChatGPT indicated we were seeking “An order pursuant to Rule 7-1(7) of the Supreme Court Civil Rules, compelling the Plaintiff to produce...”

I have seen several subrules cited as the rule 'pursuant to which' a document disclosure order was sought. However, Rule 7-1(7), which addresses how a party is to describe a document over which privilege is claimed, is probably not the correct subrule.

Furthermore, the grounds provided for seeking the order are simply that the records are relevant and that “The Defendant has no other means of obtaining the records from the Plaintiff’s chiropractors.” This argument may not be the most compelling. Adding more specificity did not seem

to help either: when given the correct statutory citations, ChatGPT referred to them but then misstated their effect. For example, it referred to “Rule 7-1(10) of the British Columbia Supreme Court Civil Rules, which provides that the court may order the production of a document even if it would be subject to a claim of privilege.” When I asked for supporting

case law, it provided four cases, including one purportedly from the Supreme Court of Canada. However, there are no records of any of those cases. Simply asking ChatGPT to advise “What case would a defendant refer to in a BC Supreme Court proceeding when seeking an order compelling disclosure of the plaintiff’s medical records?” also elicited a referral to a non-existent Supreme Court of Canada case.

Switching course, I asked ChatGPT to provide a case law summary for *Richter v. Richter Estate*, 2023 BCSC 105 (CanLII). However, I was informed that its knowledge base only goes up until September 2021.

Accordingly, I asked for a summary of *Kaladjian v. Jose*, 2012 BCSC 357. ChatGPT started its summary as follows:

Decision: The court found that Jose was liable for the damages suffered by Kaladjian. The court held that Jose had breached her duty to maintain the property in a safe and habitable condition, and that this breach had caused Kaladjian’s injuries. The court also found that Kaladjian had suffered a number of injuries as a result of the poor condition of the property, including a broken ankle, a back injury, and various cuts and bruises.

ChatGPT continued to discuss how Mr. Kaladjian was awarded \$50,000 in damages and \$5,000 in punitive damages and concluded that it was an important decision in landlord-tenant law. However, the Kaladjian decision is an appeal from a chambers ruling and is generally cited as establishing that the document disclosure obligations under Rule 7-1 are narrower than the obligations under the previous Rules. In the underlying action, Vicky Kaladjian sought damages from the defendant for injuries suffered in a motor vehicle accident. As far as I can tell, the entire case summary that ChatGPT generated was a work of fiction.

Hoping to end on a strong note, I asked ChatGPT who authored the decision in *Kaladjian v. Jose*, 2012 BCSC 357. It confidently responded, “Madam Justice Loo.” Unfortunately, the correct answer was the Honourable Mr. Justice Davies.

Once again, ChatGPT seems to underperform when asked to complete a litigation assignment. It's possible that I'm simply more discerning in these areas of law, although I also suspect that the algorithm may have less exposure to "good" source material to draw from.

4. Client Communication

While it's probably still some time before we let ChatGPT hold the pen for pleadings or communication between counsel, it may be more effective when addressing a less specialized audience, such as in client communications.

Dimly recalling an assignment from PLTC, I asked ChatGPT to prepare a letter advising a client that I had failed to commence their action within the limitation date. This is probably no good way to present this news. However, ChatGPT's decision to open with, "I am writing to you today with some unfortunate news" and to close with "I understand that this may be a difficult situation to navigate, but please know that I am here to support you and will do everything in my power to assist you" are probably not the least bad choices.

Lowering the difficulty, I asked it to draft an email advising a client that their examination for discovery was postponed because the other party's lawyer was suddenly unavailable.

The results were much better.

I would have some edits: In particular, I would not specify as ChatGPT had that: *"I understand that this is a frustrating delay, but it is not uncommon for these things to happen."* There's little to be gained here by trying to suggest to the client that I have fully considered the impact on them, and it reads as disingenuous. Further it may seem a reassurance to let the client know the delay is not abnormal, but there is arguably

an insinuation that, since these delays are not uncommon, perhaps their frustration is unreasonable.

In both writing assignments, and more generally, I found ChatGPT had a tendency to overexplain. Much of improving as a writer in a legal/business context is learning to predict your audience's reaction to your work. Then the focus becomes getting the reaction you're looking for as efficiently as possible. From my limited sample, ChatGPT is not adept at these aspects of writing.

This is a tendency common with less experienced (and some more experienced) writers. Again, I wonder if the issue is simply arising from a similar tendency being present in so much of the material ChatGPT trained on.

5. Conclusion

While I have been fairly critical at times, it is evident that ChatGPT is an amazing piece of technology. I anticipate significant advancements will be made over the next few years, particularly as companies move to commercialize this technology for the legal profession. Beyond simply enabling lawyers to automate aspects of their practice, I see potential for conversational text-based AI to augment the way we approach legal problems and build arguments.

ChatGPT is a ready-made interlocutor sitting on your desktop. While at present this technology has limitations, even when ChatGPT's provides incorrect information, it composes arguments in a way that mirrors human reasoning.

Going forward, the ability to hash out ideas and test arguments without having to engage a colleague should become exceedingly valuable for those who are able to take advantage of the technology. **M**

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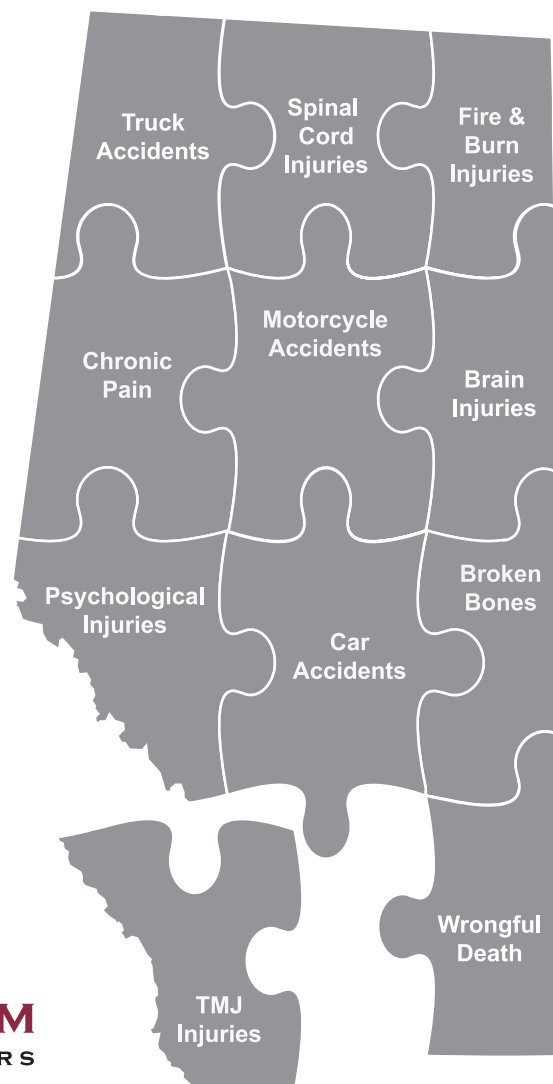
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Trevor Todd is one of the province's most esteemed estate litigation lawyers. He has spent 50 years helping the disinherited contest wills and transfers – and win. From his Kerrisdale office, which looks more like an eclectic art gallery than a lawyer's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

Severance of a Joint Tenancy

Joint Tenancy and Tenants in Common

Joint tenancy and tenancy in common are the two most common forms of concurrent property ownership in Canada.

In a joint tenancy, the “four unities” of title, interest, time and possession are present and co-owners hold an equal interest in the property as a unified whole. The common law treats joint tenants as a single tenant: each holding the whole for all, with no distinct shares held by anyone.

In contrast, in a tenancy-in-common, one co-owner may hold a greater proportionate interest in the property than the other co-owner(s).

The principal and distinguishing characteristic of joint tenancy is the right of survivorship. When one joint tenant dies, his or her interest in the property is extinguished and passes to the surviving joint tenant(s) automatically by operation of law.

The right of survivorship is a revocable “expectancy” that manifests only upon success in the so-called “ultimate gamble” – survival – and then only if the joint estate has not been previously destroyed by an act of severance.

Unlike that of a joint tenant, a tenant-in-common's interest in property remains intact upon death and passes into his or her estate.

The Four Unities Required to Create a Joint Tenancy

- 1. Unity of title** - means the title of each joint tenant arose from the same act or instrument.
- 2. Unity of interest** - means their holdings are perfectly equal in nature, extent and duration.
- 3. Unity of time** - means all the interests vested simultaneously.
- 4. Unity of possession** - means each joint tenant has a right to present possession and enjoyment of the whole property, but no right to exclusive possession of any individual part of the whole.

Assuming all four unities are present, the question of whether a joint tenancy or a tenancy in common has been created is determined by the intention of the grantor.

Severance of a Joint Tenancy

A joint tenant is free to deal with his or her interest and may sever a joint tenancy, with or without the consent or knowledge of the other joint tenant(s).

After a joint tenant dies however, severance is no longer possible because death extinguishes the joint interest; thus, a will cannot sever a joint tenancy: *Bergen v. Bergen*, 2013 BCCA 492 at para. 40;

When a joint tenancy is severed , the joint tenancy is converted into a tenancy-in-common and the right of survivorship is extinguished. It is important to know that once the joint tenancy is severed, it remains such and like a broken “Humpty Dumpty,” it can only be put together by starting over and recreating the four unities.

As a consequence of severance, each co -owner then becomes entitled to a distinct share rather than an undivided interest in the whole.

As a consequence of severance, each co -owner then becomes entitled to a distinct share rather than an undivided interest in the whole.

Severance Is “Typically” Affected in One of Three Ways:

1. By one person acting unilaterally (and usually deliberately) upon his or her own interest, so as to destroy the four unities (i.e. by transferring his or her interest to his or herself as provided for in the *Property Law Act* and the *Law and Equity Act*);
2. By mutual agreement, such as a written marital separation contract;
3. By any “course of dealing” sufficient to intimate that the interests of all were mutually treated as constituting a tenancy-in-common- for example, conduct which demonstrates both tenants mutually dealt with their interests as several and separate.

The onus of proof rests on the party asserting the severance: *McKee v. National Trust Co.* (1975), 7 O.R (2d) 614 (CA).

There are several other modes of severance including but not restricted to bankruptcy, partition, and order made under matrimonial legislation.

The BC Court of Appeal in *Bergler v. Odenthal*, 2020 BCCA 175, confirmed that both a declaration of trust and a secret trust would have the effect of severing a joint tenancy (see also *Public Trustee v. Mee* (1972), 2 WWR 424 (BCCA), where a bare trust declaration was held to sever a joint tenancy).

Severance by Conduct

The underlying rationale for a course of dealing severing a joint tenancy is that it ensures that a right of survivorship does not operate unfairly in favour of one owner, where the co-owners have demonstrated through their conduct a common intention to no longer treat their respective shares in the property as an indivisible unified whole.

The following are five courses of conduct between joint tenants that have resulted in a severance of their joint tenancy, sometimes without any knowledge or intention on their part to have done so.

A. Acrimonious Conduct Between the Joint Tenants

In *Preskar Estate v. Wagner*, 2023 BCSC 80, a BC court found that a joint tenancy with a right of survivorship had been severed into a tenancy-in-common by reason of the joint owners’ acrimonious conduct to each that was inconsistent with joint tenancy unity.

An unmarried couple who owned their property in joint tenancy had acrimonious family litigation for many years, starting in 2007 that never resolved. The joint tenancy was never severed and when Mr. Preskar died, his interest in the joint tenancy property immediately went to his partner by right of survivorship.

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

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

The BC court adopted the reasoning of the Ontario Court of Appeal in *Hansen Estate v. Hansen*, 2012 ONCA 112, where the spouses had separated and retained legal counsel, one party prepared a new will, and the lawyers were in the process of negotiating the division of their joint assets, but one spouse died before the negotiations were completed.

The Appeal court held that even failed or uncompleted negotiations can lead to severance because “the negotiation of shares and separate interests represents an attitude that shows that the notional unity of ownership under a joint tenancy has been abandoned”.

B. Agreement to Ultimately Pay the Sale Proceeds into Two Separate Accounts

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

The couple agreed to sell the property to a family member and prior to her death, the wife and husband had agreed that one-half of purchase price would be paid to each of them and the proceeds were to be maintained in separate bank accounts.

The court found that these facts were sufficient indicia of the destruction of unities of interest and possession, both by agreement and course of conduct.

C. Partnership of Jointly Owned Property

In *Garland v. Newhouse*, 2021 BCSC 1291 (upheld at 2022 BCCA 276), a partnership between non-spouses of a jointly owned property ran for profit or loss was held to sever the joint tenancy when one of the partners died.

The parties had no personal relationship and had equally contributed to the purchase of the investment property, equally shared expenses associated with the property, and equally shared in profits derived. Their objective was to earn profit over time. They opened the joint bank account to manage the financial aspects of the business. The accounting records describe the arrangement as a partnership and individuals as partners.

The court found that there was in fact a partnership and that it was inconsistent with a joint tenancy with right of survivorship. Partners share profits and losses and the legal framework of a partnership is not compatible with the legal principles of a joint tenancy.

Where the property in issue is partnership property, there is a presumption that there is no right of survivorship as between partners, at least as to their beneficial interest in partnership assets. Absent compelling evidence of a contrary agreement, a surviving partner holds legal title to property held in joint tenancy on trust for the surviving partner and the estate of the deceased partner: *Agro Estate v. CIBC Trust Corp.* (1999), 26 E.T.R. (2d) 314 at para. 44.

D. Never Intended a Joint Tenancy

In *Lescano v. Unlu*, 2016 BCSC 1535, the court found that if the joint tenants ever were a couple, their relationship had ended long ago, that at least one of the parties, if not both, did not understand the legal effect of a joint tenancy, and did not want it from the outset. A handwritten will prepared by one of the joint owners indicated that she wished her share of the property to go to her three children equally in the event of her death, and the survivor testifies neither of them ever did want a joint tenancy.

E. Misuse of Power of Attorney

In *Zeligs v. Janes*, 2016 BCCA 280, the BC Court of Appeal upheld a trial decision finding that a joint bank account was severed when one of the joint tenants withdrew funds from the joint account using a power of attorney that benefitted only herself. In doing so, the joint tenant automatically severed the joint fund and converted it into a tenancy-in-common, thus extinguishing the right of survivorship.

Conclusion

It is not exactly clear what evidence and how much of it the courts may require in order to find that a joint tenancy has been severed by conduct, but it is certainly a growing area of law and the courts have shown a willingness to expand the area.

The courts are being presented with more and more fact patterns of conduct where the co-owners have demonstrated through their conduct a common intention to no longer treat their respective shares in the property as an indivisible unified whole.

What is particularly interesting about this growth area of law is how uninformed the public and even the legal profession are about severance by conduct and the possible significant financial and emotional consequences of their actions.

More importantly, the lack of knowledge of a severance by conduct can lay dormant for many years until typically contested after death, such as in the Preskar Estate case where the acrimonious behavior that severed the joint tenancy many years before was not reflected on the land title deed.

It will increasingly become the norm in matrimonial and estate litigation cases to explore whether in years past there was ever conduct between the joint tenants that might have severed their joint tenancy so that one half of the property is “up for grabs” by the estate instead of going to the surviving joint tenant. **IV**



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ARTICLE ►

BY **DOUG CHIU**TLABC Sustaining Member
PAC Contributor

TLABC COMMITTEE

- Executive Committee
- EDI Committee Co-Chair

Doug Chiu is a Partner at Hammerco Lawyers LLP and heads their Commercial Litigation Department. He is a member of the Executive Committee of TLABC's Board of Governors. Along with Kyla Lee and Elsa Wyllie, Doug is one of the co-chairs of TLABC's newly formed Equity, Diversity and Inclusivity Committee.

Equity, Diversity and Inclusivity – Difficult but Important

The ideas surrounding Equity, Diversity and Inclusivity have been a buzzword in recent years. More and more organizations and companies are being cognisant in the need for a more equal representation of voices. This notion is not lost upon us in our legal sphere; in fact, some may say that it is long overdue.

Numerous studies have shown the importance of any organization having a strong EDI program. Not only does it strengthen its culture, but it trickles down to its members, employees, and even its public image. Important contemporary issues have come to the forefront and members have expectations that their organization will address and act on them.

Even within our litigation circle, there has been much discussion on very contemporary topics. These issues span from introductions of counsel in Court, to efforts made in creating a more diverse judiciary. They include newfound recognition of important cultural days of significance, to open discussions about how some lawyers have been personally affected in their legal career due to their gender, race, or disability.

TLABC recognizes the importance of Equity, Diversity and Inclusivity. In fact, it has been a mandate of the Board of Governors to establish our own Committee to address these issues for our members, and the public. A call out for volunteers to join our EDI Committee was made and we were thrilled to receive interest from numerous members. This is indicative of not only one's personal interest but also how EDI has resonated in our work and legal community. We are proud to announce that our Committee is made up of 10 individuals, who not only vary in gender and race, but also practice area, geography and legal experience.

The EDI Committee recently had our first meeting and we all recognize that starting such an initiative will take time and patience. It is not an easy task as it requires a recognition of past errors, a desire to change, along with exposing personal vulnerabilities and circumstances. Nonetheless, our goal will be to focus on key areas where we will be able to make a difference.

Whether this is spotlighting key TLABC members or providing important opportunities to showcase other members, or even assisting and partnering up with other like-minded organizations, we are committed in furthering TLABC's EDI initiatives. We are an organization that is comprised of over 1,400 legal professionals. Not only do we represent different clients and practice in different areas of the province, we are also made up of individual backgrounds and personal experiences. It is our ultimate hope that these differences are recognized, shared and valued. This is a difficult but important task and we ask that you kindly stay tuned to our progress. **W**



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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.



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.

CONSTITUTIONAL LAW — Principles — Access to justice • April 2019 amendments to the Civil Resolution Tribunal Act giving the Civil Resolution Tribunal jurisdiction over the determination of: (a) entitlement to no-fault accident benefits paid or payable under the Insurance (Vehicle) Act; (b) whether an injury is a "minor injury" under the Insurance (Vehicle) Act; and (c) liability and damages for personal injury of \$50,000 or less — Court finding ss. 133(1) (b) and (c) of the Act, relating to liability and damages, to be unconstitutional and of no force or effect, since those provisions prevent access to the courts in a manner inconsistent with Constitution Act, s. 96, thus falling outside provincial jurisdiction under s. 92(14) to administer justice — Appeal court majority allowing appeal, finding the new provisions not giving a provincial tribunal the powers of a s. 96 court — Supreme Court of Canada dismissing application for leave to appeal with costs. *Trial Lawyers Assoc. of British Columbia v. British Columbia (Attorney General)* (<https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/19605/index.do>) S.C.C., Wagner C.J. & Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer & Jamal JJ., 40291, December 22, 2022, 1pp., [CLE No. 78868] • On appeal from 2022 BCCA 163, [2022] C.D.C. 77225 (CLE)

COSTS — Matrimonial proceedings — Conduct of parties • Offer to settle Court finding wife substantially successful at trial of parties' family law action — Court finding no litigation conduct on husband's part entitling wife to special costs, but finding her entitled to double costs based on second of 2 offers to settle. Following trial of the parties' family law action and the court giving judgment, the wife sought costs, including special costs and double costs. The wife made an offer to settle in September 2013, which was subsequently withdrawn in January 2014. She sought an award of double costs from the date of that offer on the basis that the offer should have reasonably been accepted. She made a further offer in April 2014. The husband asserted that the parties should bear their own costs. Held, wife entitled to double costs from date of April 2014 offer. The wife achieved substantial success at trial. She achieved success on five of the six matters at trial. With respect to the weight or importance of the individual matters, the wife was successful on the three matters having the largest monetary value. The British Columbia courts have made it clear that a party seeking special costs must demonstrate exceptional circumstances and that the courts should also show restraint in awarding such costs. Here, some of the husband's impugned conduct clearly constituted pre-litigation conduct. With respect to his failure to acknowledge the existence of an oral agreement between the parties until the eve of trial, that did not meet the high standard for "reprehensible" conduct. It was apparent from the husband's testimony that he genuinely believed that the parties' separation in 2011 was a temporary "trial separation". It was his belief that the agreement was only an interim agreement that apparently motivated him to deny its existence for so many years. Thus his position was not motivated by malice but by an honest belief in his position. The wife had not demonstrated the type of exceptional circumstances required to justify special costs. With respect to the offers to settle, the 2013 offer was obviously far more favourable to the husband than the ultimate result at

ARTICLE ►



BY ALISON WILKINSON

Alison Wilkinson (she/her) is a staff lawyer for the British Columbia Law Institute and the Canadian Centre for Elder Law. She obtained her B.A. in Psychology from the University of Victoria, and her J.D. from the University of British Columbia. She is trained in arbitration, mediation, coaching and plain language writing. Alison previously worked as in-house counsel and as a family lawyer, as well as a sessional instructor on dispute resolution for the Faculty of Business at Thompson Rivers University. She lives in Kamloops with her wife and son.

Why Language Matters: Gender Diversity in Legal Writing

The Primary Tool of Law is Language

There are entire textbooks drafted on the construction of statutes. Lawyers and judges study the word choice of contracts, legislation, and case law. Passages of judgments are analyzed endlessly to match an argument or intended purpose. We underline and bold passages that capture the meaning of a law or a judicial decision.

Words are the bricks with which we work. For gender diverse individuals, these bricks have often constructed a wall.

A Word Can Change Everything

In the legal profession — even more than in other professions — *the words we choose* are fundamentally important.

Words don't just shape the law; they are the law. They dictate application and enforcement. For example, the difference between *shall or may* can impact whether a person obtains an outcome or not. The wrong word can result in injustice and exclusion.

This is often the experience of gender diverse individuals and those in non-traditional families. Take for example a recent case involving a polyamorous triad.¹ The British

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Columbia *Family Law Act* does not acknowledge three parents if a child is conceived through sexual intercourse.² As a result, the impacted family had to apply to court to have a third parent recognized. For children conceived through sexual intercourse, the British Columbia *Family Law Act* only considers a *birth mother* and a *biological father*.³ The use of these words is to the exclusion of all others. Justice Wilkinson recognized this fact in stating that the law did not contemplate this family.⁴ As a result, the Court had to use its *parens patriae* jurisdiction to legally acknowledge what they lived every day.

Language Shapes Attitudes

The words we use to describe our world also impact how we see it.

Certain words exude judgement and negative connotations. Words that make us cringe now were commonly used not so long ago.

The problem is not limited to discriminatory words. It is not limited to people who actively hold negative beliefs and stereotypes about gender diverse people.⁵ These things can exist in the language of well-meaning individuals as well.⁶ Accidentally misgendering someone, for example, can cause pain and distress. Only using he/she constructions in our writing overlooks the existence of an entire group of people. Human rights law understands this fact — it is not about intentions, but real-world implications.⁷

Many have retaken and reframed the language used to describe them. This work has been undertaken by various groups including:

- Persons with disabilities;
- First Nations, Inuit, Métis, and Indigenous people;
- People of diverse races and places of origin;
- People with diverse sexual orientations and gender identities;
- Those over 65.

This is a process of restoring identity and dignity. It is also about respecting how people understand and express their experiences.

For example, we capitalize First Nation and Indigenous to recognize the unique governmental, spiritual, and cultural identity of Indigenous Peoples.⁸ Where imposed labels diminish power, chosen language can increase it.

We can only discover chosen language *by asking*. We must restore the power of each individual to identify who they are, and what they want to be called.

There is no one-size-fits-all for identity. It is by its nature unique. And by its nature, it must be determined by those who hold and embody that identity. In other words, we must ask, consult, and not assume to know.

Writing is an Actionable Step

For the same reason, it matters what we write. When we address our letters ‘dear sir or madam’ we live in a world of sirs and madams. By changing our language to reflect a broader spectrum, we are recognizing gender diversity.

For example, a recent Human Rights Tribunal decision held that failure to use a person’s correct pronouns in the workplace is discrimination under the *BC Human Rights Code*.⁹

This decision clearly communicates why it is important to use the correct pronouns for individual dignity. The Tribunal stated:¹⁰

Like a name, pronouns are a fundamental part of a person’s identity. They are a primary way that people identify each other. Using correct pronouns communicates that we see and respect a person for who they are. Especially for trans, non-binary, or other non-cisgender people, using the correct pronouns validates and affirms they are a person equally deserving of respect and dignity.

Our word choice is an actionable step that each of us can take and is one of the most powerful gestures of care we can offer one another. When we speak of persons who become pregnant, we are recognizing that pregnancy is not exclusive to cisgender women. When we use examples without gendered pronouns, we are reflecting a world that contains more than binary ideas of gender. When we ask about someone’s partner as opposed to husband or wife, we give space by not assuming heteronormativity.

These represent adjustments each of us can make. They are choices that indicate our willingness to learn, to change, and to recognize the dignity of others.

As we have seen, every word has extraordinary power to represent or exclude, empower or disempower. At times, we may choose the wrong words. A phrase or word can have unintended and unforeseen consequences.

This is the dance we undergo to move forward. No person can be a member of all communities. Mistakes will be made. If we approach this task with a beginner’s mind — with a sense of curiosity — we can learn the overlooked nuances and impacts of our word choices. More importantly, we can be guided towards meaningful solutions by those who live with the consequences.

Accidentally misgendering someone, for example, can cause pain and distress. Only using he/she constructions in our writing overlooks the existence of an entire group of people.


Tools for Change

Writing is a skill. It is also a choice. These are two things directly in our control.

We can learn to write in a gender inclusive way. It may take a little work upfront to change our writing style, but as we have seen, every word matters.

When we put pen to paper, we can choose to reflect the world as it truly is — a world that is anything but binary.

The British Columbia Law Institute recently released ‘Gender Diversity in Legal Writing: Pronouns, Honorifics, and Gender-Inclusive Techniques.’ This publication is a guide to support writers in moving towards a more inclusive writing style. It is free for download at [bcli.org](https://www.bcli.org).

Editor’s Note: For more on this topic, watch the TLABC webinar on Gender Diversity in Legal Writing by Alison Wilkinson, British Columbia Law Institute & Canadian Centre for Elder Law on-demand at https://www.tlabc.org/?pg=2022_GenderDiversityLegalWriting. Permissioned for members only. 

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- 1 British Columbia Birth Registration No. 2018-XX-XX5815 (Re), 2021 BCSC 767.
 - 2 Ibid at para 19.
 - 3 Ibid.
 - 4 Ibid at para 31.
 - 5 “Bias and prejudice” online: Ontario Human Rights Commission <https://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression/4-bias-and-prejudice#_ftn12>.
 - 6 Ibid.
 - 7 Nelson v Goodberry Restaurant Group Ltd. Dba Buono Osteria and others, 2021 BCHRT 137 at para 84 [Nelson].
 - 8 Gregory Younging, Elements of Indigenous Style: A Guide for Writing By and About Indigenous Peoples (Canada: Brush Education Inc., 2018) at 77.
 - 9 Nelson, supra note 7.
 - 10 Ibid at para 82.

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MEDICAL MALPRACTICE ►



BY **LINDSAY MCGIVERN**
TLABC Member

Lindsay McGivern is an associate lawyer at Pacific Medical Law. Lindsay obtained her law degree from Dalhousie University in 2014 and was called to the Bar in 2015. Her practice is focused on representing patients who have suffered injury as a result of medical malpractice. Lindsay articulated at a civil litigation defence firm before moving to Pacific Medical Law. Working on both sides of civil litigation has allowed her to have a broader perspective and given her a better understanding of the different approaches taken by plaintiff's and defence counsel.

Causation in Birth Injury Cases

This is the sixth 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 on causation in birth injury cases and, specifically, issues related to proving that different treatment would have been available if appropriate care had been provided and the treatment available would likely have avoided the outcome.

Introduction

Causation defences in birth injury cases were, historically, somewhat rare. The focus in the past seemed to be more on defending the care provided rather than building up a strong defence that, even if the medical practitioner provided inadequate care, the plaintiff had failed to prove the causal connection between that care and the ongoing injuries. In more recent birth injury litigation, causation defences arise in most, if not all, cases.

Causation can be difficult to prove in any medical case; there is simply so much that is still unknown in medicine. This uncertainty, despite all the advances that have been made in science and technology can make it impossible for a plaintiff to prove the factual cause of an injury, let alone the legal cause.

In birth injury cases, the uncertainties are even greater. With adult patients, the physician can speak to the patient and collect a history including past medical issues and current symptoms. The physician can observe the condition of the patient and perform a physical assessment. Blood can be drawn, urine samples can be obtained, lumbar punctures can be performed. These routine tests all provide additional information as to what is happening with the patient. Care for an unborn child is drastically different. Most of the information as to the health and wellbeing of the fetus is obtained from ultrasound images, the presence or absence of fetal movement and an assessment of the fetal heart rate. Direct assessments of a fetus, if even possible, carry significant risks (including miscarriage) and are therefore quite rare. The limitations on the information available to medical practitioners can make it extremely difficult, or impossible, to establish when and how an injury occurred.

In addition, the process of childbirth carries many risks to the fetus from numerous potential non-negligent sources. An oft cited quote from Lord Denning appears in the defence submissions in many birth injury claims:

Being born is dangerous for the baby. So much so that an eminent professor in this case tells us that: 'Throughout history, birth has been the most dangerous event in the life of an individual and medical science has

not yet succeeded in eliminating that danger.' He parodies the psalmist by referring to 'valley of the shadow of birth'.

This has its legal consequences. It follows that, when a baby is stillborn or dies soon after birth or is born damaged or deformed, that fact is no evidence of negligence on the part of the doctors or nurses attending the birth. It does not speak for itself. The maxim *res ipsa loquitur* does not apply.¹

Within this valley of the shadow of birth, identifying the factual cause of an injury and then linking that injury to inadequate care is frequently the most challenging part of the case.

The Legal Principles

The law on causation is clear and usually not in dispute. The plaintiff must prove, on the balance of probabilities, the defendant's act (or failure to act) caused the injury. The generally applicable test is the "but for" test; the plaintiff must "show that the injury would not have occurred but for the negligence of the defendant."² The plaintiff is required to lead sufficient evidence to establish, using a robust and pragmatic approach to the assessment, that the defendant's negligence was the cause, both in fact and in law, of the injuries sustained.³ The plaintiff must establish that the defendant's negligence was necessary to bring about the injury (the injury would not have occurred without this negligence).⁴ The defendant's wrong need not be the sole cause of the loss, but it must be part of the cause. "But for" causation raises the counterfactual question: what would likely have happened if the defendant had discharged his or her duty? Properly understood, "but for" causation simply means causation in fact.⁵

One of the issues that often arises with clients seeking to pursue a medical malpractice claim is the possibility of a better outcome. If, for example, expectant management (a 'wait and see' approach) led a child to sustain birth injuries and the experts agree the patient should have been actively treated, any parent will tell you they wanted the active treatment, no matter the risks. If the active treatment only offered a 25% chance of avoiding or improving the outcome, they cannot succeed in a medical malpractice claim, a concept that can be difficult to comprehend on an emotional level. The law is summarized by Adair J. in *Wiebe*:⁶

[115] It is not enough for a plaintiff to establish that a medical outcome might have been better had the defendant(s) acted differently. The trier of fact must be convinced by the evidence that the outcome probably would have been more favourable in order to be satisfied of causation on a balance of probabilities. See *Seattle et al. v. Purvis et al.*, 2005 BCSC 1567, at para. 145, aff'd 2007 BCCA 349.

[116] Moreover, as Beames J. observed in *Jackson v. Kelowna General Hospital et al.*, 2006 BCSC 279, at para. 33, aff'd 2007 BCCA 129:

[33] The plaintiff cannot meet the onus upon him to prove causation by merely proving the loss of a chance (*Cottrelle*, supra, at para. 36). Similarly, it is not enough for a plaintiff to prove that the defendants "created a risk scenario within which the plaintiff's pain, suffering and losses [have] occurred" (*Oliver (Public Trustee of) v. Ellison*, [1998] B.C.J. No. 589 (S.C.), at paras. 31-33; *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491 at para. 116).

Examples in the Caselaw

K.S. (Litigation Representative of) v. Willox, is a prime example of the loss of chance being insufficient to ground a claim, despite a known treatment that may have drastically altered the child's outcome and avoided a catastrophic injury.⁷ In *K.S.*, the plaintiff was a 15-year-old boy with severe cognitive deficits, limited vision in one eye, hypersensitivity to external stimuli and severe Autism Spectrum Disorder. The lawsuit revolved around the care *K.S.*'s mother, *J.S.*, received during her pregnancy. *J.S.* was pregnant for the first time and cared for by Dr. Willox during her pregnancy. She advised him that her own mother had an incompetent cervix, had miscarried at least once and had received cervical cerclage for her pregnancies with *J.S.* and her siblings. Dr. Willox told *J.S.* that an incompetent cervix was not genetic. During her pregnancy, *J.S.* attended hospital and Dr. Willox's office for a few concerns, including passing a clot, vaginal discharge and spotting.

The critical issues in this case related to a routine ultrasound performed on October 3, 2000. The ultrasound showed that the internal cervical os (located at the top of the cervical canal near the uterus) was open with fluid bulging towards the os. One possible cause of this could be an incompetent cervix. *J.S.* asked Dr. Willox about cervical cerclage (stitching the cervix closed to prolong the pregnancy). Dr. Willox assessed *J.S.* and determined that the external cervical os (located at the bottom of the cervical canal near the vagina) was closed. He consulted Dr. Muir, an obstetrician, who advised expectant management. *J.S.* attended Peace River Hospital on October 22, 2000, with mild contractions. She was transported to a hospital in Edmonton where she was started on medication to try to avoid early delivery but it was unsuccessful. *R.S.* was 23 weeks gestational age and weighed less than 1½ pounds.

Moreau J. found that the expectant management plan met the standard of care, but Dr. Willox breached the standard of care by failing to order weekly clinical examinations and serial ultrasounds at least every two weeks. In addition, when *J.S.* was having discharge that was consistent with passing the mucus plug per vagina and, a week later, when *J.S.* had bloody mucous discharge, Dr. Willox breached the standard of care by failing to consider that this may be a sign of progressive changes to the cervix. These changes could not be evaluated by clinical examination alone and may have warranted cervical cerclage. In order to meet the standard of care, Dr. Willox was required to schedule ultrasounds

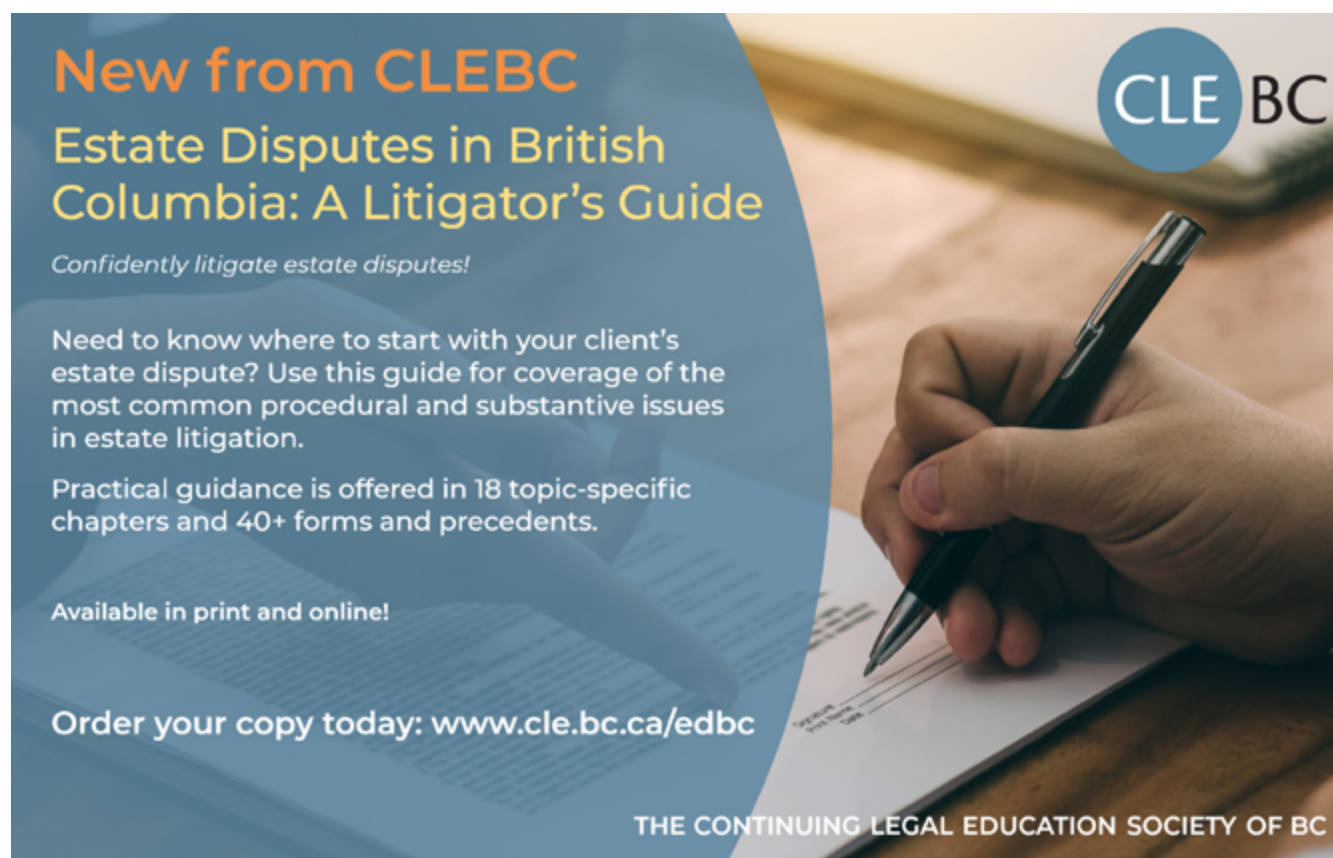
immediately after this mucousy discharge was noted and to consult again with an obstetrician about this new symptom.

K.S. nevertheless failed to prove causation. The first causation issue was whether K.S.'s preterm birth was caused by an incompetent cervix (which could be treated by cervical cerclage) or caused by an infection. The defence theory of the case was that the mom and fetus had an infection that led to the preterm delivery. Their expert testified that the most common cause of pre-term birth is infection. The plaintiff's theory of the case was that the infection occurred not long before delivery because of exposure to vaginal bacteria after J.S.'s cervix started to open due to cervical incompetence. Moreau J. accepted that the dilatation of J.S.'s cervix (preceded by the opening of the internal cervical os and funnelling of the membranes into the cervical canal) was more likely the result of an incompetent cervix than a pre-existing subclinical infection. The plaintiff's theory that the infection was caused by the dilatation of the cervix and exposure to vaginal flora was accepted. Moreau J. found that it was more probable than not that J.S. had an incompetent cervix and that the incompetent cervix caused the pre-term delivery of K.S.

Unfortunately, for the plaintiff, his claim failed on a series of other causation issues. Moreau J. found that for patients like J.S., with no history of preterm birth, cerclage was not being offered in October 2000 based on ultrasound findings alone, with no other

symptoms. Emergency cerclage was an option once J.S.'s cervix started to open but this was a very short window in her case. J.S.'s cervix started to open sometime between her October 20 appointment with Dr. Willox and her midday presentation to Peace River Hospital on October 22, at which time her cervix was already seven centimetres dilated. By the time she arrived in hospital, emergency cerclage was no longer possible. It was not a viable option if there was suspicion of infection, labour, or imminent delivery. Given that cerclage is contraindicated when infection is present, Moreau J. considered whether emergency cerclage would have prevented the infection that did occur in this case. She found that it was unclear whether the infection could have been prevented had the emergency cerclage been performed in the very short window of time after J.S.'s cervix started to open and when K.S. was born. As a result, the plaintiff had failed to meet the burden of proof.

The final issue to be considered, although ultimately irrelevant due to the finding that emergency cerclage would not have been performed, was the cause of K.S.'s brain injury. The plaintiff had more success on this issue. There was some suggestion that infection was the cause of the brain injury. Moreau J. accepted the plaintiff's expert's opinion it was more probable than not that at the time of his birth, K.S. did not have an active infection that caused the damage to the white matter of his brain and other neurological



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injuries. She accepted that the progressive deterioration of the white matter of K.S.'s brain more probably occurred after his delivery and was the combined result of his extreme prematurity and the resuscitation procedures required in the first hours and days after delivery. The court also accepted that the Autism Spectrum Disorder was part of the prematurity related brain injury.

Medina (Litigation guardian of) v. Wong is another birth injury case that could not overcome the causation hurdle.⁹ The plaintiff, Cesar Medina was a five-year-old boy who sustained a catastrophic brain injury leading to cerebral palsy. As mentioned above, the fetal heart rate is one of the few available sources of information about fetal wellbeing during pregnancy, labour, and delivery. The issue in this case was whether the medical team was negligent in their interpretation of the fetal heart monitoring strips and whether the plaintiff ought to have been delivered much earlier than he was. Ultimately, Cesar Medina was delivered by emergency caesarean section in response to fetal heart rate abnormalities, but the plaintiff's claim was that the delivery failed to occur in a timely manner and that earlier delivery would have avoided or minimized the plaintiff's injuries.

Episodes of relative hypoxia are a regular part of childbirth. The mother's contractions restrict blood supply and oxygen delivery to the fetus. When the contraction ends, the baby can catch its breath

(so to speak) and withstand these interruptions in oxygenation. When the periods of reduced oxygenation continue for longer, or the fetus has reduced capacity to recover from them, there are certain mechanisms the fetus can use to compensate for the reduced oxygenation and avoid injury. At some point, however, the level of hypoxia will overwhelm the infant's ability to compensate and brain injury will occur on an exponentially increasing basis.

There are different types of brain injuries that occur under different conditions. If the hypoxia is mild but prolonged, particular parts of the infant brain will be injured. If the hypoxia is severe, different parts of the brain will be injured (and a baby can only survive a short time in these conditions). In *Medina*, the plaintiff's theory of causation was that the fetus was compensating for an ongoing reduction in oxygenation until the last 14 minutes of the labour at which time his ability to compensate ended and brain injury set in. The plaintiff argued that he had sustained an acute profound (short but severe) hypoxic-ischemic injury minutes before delivery. The defendants' theory of causation was that the infant had an infection that resulted in impaired placental blood flow and impaired oxygenation in the 12-36 hours prior to delivery. They denied the existence of a severe acute event that could have caused injury at the very end of the labour.

The court found that the plaintiff had not met the burden of

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proof. The existence of hypoxia alone is not enough to cause brain injury unless it overwhelms the fetus's ability to compensate and the fetus is no longer able to cope with it. *Abrioux J.* held that the plaintiff had not established that the fetus was unable to compensate for the hypoxia in the minutes before birth. The court held that the plaintiffs had not established that an acute hypoxic-ischemic injury occurred. The plaintiff also argued that he was a "thin skull," more susceptible to hypoxia due to intrapartum infection. *Abrioux J.* found that the inflammatory response from the infection was initiated 12-36 hours prior to birth and the fetus was still compensating at the time of delivery so he was unable to conclude that any damage flowing from that vulnerability would have been avoided if the plaintiff was delivered an hour earlier. *Abrioux J.* also indicated that the vulnerability from the earlier inflammatory response to the infection may have been the primary cause of the injury.

Medina and K.S. demonstrate some of the many causation complexities in birth injury cases. This is not to say, however, that causation is insurmountable in all cases. When sufficient information is available, it may be possible to link the negligent care to the injury suffered and establish that "but for" the negligence, the injury would have been avoided. Our previous article in this series, on the standard of care in birth injury cases, discussed *Ediger (Guardian ad litem of) v. Johnston*, a case involving an attempted mid-level forceps delivery.⁹ The forceps delivery failed, and Dr.

Johnston left the room to arrange for a caesarean delivery. Minutes later, the fetal heart rate plummeted into a persistent bradycardia and never recovered. The plaintiff, Cassidy Ediger, was delivered by caesarean section eighteen minutes later but suffered a severe brain injury resulting in spastic quadriplegic cerebral palsy. At trial, the court found that Dr. Johnston's failure to ensure surgical backup was immediately available in the event of a bradycardia following the mid-level forceps procedure resulted in the plaintiff's severe brain injury.

The BC Court of Appeal allowed the defendant's appeal. First, the Court of Appeal held that the evidence did not support the trial judge's conclusion that the attempted forceps delivery caused the bradycardia. In the court's analysis, cord compression from the forceps delivery would have resulted in a bradycardia almost simultaneous with the attempt, not a few minutes later, after Dr. Johnston had left the room. If the forceps did not cause the bradycardia, Dr. Johnston's breaches of the standard of care leading up to the procedure were not a "but for" cause of the plaintiff's injuries as the bradycardia could have occurred in any

event. Second, the Court of Appeal held that, although injury would have been avoided if the plaintiff had been delivered 10 minutes earlier, it had not been established that the delivery would have happened any sooner if Dr. Johnston had arranged for immediately available surgical backup.

The appeal to the Supreme Court of Canada was on the issue of causation. The Supreme Court of Canada allowed the appeal and upheld the trial judge's decision. The court held that the trial judge did not err in accepting that the bradycardia was caused by the forceps displacing the baby's head such that the umbilical cord could slip into the space and become trapped. With the next maternal contraction, the cord would then be compressed, cutting off the baby's blood and oxygen supply. The Supreme Court of Canada held that it was acceptable for the trial judge to accept the plaintiff's theory of causation after weighing the evidence, including the physiology of labour, the known risk of

cord compression with mid-level forceps procedures and the close proximity in time between the application of the forceps and the onset of bradycardia.

Furthermore, the court held that the trial judge did not err in accepting that the injury could have been avoided if Dr. Johnston had arranged for immediately available surgical backup. The defence interpretation of "immediately available" was that Dr. Johnston was only required to ensure the anaesthetist was not engaged in a surgery at the time of the forceps procedure.

The Supreme Court of Canada

rejected this interpretation. While it was accepted that the presence of the anaesthetist alone would not have led to delivery in time to avoid the brain injury, Dr. Johnston could not avoid liability based on this reality. If it was accepted that surgical backup "immediately available" meant only availability of the anaesthetist, the physician would never be liable for breaching the standard of care when fetal bradycardia occurred and the bradycardia would lead to injury in all cases. It would impose a standard of care in response to the risk of bradycardia that would make no material difference to the ability to respond to the bradycardia. The Supreme Court of Canada interpreted the trial judge's reasons differently: the trial judge contemplated a standard of care that was responsive to the recognized risk of fetal bradycardia in mid-level forceps procedures and required reasonable precautions to allow for delivery without injury if a bradycardia indeed occurred. The risk could not be disregarded. The failure of Dr. Johnston to take precautions caused a delay in delivery and as a result caused injury from the bradycardia.

The defendant's wrong need not be the sole cause of the loss, but it must be part of the cause. "But for" causation raises the counterfactual question: what would likely have happened if the defendant had discharged his or her duty?

Conclusion

As can be seen from the examples discussed in this article, advancing a medical malpractice claim for a birth injury requires careful consideration of, and expert evidence, on the causal link between the criticized care and the injuries of the plaintiff. The uncertainties in medicine, particularly with respect to the timing and source of injuries sustained prior to the birth of a child, make causation a key issue in these cases. Those same uncertainties can make it difficult for parents to accept that, although the physician, nurse or midwife erred and mishandled their medical care and their child suffered an injury, they will not receive compensation because there is insufficient evidence to prove a link on the balance of probabilities. It is incumbent on the legal team to ensure they understand the medical issues at play and to work with their experts to compile a solid and convincing explanation for how the breach of the standard care, more likely than not, caused the child's injury. **V**

- 1 Whitehouse v. Jordan and another, [1980] 1 All ER 650 at 652 (C.A.), aff'd [1981] 1 All ER 267 (H.L.)
- 2 Clements v. Clements, 2012 SCC 32, [2012] 2 SCR 181.
- 3 Wiebe v. Fraser Health Authority, 2018 BCSC 1710 at para 114
- 4 Wiebe, supra at 113
- 5 Stirrett v. Cheema, 2020 ONCA 288
- 6 Wiebe, supra
- 7 [2016] A.J. No. 867
- 8 [2018] B.C.J. No. 334
- 9 2013 SCC 18



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When is a Place a “Safe Place”?

On March 10, 2023, the Supreme Court of Canada released its decision in *R. v. Downes*, 2023 SCC 6. The unanimous decision¹ reversed the British Columbia Court of Appeal and confirmed the conviction at trial of Randy Downes. The decisions from the British Columbia Supreme Court up to the Supreme Court of Canada clarify a unique issue. Is there such a thing as a “safe place” where all members of society are protected by the criminal law from surreptitious observations or recordings? The Supreme Court of Canada has conclusively ruled that there are in section 162(1)(a) of the *Criminal Code*.

At trial, Mr. Downes was convicted of two counts of voyeurism under section 162(1)(a) after he surreptitiously took pictures in a changing room of two boys aged between 12 and 14 years old. The two incidents occurred while Mr. Downes was the hockey coach of the two victims, with the photographs taken of one youth, T.R., in 2013 and the photographs of the other youth, G.C., taken in 2015. The photographs did not contain full nudity, and it was not argued that they were pornographic or taken for a sexual purpose, but they showed the two young boys in various states of undressing. Specifically, there were pictures of the boys in only their underwear.

The wording of s. 162(1) is as follows:

162(1) Everyone commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if

- (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
- (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
- (c) the observation or recording is done for a sexual purpose.

Acknowledged at the trial was the dearth of judicial reasoning on this section. The trial judge was provided with the authorities of *R. v. Rudiger*, 2011 BCSC 1397 and *R. v. Jervis*, 2019 SCC 10, though both were specifically concerned with s. 162(1)(c).² The trial judge had the difficult task of interpreting s. 162(1)(a) in the unique factual situation of this case. At trial, it was argued that an essential element of s. 162(1)(a) was that the Crown needed to prove that the location of the offence was a place where a person can be reasonably be expected to be nude at the time that the offence took place. The evidence was clear that the changing room would be a place where some individuals would be fully naked at some point in time, but there were conflicts in the evidence about whether boys of this age range would shower or ever be fully nude in the change room.

The trial judge rejected this defence argument and found that there was no temporal component to the question of whether the place where the offence occurred was one in which a person could reasonably be expected to be nude. While the language of “safe

place” only develops in the Supreme Court of Canada decision, the trial judge found that there can be private or semi-private places which will always be protected by s. 162(1)(a) no matter what activity is occurring at the time of the offence. The trial judge considered the authority of *Jervis* and its articulation that “homes, bathrooms, and change rooms are ‘traditionally private’ or ‘quasi-private’ places in which a person can reasonably expect privacy, and in which they can also reasonably be expected to be nude or partially nude”.³ The trial judge also noted that Parliament had specifically used the example of a changing room in legislative records leading up to the enactment of s. 162(1)(a).⁴

At the British Columbia Court of Appeal, the question of whether there is a temporal requirement for a “safe place” was relitigated. In a 2-1 majority decision, the British Columbia Court of Appeal found that because the offence of voyeurism is concerned with bodily and sexual integrity — not just privacy alone — there needed to be a nuanced view of the “characteristics of the place in which the observation or recording is made, given its use at the time of the observation or recording.”⁵ The court rhetorically considers whether taking a surreptitious photograph of a fully clothed individual in a dressing room when no one else is present or expect to be present is an offence under s. 162(1)(a).⁶ Ultimately the majority argues that the determination is flexible and cannot be reduced to a rigid characteristic of the room itself: “The characteristics of a place are not immutable. A room may be used for multiple purposes, and what one expects to observe at the place will depend upon how the place is being used when the observation is made.”⁷

The Crown appealed the British Columbia Court of Appeal decision as of right on the question of whether s. 162(1)(a) required “the person be in a place in which a person can reasonably be expected to be nude at the specific time when the person is surreptitiously observed or recorded.”⁸ The Supreme Court of Canada clearly articulated that there is no temporal component to the place where the offence occurred, and thus appears to have ushered Canada into a legal state of immutable “safe places.”⁹

The SCC arrived at this conclusion from both a textual interpretation and a policy-based argument. The Court found that the text of s. 162(1)(a) made the determination of “place” objective on three grounds. First, it considered the wording of s. 162(1)(a) in which the specific article of “**the** person is in a place” is modified to the general article of “a person can reasonably be expected to be nude...” This grounds the analysis in the space where the observation or recording is taken, rather than on the state of the person being recorded or observed. Second, the Court found the language of “reasonably be expected” grounds the analysis on the objective nature of the place rather than the accused subjective belief about what might be occurring in the space at that time.¹⁰ Third, the Court compared s. 162(1)(a) to section 162.1(1), the offence of publishing an intimate image without consent. Section 162.1(2) explicitly defines an intimate image with references to “at the time of the recording” and “at the time the offence is committed,”¹¹

while that type of temporal language is explicitly missing from s. 162(1)(a). With the Court finding that the determination of place is an objective one, there is no temporal component to the analysis of the place.

The Supreme Court of Canada also considered Parliament’s purpose in enacting s. 162(1)(a). A key feature of this analysis was Parliament’s stated purpose of protecting sexual integrity, specifically of children and other vulnerable persons. The Supreme Court of Canada finds that Parliament’s intention towards this legitimate purpose means that “s. 162(1)(a) stipulates a rule that normatively identifies a class of quintessentially ‘safe places’, such as bedrooms, bathrooms, and dressing rooms, in which people should be entitled to not be non-consensually observed or visually recorded, whether or not they or another person in the place are reasonably expected to be nude at the time of the observation or recording.”¹² A place simply is or is not a “safe place.”

Returning to the rhetorical example of the British Columbia Court of Appeal, does this Supreme Court of Canada decision mean that that the essential elements of voyeurism are made out if one department store staff member took a surreptitious photograph of another fully clothed staff member while they were cleaning up discarded clothing in a changing room?

The British Columbia Court of Appeal concluded that it should not, as this went beyond the scope and purpose of the criminal offence of voyeurism. The danger perceived by the Court of Appeal was the risk of reducing the sexual offence of voyeurism to a solely privacy-based offence. This argument is compelling when considering the structure of s. 162, which first contains the “reasonable expectation of privacy” as a privacy consideration gateway before considering the three subsections concerned with protecting sexual integrity.

The Supreme Court of Canada seems to agree with this structural reading of s. 162, finding that *privacy* is the gateway consideration in s. 162(1) generally, while subsections (a) through (c) are each concerned with protecting a particular type of *sexual integrity*.¹³ Section 162(1)(a) is concerned with protecting “safe places”, but the now immutable status of those places seems to remove any nuance in the analysis of s. 162(1)(a) for those spaces that could be considered multi-purpose rooms. In the department store example — with a changing room being an immutable “safe place” — would not the sole issue be whether the gateway consideration of privacy was breached?

Beyond the logic stated in the reasoning, the Supreme Court of Canada was likely mindful of two pressing real-world issues. Technology is rapidly outpacing the law in terms of how surreptitious recordings can be made, and protecting vulnerable groups is a legitimate and pressing public objective. It is not surprising that when forced to confront the fact that two young boys were betrayed by their hockey coach, the Supreme Court of Canada chose to protect the vulnerable with immutable “safe places.” To err on the other side could mean “surreptitious photos of children in their underwear in inherently private places would be

permitted without criminal sanction simply because the children in those places were too self-conscious to undress (such as boys around the age of puberty).”¹⁴

While this language recalls the Court’s clear articulation in *R. v. Friesen*, 2020 SCC 9 that the criminal law needs to protect the sexual integrity of children,¹⁵ the issue arises with the fact that s. 162(1)(a) is not an offence that solely protects children and vulnerable groups. The offence of voyeurism captures conduct that could be perpetuated against any part of society. Privacy is an important value to protect in our society, but it is not interchangeable with sexual integrity. When the subject matter is secret pictures of children though, it is difficult to not blur these lines.

At the Supreme Court of Canada, a final argument was advanced that if the definition of place in s. 162(1)(a) did not have a temporal component, it was overbroad. This argument was only first raised at the British Columbia Court of Appeal, not addressed by the Court there, and not considered by the Supreme Court of Canada due to the lack of an evidentiary record. It may be that a future case will refocus this issue. **VI**

- 1 Brown J. did not participate in the final disposition of the judgment
- 2 *R. v. Downes*, 2019 BCSC 992 at para 55
- 3 *R. v. Downes*, 2019 BCSC 992 at para 208
- 4 *R. v. Downes*, 2019 BCSC 992 at paras 209-212
- 5 *R. v. Downes*, 2022 BCCA 8 at para 54
- 6 *R. v. Downes*, 2022 BCCA 8 at para 39
- 7 *R. v. Downes*, 2022 BCCA 8 at para 37
- 8 *R. v. Downes*, 2023 SCC 6 at para 1
- 9 *R. v. Downes*, 2023 SCC 6 at para 49
- 10 *R. v. Downes*, 2023 SCC 6 at para 41
- 11 *R. v. Downes*, 2023 SCC 6 at para 42
- 12 *R. v. Downes*, 2023 SCC 6 at para 45 (emphasis in original)
- 13 *R. v. Downes*, 2023 SCC 6 at paras 30-34
- 14 *R. v. Downes*, 2023 SCC 6 at para 50
- 15 *R. v. Friesen*, 2020 SCC 9 at paras 55-57

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No-Poach No More: *The New Competition Act*

The criminal provisions of the *Competition Act* are about to be updated and will come into force on June 23, 2023. The updated legislation has a greater emphasis on protecting labour competition.

Notably, no poach agreements between employers will be illegal; a breach of the criminal provisions of the *Competition Act*. A no poach agreement is a deal between employers not to hire each other's employees. It is similar to a non-compete clause, as it is a tool used by employers to prevent their employees from leaving, thereby creating greater employer bargaining power and stagnating wages. However, unlike non-compete clauses, no poach agreements are typically hidden from the employees they affect.

Recently, there has been judicial comment on no poach agreements. While no poach clauses have harmful effects of these agreements, courts have held that no poach clauses do not breach the criminal provisions of the *Competition Act*. This approach is in line with previous guidance published by the Competition Bureau which suggested these agreements are not inherently anticompetitive. Unfortunately, this approach does not protect labour competition and leaves employees with no recourse under the *Competition Act*.

Criminalizing no poach agreements indicates a changing political mindset. Whereas previous regimes determined that no poach agreements are not inherently anticompetitive and warrant criminal penalties; now, the government wants to penalize this behaviour. It appears that the government now accepts that no poach agreements are inherently anticompetitive. These soon-to-be criminal conspiracies will be subject to fines at the discretion of the court and up to 14 years in jail.

The Current Competition Act

At the moment, the *Competition Act* criminalizes the following behaviour:

- 45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
- (a) to fix, maintain, increase or control the price for the supply of the product;
 - (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
 - (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Various entities have determined that the agreements listed in section 45 does not include buy-side agreements between employers, such as no poach agreements.

In November 2020, the Competition Bureau released its statement on the application of section 45 to no poach agreements. The Bureau determined no poach agreements do not attract criminal review. The rationale is that no poach agreements *may* have anticompetitive effects; the Bureau was not certain that these agreements *will* have anticompetitive effects.¹

The Competition Bureau subsequently released their Competitor Collaboration Guidelines in May 2021. They note that section 45 is reserved for agreements which constitute “naked restraints” on competition. Naked restraints are restraints which are “so likely to harm competition and have no pro-competitive benefits that they are deserving of prosecution without a detailed inquiry into their actual competitive effect.”² Since buyer (employer) side agreements are not inherently anti-competitive, they should not be reviewed as a criminal offence.³

Additionally, the Competition Bureau highlighted the wording of section 45, which is directed at the *supply* of a product or service; not the *purchase* of a product or service.⁴ Thus, only supply-side agreements breach section 45; buy-side agreements do not.

The Competition Bureau’s statement was reviewed in *Latifi v. The TDL Group Corp.*, 2021 BCSC 2183. This case dealt with a no poach agreement within Tim Hortons standard form franchise agreements. Pursuant to the franchise agreements, franchisees — who owned and operated Tim Hortons restaurants across Canada — could not hire current employees at other Tim Hortons restaurants.

The Honourable Justice Sharma reviewed the Competition Bureau’s statement that it considers no poach agreements to fall outside the ambit of s.45 of the *Competition Act*. Justice Sharma queried whether the Bureau’s statements were admissible, concluding that regardless of whether they are admissible, the statements are neither binding nor determinative (at paragraph 73). While Justice Sharma considered the “naked restraints” concept, she ultimately concluded that no poach agreements fall outside of section 45 because the section does not include the purchase of a product or service:

[31] TDL submits s. 45 was never meant to apply to the type of agreement in which the No-hire clause appears. Its position rests on distinguishing between “buy-side”

and “sell-side” agreements. TDL submits s. 45 applies to inherently anti-competitive “sell-side” agreements, specifically those where competing suppliers agree to fix prices, allocate markets, or limit output.

[32] These are contrasted to “buy-side” agreements where purchasers of a product agree to fix the price of products they purchase. TDL submits buy-side agreements are not inherently anti-competitive; therefore, they are not captured by s. 45, which has penal consequences. Instead, buy-side agreements can in some circumstances enhance competitiveness, for example, allowing medium-sized business to pool their purchasing power to better compete with larger businesses.

...

[37] TDL submits it is clear on its face that s. 45 is aimed at the supply or the production of products, not the purchase of products. Its position is that the provision aims to prohibit certain conspiracies or agreements amongst competitors engaged in the supply of a product, which are deemed to be anti-competitive.

...

[44] This reflects what TDL say is Parliament's intent to prohibit inherently anti-competitive supply-side agreements. TDL maintains the No-hire clause is not a supply-side agreement, and therefore the claim is bound to fail.

...

[55] Section 45 uses the phrases “the supply of the product” and “the production or supply of the product”. It also identifies in subsections (a)–(c) the specific types of agreements amongst competitors that are prohibited.

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Notably, each one refers to a prohibited activity with regard to “the supply” of the product.

[56] I find a plain reading of section 45 supports TDL’s position. The focus of s. 45 is to prohibit certain agreements amongst people who are competitors with each other “with respect to a product”. It creates an offence if those competitors do certain things with regard to “the supply” or “the production or supply” of “the product”. Grammatically, there is no need to include the word supplier in s. 45, and arguably, it would be unwieldy and redundant to do so.

In *Mohr v. National Hockey League*, 2021 FC 488, the Honourable Chief Justice Crampton came to the same conclusion. The case involved conspiracies between the National Hockey League, American Hockey League, and East Coast Hockey League, in addition to other hockey leagues. The plaintiff alleged the leagues conspired to impose nominal wages on hockey players and to restrict rights to market their image, sponsorship and endorsement opportunities.

Justice Crampton focused on the plain wording of the statute, noting at paragraph 35:

As is apparent from the plain language of subsection 45(1), it applies only to “competitors” who enter into a conspiracy, agreement or arrangement concerning either the “supply” or the “production or supply” of the product in respect of which they compete.

Justice Crampton also highlighted the Competition Bureau’s “naked restraints” rationale at paragraph 33:

[S]ection 45 does not apply to the types of agreements that are alleged in the Amended Statement of Claim. Among other things, those agreements are not the types of unambiguously harmful “hard core cartel” agreements, also known as “naked” cartel agreements, that are contemplated by section 45.

The Federal Court of Appeal affirmed Justice Crampton’s decision in *Mohr v. National Hockey League*, 2022 FCA 145, but did not delve into the “naked restraints” rationale. Instead, the appeal court focused on the wording of the statute:

[33] ... Section 45 is limited to agreements between competitors to fix prices or allocate markets relating to “the production or supply” of a product or a service— otherwise known as “sell-side” conspiracies.

As a result of these decisions, employees do not have recourse under the *Competition Act* for conspiracies entered into by their employers.

The New Competition Act: A Changing Mindset

It appears the Government of Canada took note of a gap in the criminal provisions of the *Competition Act*, allowing buy-side agreements between employers, such as no poach agreements, to go unpenalized.

Among the many changes to the *Competition Act* is the addition of subsection 45(1.1) to the existing criminal provisions. Subsection 45(1.1) will state:

45 (1.1) Every person who is an employer commits an offence who, with another employer who is not affiliated with that person, conspires, agrees or arranges

- (a) to fix, maintain, decrease or control salaries, wages or terms and conditions of employment; or
- (b) to not solicit or hire each other’s employees.

No poach agreements will now attract criminal penalties.

After the announcement of this subsection, the Competition Bureau released a new statement on no poach agreements: “Enforcement guidance on wage-fixing and no poaching agreements”. This guidance, published in February 2023, supplements the Competitor Collaboration Guidelines from May 2021.⁵

The Competition Bureau’s new guidance is a radical change from the statements made less than two years prior. The Bureau highlights that the Government of Canada is concerned with protecting competition in labour markets by prohibiting agreements to fix wages and restrict job mobility: “Maintaining and encouraging competition among employers results in higher wages and salaries, as well as better benefits and employment opportunities for employees.” This includes no poach agreements.


Surprisingly, the Competition Bureau now appreciates that no poach agreements are “naked restraints” on competition: “that is, restraints on wages or job mobility that are not implemented in furtherance of a legitimate collaborations, strategic alliance or joint venture.” In a reversal from their 2020 statement, the Competition Bureau now intends to seek criminal penalties for this inherently anticompetitive behaviour.

The Competition Bureau provides an example of a no poach agreement which would raise criminal concerns:

Company A is in the business of franchising fast food restaurants across Canada. Company A and each franchisee spend a lot of money and time training new employees. To this end, the franchise agreements entered into by Company A and each franchisee include a no-poaching clause whereby the franchisor and franchisee each undertake to not hire persons who are currently employed by the franchisor and other franchisees. Each franchisee has an understanding that the hiring of its employees by another franchisee or Company A is prohibited.

This example is practically identical to the Tim Hortons no poach agreement analyzed in *Latifi v. The TDL Group Corp.*, 2021 BCSC 2183. Evidently, there has been a shifting mindset over the last couple years.

In its current form, section 45 of the *Competition Act* is focused on supply of products and services; but not the purchase of those products and services. The wording of section 45 led the Competition Bureau and the Federal Court to believe that no poach agreements are not “naked restraints” on competition.

It allowed no poach agreements to go unpenalized. However, the Government of Canada rectified this issue with the addition of subsection 45(1.1). By focusing on maintaining competition in the labour market and protecting employees from wage fixing agreements, the government has signalled that they view no poach agreements to be inherently anticompetitive, having little-to-no social value. Offenders can face prison time.⁶ 

- 1 Competition Bureau Canada, “Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements,” November 27, 2020: <<https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html>>
- 2 Competition Bureau Canada, “Competitor Collaboration Guidelines,” May 6, 2021: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/competitor-collaboration-guidelines#sec01-1>>
- 3 Competition Bureau Canada, “Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements,” November 27, 2020: <<https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html>>
- 4 Competition Bureau Canada, “Competition Bureau statement on the application of the Competition Act to no-poaching, wage-fixing and other buy-side agreements,” November 27, 2020: <<https://www.canada.ca/en/competition-bureau/news/2020/11/competition-bureau-statement-on-the-application-of-the-competition-act-to-no-poaching-wage-fixing-and-other-buy-side-agreements.html>>
- 5 Competition Bureau Canada, “Enforcement guidance on wage-fixing and no poaching agreements,” February 6, 2023: <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/consultations/enforcement-guidance-wage-fixing-and-no-poaching-agreements>>

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Economic loss comes at the end of your chain of evidence. I distill the germane parts into lost net past earnings, lost future employment capacity, and present value of any future care costs (all perhaps as ranges), perhaps plus lost future domestic capacity (usually per hour per week).

I have regularly given expert, opinion evidence on such matters in the Supreme Court of British Columbia since 1989. I first gave expert evidence on economic losses (in the Superior Court of the State of Washington) in 1972; I first appeared before the BC Human Rights Commission in 2000 and the Tax Court of Canada in 2005. I also welcome clients to my practice in personal-income taxation.

I earned my Bachelor of Science in Electrical Engineering from Purdue University in 1962, served as a US Army EOD or bomb-disposal officer, and earned my Master of Arts in Economics from the University of Oregon in 1968. I qualified as a Certified Management Accountant or CMA in the United States in 1983 and as a Certified General Accountant or CGA in British Columbia in 1986 — now Chartered Professional Accountant or CPA, CGA. I exceed the 40 hours per year of continuing professional development that professional accountants require.

I have worked professionally for 46 years as an economic and financial analyst and for nine years as a full-time university teacher (three years teaching accounting at Simon Fraser, six years teaching economics at Western Washington). I dragonboat, I cycle, and I capped half a century of running with second place (not last) in my age group in the last half-marathon my knees allowed, Seattle 2016.

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In Dueck v Mikoula, the Hon Mr Justice H L Skipp wrote: “It is my opinion that the plaintiff should be profoundly grateful to Mr Teasley, as he was the only organized, credible witness to testify. In short, in my humble opinion, the plaintiff owes whatever success he enjoyed to Mr Teasley.” [1996 BCSC 3199, ¶4]

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EMPLOYMENT LAW UPDATE ▶



BY **ROSE KEITH KC**
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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.

Employee vs. Independent Contactor

In employment law, one of the frequent questions that we get from our clients, whether they are employees or employers, is whether the relationship that they are entering into is an employment relationship or whether it can be considered an independent contractor relationship. From the worker's perspective, the perceived benefit of being a contractor rather than an employee usually relates to tax consequences. From an employer's perspective there is a perceived benefit to what is seen as the simplicity of a contractor relationship. There is no need to deduct and remit taxes, CPP or EI, and there is none of the formality of an employment relationship.

There is a perception that the relationship between the worker and the employer can be ended at any time with little to no liability falling to the employer. But is this true, and is there any downside to characterizing a working relationship as one of independent contractor when in reality it is an employment relationship?

In this column, I will detail the considerations that are relevant to a determination of whether a worker is an employee or a contractor and the importance of that determination. This truly is one of those designations where the substance of the relationship is important, not what the parties have decided to call themselves.

If it walks like a duck and talks like a duck, it is a duck, and it is of no consequence that the parties have decided to call it a goose. When advising clients on either side of this equation, it is important for counsel to understand the legal implications of calling the working relationship something it is not and mitigating the risks that arise for your client from doing so.

The starting point of the analysis is understanding the process that is undertaken by an adjudicator in determining the proper classification of a worker. An independent contractor serves clients through their own business, whether incorporated or not, while an employee works as part of their employer's business. The factors considered by adjudicators in determining whether a worker is an employee or an independent contractor include the following:

1. Degree of Control Exercised Over the Worker

Control is the right to instruct how, when and where work is performed and the right to determine who performs the work. The more control that is exercised over a worker, the further along the continuum to being an employee the worker will be. One of the key indicators of whether a worker is an independent contractor rather than an employee is whether the worker is able to subcontract the work or assign the work to its own employees. A contract that requires the personal performance of the work by a specified individual is an indication of employment, while the lack of such a requirement is an indication of an independent contractor relationship. Instructing a worker how, when or where the work is performed is an indication that the worker is an employee, while leaving the worker with the discretion to determine how, when and where work is performed is an indication that the worker is an independent contractor.

2. Ownership of Tools

In a typical employment relationship the employer provides the worker with all the tools that they need to perform the work that they are hired to perform. In an independent contractor relationship, the worker will generally own and supply the tools required to perform the required work. The more tools provided by the employer to enable the worker to perform their work, the more likely the worker will be found to be an employee, not an independent contractor.

3. Chance of Profit/Risk of Loss

In a typical employment relationship, the worker is paid their wage regardless of the success of the business and regardless of how quickly they perform the required tasks. An employee does not have any expenses or liabilities associated with the business. In an independent contractor relationship, the worker is operating their own business and will profit by completing work quickly and efficiently or may suffer a loss where expense in performing the work exceeds the income gained by performing the work. The more potential for the worker to profit or lose from the manner in which they are completing the agreed upon work, the further down the spectrum of independent contractor they become.

4. Exclusivity

Generally an employee is a worker who only works for one specified employer and spends the bulk, if not all, of their working time providing services to that employer. This is contrasted with an independent contractor who has the freedom to work for a variety of customers at any one time. A worker that is required to dedicate their time to one employer is more likely to be found to be an employee. Likewise, a worker that is required to enter into a non-competition agreement limiting their ability to work for others either during or after the work engagement has come to an end are more likely to be seen as employees than independent contractors. The requirement of exclusivity is a factor that indicates that a worker is in an employment type relationship, not an independent contractor relationship.

5. Intentions of the Parties

The intention of the parties when entering into the work arrangement is a factor that will be considered by adjudicators. That intention can be ascertained from the wording of the written agreement and factors such as whether the worker collects and remits sales tax for their services. However, the evidence of the intention of the parties is not determinative,

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rather adjudicators will review the entirety of the working relationship to determine its true nature. Does it walk like a duck? Does it talk like a duck?

So, what are the consequences of getting it wrong? For an employer, the potential consequences are significant. The true nature of the relationship between the parties often becomes an issue because of a breakdown of the working relationship or the termination of the working relationship. In those circumstances, the worker who has been characterized as an independent contractor is found in actuality to be an employee, the employer faces the following potential liabilities:

➤ **Employment Standards**

Employees are entitled to a variety of statutorily mandated minimum employment standards and benefits, including paid statutory holidays, paid sick leave and notice of termination. These are benefits that typically contractors would not be provided with. If a worker is found to be an employee rather than a contractor, they will retroactively be entitled to these benefits and the employer will be subject to fines for failure to comply with the statutory regime.

➤ **Payroll Deductions**

Employers are required to make mandatory payroll deductions, remittances and contributions including income tax, employment insurance premiums and Canada Pension Plan contributions. If a worker is found to be an employee and not an independent contractor as characterized, the employer may face prosecution requiring payment of all mandatory payroll deductions, remittances, and contributions and the imposition of a fine for the failure to have done so.

➤ **Workers' Compensation**

Employers are generally required to remit workers' compensation contributions for all employees. The purpose of the contributions is to fund benefits that are provided to workers that are injured during the course of their employment. If a worker is found to be an employee after initially being characterized as an independent contractor, the employer may be faced with an order to make retroactive contributions to workers' compensation, to bear the costs of any expenses associated with the workers' injury and face charges and fines for failure to report required information to workers' compensation.

➤ **Reasonable Notice**


An independent contractor agreement typically specifies the amount of notice that must be provided by either party to terminate the working relationship. If the worker is later found to be an employee rather than an independent contractor as

originally characterized, the worker will be entitled to notice as required by the statutory regime. If the contract fails to provide that amount of notice, any termination provision will be void, with the result that the employee will be entitled to common law notice of termination. That notice could be up to 24 months depending on the length and nature of the employment relationship.

Even in situations where the characterization of the working relationship as one of independent contractor can be maintained, that is not determinative. If there is a prolonged period of economic dependence by the worker on the employer, there may be a finding that the worker is a "dependent contractor" which would then entitle them to reasonable notice of termination.

The lesson of all of this in advising clients is to carefully consider the true relationship between the parties and to be aware of the potential problems and liabilities that can arise if the relationship has not been properly characterized from the outset. **LV**

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Your Voice Matters

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



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

The Public Affairs Committee, known as PAC, is TLABC's fundraising program, and supports the public affairs and advocacy work that we do. PAC allows lawyers to have a collective voice in the justice community on issues affecting British Columbians.

PAC is 100% funded through voluntary contributions by members and firms. PAC funds are raised specifically for non-operating expenses and are not used to cover the daily operations of the Association. A healthy PAC fund ensures that TLABC can deliver on our mission to support and fight for the rights of individuals in British Columbia.

“ 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. ”

~ Bill Dick KC, TLABC Past President

Thanks to PAC contributions, the **No to No Fault** campaign continues to raise awareness about the struggles faced by British Columbians who have been injured in car accidents and have subsequently been let down by ICBC. We have developed a dozen videos of accident victims sharing their stories. Our work with these and other victims has led to more than 50 stories in the media.

In court, we still await a ruling from the Supreme Court of Canada in *R v. Johnston et al*, a case in which we intervened regarding **procedural fairness** in the use of Vukelich reports.

On the **criminal law** front, counsel has submitted our factum to the Supreme Court of Canada regarding our intervention in *R v. Kruk*. This will be our third intervention on criminal matters tied to procedural fairness. We are also awaiting a ruling from the BC Court of Appeal regarding our disbursements challenge.

Away from the courts, but still with the interests of our members and their clients in mind, TLABC's **Family Law** committee has been working with Rise Women's Legal Centre to engage with the Law Society regarding improved family violence training for family law practitioners.

Having completed the work on the disbursements challenge, counsel has turned their attention back to our challenge to the government's no fault scheme.

Whether it is in the courts, in the media, or in the halls of the legislatures, TLABC members and **PAC contributors** know that they are directly supporting the one organization that is looking out for their interests as a litigator, and for the interests of the British Columbians they represent.



WILL YOU STAND UP FOR THE RIGHTS OF BRITISH COLUMBIANS?

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

Thanks to the ongoing commitment of PAC donors, 2022 was another busy year for TLABC. While reserves ensure continuity of work that we have underway, there will always be new challenges and battles to fight.

This is why your help is needed.

Please become a PAC supporter by joining your colleagues in our mission to support and promote the rights of individuals in British Columbia. Together, we can make a lasting impact.

In appreciation, your name will be recognized in all PAC signage at TLABC Events, online and in *the Verdict*.

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Thank You

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EIGHT QUESTIONS

for Kirti Naslund

Founder & Principal, Summit Law Office, Abbotsford
TLABC Executive Committee Member and PAC Contributor

1 How has TLABC membership enhanced your practice?

TLABC has been an incredible source of support to our small but growing firm. The TLABC seminars have allowed us to not only gain valuable insights from seasoned lawyers, but it has allowed us to connect with other lawyers from all across British Columbia.

2 Tell us a little about your firm.

Summit Law Office is a small practice in Abbotsford, with a team of five dedicated lawyers who specialize in various areas of law. We take pride in providing exceptional service and care for our clients' needs, whether they require legal assistance in real estate law, family law, criminal law, corporate law, or wills and estates.

Our team has an impressive track record of success in resolving complex legal matters for our clients. We have a deep understanding of the law and possess the skills and knowledge required to navigate the legal system with ease.

At our law firm, we believe that every client deserves personalized attention and care. We work closely with each of our clients to understand their unique needs and objectives, and tailor our legal strategies accordingly. We are committed to providing honest and transparent advice to our clients, ensuring that they are fully informed throughout the legal process.

We take a collaborative approach to our work, leveraging the collective expertise of our team of lawyers to provide the best possible outcome for our clients. Our lawyers are highly skilled and experienced, and we pride ourselves on our ability to deliver results that meet or exceed our clients' expectations.

We believe in giving back to the community and our team has volunteered for a variety of causes, including multicultural and pro-bono events such as the South Asian Legal Clinic and Access Pro Bono.

3 What led you to choose law as a profession?

My background in business and real estate played a crucial role in choosing law as a profession. I was a financial advisor at TD Canada Trust for 2 years, where I gained valuable insights into the legal aspects of finance, such as taxes and investments.

Additionally, my 16 years of experience as a conveyancer allowed me to see firsthand the impact that legal issues can have on property transactions. I observed the importance of having a thorough understanding of real estate law to ensure that transactions were completed successfully.

I realized that with my background in business, I had a unique skill set which I could use to guide clients through complex financial transactions and help them navigate the legal system. This, along with my personal journey, inspired me to pursue a career in law.

4 What are the most rewarding aspects of your career?

A law career can be a highly rewarding profession for those who are passionate about justice, advocacy, and making a positive impact on people's lives. One of the most rewarding aspects of my career is the opportunity to help individuals and communities get access to justice in the area of family law.

My experience in wills and estates, along with business, allows me to provide comprehensive advice to my clients. Aside from private practice, our firm is also passionate about increasing access to justice by representing Legal Aid BC clients all over the province.

The intellectual challenge of these complex legal matters is also rewarding as the constant learning motivates us to work hard every day.

“

If you believe in access to justice and advocacy, then contributing to PAC is a must for you.

5 What do you know now that you wish you'd known as a new lawyer?

I have learned some valuable lessons that I wish I had known as a new lawyer. One of those lessons is to seek the support of a mentor early on in your career as a new lawyer. Having a mentor who could guide you through the complexities of the legal profession is immensely beneficial.

Not only does a mentor provide a source of support, but they can help you build the confidence to jumpstart your own practice. The second is the importance of building a network of people around you, not just lawyers, who you can rely on for support or a different perspective when the day has been especially tough.

6 You're a PAC contributor. What motivates you to contribute?

PAC has taken on various legal challenges recently, ones that significantly impact British Columbians. As lawyers, we have an obligation to advocate for those whose voices cannot be heard. PAC does that fearlessly. For me, the motivation came from attending the executive committee meetings and getting in-depth knowledge and understanding of how the PAC Program works to achieve its mandate.

As I was not able to contribute my time, supporting PAC financially helps to voice my support for the work they are doing.

7 Why is TLABC's advocacy work important to you?

I come from India where the trampling of an individual's rights is common, and often expected. I have heard clients comment that the existence of rights, and for the law to be implemented equitably in all situations, is one of the reasons they migrated to Canada. But what happens if that very fundamental right is being restricted? Or the laws exist but the individual cannot access the courts due to language or monetary barriers?

TLABC provides support to all its members and creates opportunities for the voice of the public, through its members, to be heard at various events and committees. TLABC advocates for its members and the public, and that is why I strongly believe in the work TLABC does. As Chair of the New Lawyers Committee, I can say the committee takes great pride in being able to advocate for the articulated students and new lawyers in the province, which in turn provides support to the public.



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

Simply being a member of an organization does not allow one to maximize the benefits, either to the individual or the organization. TLABC not only provides value to its members, but it also strives to provide value to the public by taking on advocacy work such as the No Fault Insurance.

PAC funds these projects. Strength comes in numbers and PAC needs the support of all its members. If you believe in access to justice and advocacy, then contributing to PAC is a must for you.

*Thank you Kirti.
We appreciate all you do
for TLABC!*

Every dollar helps.

You can become a PAC supporter today with a contribution of \$25. Please join Kirti and your colleagues by supporting TLABC's advocacy work.



Left to Right:
Theresa John, Gavin Ireland, Jennifer Reid, Daniel Gallant,
Jon Duncan, Mohammed Hajivandi, David Duncan, Jacqueline Reed

Trial Lawyers of British Columbia is an advocacy group comprised of lawyers who advocate for justice and fairness in British Columbia.

TLABC's Public Affairs Committee (PAC) gives TLABC its voice. It gives its members their say on legal issues that affect all British Columbians. Its work speaks to matters of liberty and fairness within the legal system. It faithfully and tirelessly protects the rights of individuals.

As a law firm working for the rights of individuals in northern British Columbia, Duncan and Associates, Barristers and Solicitor Inc. is a both long-time member of TLABC and a proud supporter of PAC and the work it accomplishes.

~ Jon Duncan, Founder



WE SUPPORT PAC.

DO YOU?

Thank you, Jon. We appreciate the monthly support from you and your firm!

BECOME A PAC CONTRIBUTOR

To learn more about PAC and how you or your firm can become a contributor, contact us today at 236-317-1919. Contributions to the PAC Program funds TLABC's public affairs and advocacy work, protecting the rights of all British Columbians.

PARALEGAL PERSPECTIVE ►



BY **DEB JAMISON**
TLABC Paralegal Member
PAC Contributor

Co-Chair/Instructor/ RISIA & Paralegal

Deb Jamison is an instructor and co-chair in the School of Legal Studies at Capilano University. She is also CapU's immigration liaison, Chair of the Senate Curriculum Committee, and a Senator. She rewrote the *Guide to Civil Litigation* in 2010 (and updates it three times a year). She has been a paralegal since 1993 and currently does contract work for Virgin Hickman. She has presented at and chaired a few TLABC paralegal seminars. When not working, Deb enjoys traveling, doing jigsaw puzzles and spending time with her husband and three adult children.

The Billable Hour

Introduction

"I will bill 500 hours, and I will bill 500 more..." sung to the tune of The Proclaimers' song I will Walk 500 Miles by two male articulated students donned in colourful kilts with starched white dress shirts and ties is a memory forever etched in my mind. It was almost 30 years ago, in December 1993, very early in my career as a litigation paralegal. I was at my law firm's holiday party – the first law firm event I had ever attended – and the articulated students were tasked with performing skits as part of the entertainment for the evening. It was in that moment that the importance of the billable hour became cemented in my brain.

Background

By way of background, I have been billing my time as a paralegal since 1993. I have also been teaching Law Office Procedures for paralegal students in the School of Legal Studies at Capilano University ("CapU") since 2007, which includes a component and assignment regarding timekeeping and billing. I am therefore providing my perspective as both a biller and an instructor.

This article will hopefully be helpful to those of you who are new to billing, as well as serve as a reminder of good billing practices to those of you who have been billing for a while.

Timekeeping

Timekeeping is the process by which lawyers and paralegals keep track of their time for the purpose of billing clients. Timekeeping and billing are necessary evils in most law firms, especially those with litigation practices. Timekeeping enables the firm to determine which areas of law and which cases are most profitable and provides indicators as to the productivity of the lawyers and paralegals in the firm. Most importantly, timekeeping enables law firms to bill lawyers and paralegals' time to clients and to keep track of its fees, which is especially helpful if clients challenge their legal fees in court. And although keeping track of one's time might seem like an easy task, it is not – it is an art that takes time and practice to perfect.

Most law firms use automated methods of timekeeping as manual methods are usually slow, labour-intensive and inefficient. Timekeeping and billing computer software assists in keeping track of time. In most programs, the user selects the case that is being worked on from a drop-down menu and describes their time and whether the time is billable or non-billable. The computerized time entries are then "posted" at the end of every workday and stored in the program until a bill is generated, at which time the computerized time entries are automatically calculated and included in the client's bill.

Billable v. Non-Billable Time

Billable time is actual time that a lawyer or paralegal spends working on a case and that is directly billed to a client. Any activity that a lawyer or paralegal performs to further a client's case ("legal value added"), other than clerical functions, is usually considered billable time, including investigating a case, interviewing witnesses, meeting with clients, performing legal research, drafting pleadings and court documents, as a few examples.

The billable time of lawyers and paralegals, once realized, should more than cover the law firm's overhead, which includes costs such as rent, lease payments, insurance, utilities, telephones, office supplies, equipment, and salary costs for legal administrative assistants, receptionists, clerks and administrators who manage the firm (including CFOs and COOs).

Even lawyers and paralegals who work in law firms that do only plaintiff work and bill on a contingency fee basis should keep track of their time. The two main reasons for this are as follows:

- (1) Billing is an art that takes practice and there is a chance that paralegals and lawyers may move to another firm in the future that requires billing on an hourly basis. Therefore, if they perfect the ability to keep track of their time, the transition to a firm that bills by the hour will be more seamless.

- (2) If a client ever contests a bill, the law firm will have better success at a hearing before a registrar if they can demonstrate how much time was actually spent on the file by law firm personnel, as well as the value the client received for the time spent by lawyers and paralegals on their case. The registrar will always consider the "value added" to the case when making decisions regarding law firm bills.

Non-billable time, on the other hand, is made up of the general administrative costs of doing business that are incidental to the management and supervision of the law firm.

There are typically three types of non-billable time:

- (1) **General (firm) Activities** – time spent on personnel materials, planning, marketing, client development, staff/committee meetings, law library maintenance, and professional development;
- (2) **Pro bono Work** – legal services that a law firm provides free of charge to a client who is unable to pay for the services and/or to provide a community service or generate goodwill in the community; and
- (3) **Personal Time** – taking breaks, cleaning and organizing, and taking sick/vacation days.

Non-billable time cannot be directly billed to a paying client; however, it should be tracked (other than personal time, of course) so that if a lawyer or paralegal has difficulty meeting their billable targets because they are spending time on administrative work that benefits the firm (and them), they will be able to demonstrate to this to the firm (and still be worthy of a positive review and/or pay raise).

Although non-billable time cannot be directly billed to clients, it is important nonetheless and provides value to a firm. It is essential for the efficient operation of a law firm and can also reveal how much certain clients actually cost the firm. For lawyers and paralegals, some of the benefits are as follows:

- Pro bono work can improve the morale of lawyers and paralegals by providing a sense of pride and allegiance to the firm;
- Professional development (including continuing education) and training (including mentorship) can prove invaluable, especially if time is spent improving and expanding skills and substantive law understanding in areas in which the firm practices (which can indirectly lead to an increase in the amount that can ultimately be charged for billable hours of lawyers and paralegals);
- Creating and maintaining a firm's precedent database is beneficial tool that boosts billable time for all paralegals;
- Attending events and conferences can provide invaluable networking opportunities, which may also lead to opportunities for business development.

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Keeping Track of Time

There are various ways to record or keep track of your time. The most common method is to bill time in tenths of an hour. Every six minutes is a tenth of an hour, which means that you would bill in six-minute intervals, as follows:

0 – 6 minutes	= 0.1 hour	31 – 36 minutes	= 0.6 hour
7 – 12 minutes	= 0.2 hour	37 – 42 minutes	= 0.7 hour
13 – 18 minutes	= 0.3 hour	43 – 48 minutes	= 0.8 hour
19 – 24 minutes	= 0.4 hour	49 – 54 minutes	= 0.9 hour
25 – 30 minutes	= 0.5 hour	55 – 60 minutes	= 1.0 hour

It is important to include as much detail as possible when completing your time entries and that you use clear and easy to understand descriptions. Clients are happier to pay a bill when they know exactly what they are paying for. For example, compare these two time entries:

- (1) “Telephone call – 0.3 hour”;
- (2) “Telephone call to client regarding the defendant’s application materials for production of documents and whether client has in their possession or control any of the documents in issue – 0.3 hour”.

If you were a client, which of these statements would you prefer to receive? Many clients would prefer the second time entry because they are able to see and better able to recall exactly what specific legal services they received.² They are also better able to understand the “value added” work done on their case. Furthermore, as mentioned previously, if a client ever brought a bill for review by a registrar, chances are that the registrar will rule in the law firm’s favour if the time records are detailed enough for the registrar to gain a full understanding of all the work that was done on the file to further the client’s case. Better still – if the client has a full understanding of the work done in their case, there is less likelihood that they will contest the bill in the first place.

Paralegal Timekeeping, Billing and Profitability

Many law firms set billable targets for their paralegals. Most paralegals are expected to bill between 1,200 and 1,700 hours annually. When paralegals are offered a position in a law firm, they should clearly understand the firm’s expectations regarding billable hours because there will obviously be a big difference in their quality of life between having to bill 1,200 hours a year and having to bill 1,700 hours a year. An annual billing target of 1,200 hours works out to approximately 5.2 billable hours a day, whereas an annual billing target of 1,700 hours works out to approximately 7.3 billable hours a day.

Keep in mind that billable hours are very different from actual hours spent at the office because there are numerous tasks that need to be done on a daily basis for which you cannot bill. Generally, in order to bill 7.3 billable hours, you would most likely need to be in the office for at least 9 hours.

Paralegals can contribute to the profitability of the law firm because they are capable of performing various substantive and procedural tasks that would otherwise need to be performed by a lawyer, but usually at a lower rate than lawyer hourly rates. Clients therefore often prefer being billed for paralegal time instead of lawyer time.

For example, an associate lawyer and a paralegal can both draft chambers documents and the task will take six hours. The paralegal bills at \$110 an hour and the associate bills at \$205 an hour. The cost to the client if the paralegal drafts the documents would be \$660 and the cost if the lawyer drafts the documents would be \$1,230. So, the client would save \$570 by consenting to have the paralegal draft the documents. The client would still have to pay for the lawyer’s time to review the paralegal’s documents, but the cost would still be less than if the lawyer had drafted the documents. This would result in a substantial savings to the client, especially over the life of the case.

In addition, having paralegals perform tasks that they are capable of performing, and which tasks would otherwise need to be performed by a lawyer, frees up lawyers’ time to do other important or complex things that paralegals are not permitted to do, such as running trials, speaking to contested chambers applications, conducting examinations for discovery, etc. Both lawyers and paralegals can then make money for the law firm and pay for their own salaries, without stepping on each others’ toes. And having both lawyers and paralegals working on files provides an opportunity for collaboration, as well as an opportunity to enhance each other’s strengths.

Timekeeping Suggestions

If paralegals and lawyers are expected to bill their time, it is important that they take timekeeping seriously. The following are a few practical (and ethical) suggestions to consider regarding billing and keeping track of time:³

- **Record your time as you go on a daily basis:** It is extremely important to record your time as you work on files. If you leave your time entries for the end of the day, it will be difficult to remember all the things you did and you will waste approximately 45 minutes (at least!) of billable time. In the end, you will end up doing work for which you will not receive credit (not to mention that the time spent on clients’ files will not be accurate, which may cause clients to not be happy about a high contingency fee if it appears that not much time was spent on their file). So, make sure to record your time on every file on which you work everyday as you go along (or as you finish working on each file).

- **Do not discount your time; record your actual time spent:**

When you are starting out as a new lawyer or paralegal, do not discount your time because you think you should have been able to perform a task faster. If it took you three hours to complete a task, then bill three hours. If part of the time was spent educating yourself on the task being performed, make a note of that in your time entry. Then, if your supervising lawyer thinks a discount is warranted, they can make that decision. Chances are they will most likely discount your time at the outset and if you have already discounted your time, then you will end up receiving credit for a fraction of the time you have spent working on a file. However, if you made a mistake or spent time for which you do not think the client should be billed, inform your supervising lawyer and let them make the ultimate decision about how much time to discount. As you gain more experience, it becomes easier to gauge how much time should be spent on each task and you will also get better at completing each task within the expected timeframe.

- **Bill your time honestly and fairly:** Billing more time than you actually spend just to make a good impression on your principal is foolish. Consider how much time it should reasonably take a lawyer or paralegal to complete a task and try to work within that time frame. If you are consistently a high biller because you spend a disproportionate amount of time on tasks, people will assume one of two things: Either you do not know what you are doing or you are doing more than is required to accomplish the task. Remember that the clients pay the bills, so the most important consideration in being competitive is to provide the best service at the best price. Clients want to feel like they are getting the best value for what they are paying.

- **Always be ethical:** Always be ethical in the way you complete your time entries. Embellishing your time entries is completely unethical. You will eventually be caught – and things will likely not end well.

- **Try to avoid barriers to billing time:** Be aware of things that keep you from billing, such as:

- Constant interruptions, including emails and telephone calls. If you really need to get something done, turn off the notification sound for your emails and close your office door or go someplace where you can get the work done, and let your phone calls go to voice-mail. However, check in periodically to return emails or phone calls. You should always return client phone calls as soon as possible (and always within 24 hours). Consider implementing structured blocks of time in order to complete tasks that require your undivided attention.

As you gain more experience, it becomes easier to gauge how much time should be spent on each task and you will also get better at completing each task within the expected timeframe.

- Colleagues who often come to you to talk about their problems or ask your advice about personal issues, making it difficult to pay attention to your work (and theirs). An appropriate response is “I am really busy right now, but I would like to hear about what’s going in your life at lunchtime.”
- Wasted time spent trying to track down other people or trying to find files or information you need. However, having to track down files or information has become less of a concern in the last few years as a result of paperless offices and/or proper implementation and use of document management systems.
- **There’s no time like the present:** It’s human nature to want to put off doing things that we don’t enjoy, but if you work on the tasks you don’t enjoy or have been dreading at the beginning of the day, you will have the rest of the day to work on what you do enjoy. This will leave you feeling energized and accomplished, which may indirectly (or directly) result in higher billings.⁴
- **Figure out how many hours you need to bill annually, monthly, and weekly, and keep track of your progress:** One of the first things you should do when you start a new job in a law firm is to find out how many hours you are expected to bill. If you are required to bill 1,200 hours a year, budget this on a monthly and weekly basis (factoring in any vacation time to which you are entitled) and keep track of where you are so that you will not have to try to make up for your billable time at the end of the year. Having to make up time at the end of the year is extremely stressful, not to mention sometimes impossible because there are so many waking hours in December! Don’t add any unnecessary stress to an already stressful profession!

- **Be conscious of whether billable hours are related to bonuses or salary increases:** Be aware of how billable hours are viewed with respect to bonuses and raises. In some law firms, billable hours are used to assist in making decisions about bonuses and salary increases and can be used in performance evaluations, so review your employment contract for this information so that you are not surprised when you don't receive a bonus or raise after your (hopefully annual) review.

Conclusion

Law firms depend on paralegals with proper education, training and work experience to provide competent services on clients' files. A paralegal who has mastered the art of timekeeping will be able to reach billable targets, avoid having their entries written down or written off and boost revenue for their law firm. Learning strategies to draft better time entries (billable and non-billable) will increase productivity and be one more extremely valuable tool in a paralegal's toolkit that will ultimately help to better serve clients and provide access to justice. **V**

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- 1 Roper, B.D. (2007). *Practical Law Office Management* (3rd ed.). Thomson Delmar Learning, p. 296.
 - 2 Roper, B.D. (2007). *Practical Law Office Management* (3rd ed.). Thomson Delmar Learning, pp. 298 – 299.
 - 3 Roper, B.D. (2007). *Practical Law Office Management* (3rd ed.). Thomson Delmar Learning, pp. 300, 302 – 303.
 - 4 Advice I received from Mark Virgin many years ago and which I have applied to my work almost daily since

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process which both engaged and facilitated Revenue Canada's investigation". One basis on which to distinguish *Viccars* is that the applicants sought remedies relating to the use the CRA could make of the evidence it had collected, which a judge would be able to address in any subsequent trial, whereas here Mr. Smith seeks remedies against the Commission. In somewhat different circumstances, in *B. (A.) v. British Columbia (Securities Commission)*, 2004 BCCA 249, the appellant commenced an action against the Commission from alleged negligence, and sought injunctive relief to stay investigative proceedings by the Commission from alleged breach of solicitor-client privilege.

The Commission had obtained a search warrant from the court to obtain a search of the files of the appellants' solicitors. Gerow J. had declined to grant the injunction pending a determination of privilege. The issue of whether a stay should be granted was not addressed in the decision.

Hall J.A. held it would be in the public interest to grant an interlocutory injunction pending a determination of whether a stay should be granted. He observed that the Commission rather than to bring the action for an interlocutory injunction was premature. He stated that stays of proceedings, it may be that a stay, would be premature. I observe that the Commission is not seeking remedies relating to the proceedings against him be stayed.

There is unlikely to be any prejudice to the Commission in the extent there was in the *Commission v. Branch*, [1999] 1 S.C.R. 313, where the interest is engaged at the time the stay is sought. It becomes whether or not the stay is a deprivation of fundamental justice." In *Branch*, the court held at para. 8: "The liberty interest engaged, the immediate compulsion of evidence by the Commission, and the fact that the appellant was outside of British Columbia at the time he was served with a subpoena immediately prior to giving evidence when he arrived at the Commission's office, were not sufficient to establish the consequences for the appellant of the stay. The court succeeded in *Williams v. The Commission* for a stay of proceedings of a commission of inquiry of the Commission ("NSC") with the RCMP. The appellant was not compelled to appear before the Commission when summoned. Such an argument succeeded in *Williams* for a stay of proceedings of a commission of inquiry of the Nova Scotia Securities Commission (NSC) with the NSC investigator, but he testified he had attended because he knew his counsel had advised him to do so. The court held that s. 7 applied and the appellant was not forced under the purposes of the Securities Act, but the said was only for the purposes of the investigation. However, in *Williams*, the court held that s. 7 only be used for the purposes of the investigation.

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The Court reached a decision in *Williams v. British Columbia (Securities Commission)* that the Commission's refusal to grant a stay of proceedings was a refusal by the Commission to grant a stay of proceedings.

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MEDIATION MOMENT ▶



BY **ROSE KEITH KC**
TLABC Past President
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- 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.

Types of Mediation

There are three main types of mediation – evaluative, transformative and facilitative. Understanding the key features of each and when and where to use each can assist in ensuring that you get the most out of any mediation. While the goal of a mediation is almost invariably to settle a case, the greater purpose of mediation is to enable the parties to fully understand the case and to leave the mediation knowing what the best option or course of action is for their case. A good mediator will have the ability to listen to the parties and identify the main interests of the parties, beyond the simple financial aspect, and then help each party understand that interest – and use it as a way of finding a creative solution to resolve the case. The reality is that those interests may also mean that a settlement is not always possible. A mediation has been successful, regardless of resolution, when the parties leave the mediation with a stronger understanding of their case and an ability to make better decisions moving forward.

The main differences in the three types of mediations are the level of control that the mediator exerts over the process and the extent to which the mediator expresses their opinion. Most mediators will have a preferred style that they use and then adjust this style depending on the needs of the parties and the power dynamics between the parties. Some mediators may utilize aspects of all three styles in one mediation if it is in the best interests of the parties.

An evaluative mediation is one where the mediator will exert the most control and where the mediator is the most vocal about their opinion.

An evaluative mediator will express opinions about the strengths and weaknesses of the parties' positions. An evaluative mediator will maintain control throughout the mediation process by controlling how and when the parties interact. The mediator will drive the conversation to focus on the important issues and what the parties need.

The mediator will control the conversation and interaction by expressing views about the parties' strengths and weaknesses. A mediator in an evaluative mediation is more likely to make recommendations to the parties based on their experiences. An evaluative mediation is most like a traditional settlement conference held before a judge and is the original style of mediation.

The common characteristics of an evaluative mediation include the following:

- **Assessment** – an evaluative mediator undergoes a process of assessment at all times, constantly considering and evaluating everything that the parties do or say. The evaluative mediator constantly assesses to ensure that they do not miss anything when making their evaluation.

- **Listening** – an evaluative mediator will practice attentive listening to make sure that they understand everything about the party's position. This aspect of an evaluative mediation will make the parties feel that their case is really being heard.
- **Evaluation** – in an evaluative mediation, the mediator will evaluate both the strengths and weaknesses of the parties' position and will communicate those strengths and weaknesses to the parties. The purpose of communicating the evaluation is to help the parties really understand where they stand and the extent of their bargaining power.
- **Predictions** – as part of the process of evaluation, an evaluative mediator will often offer predictions of likely outcomes in court if the parties are unable to settle. This can often be helpful in moving the parties to settlement if a party has an unrealistic view of the strength of their case.
- **Recommendations** – an evaluative mediator may present recommendations for settlement based on an evaluation of the strength of the case.
- **Shuttle negotiations** – typically an evaluative mediation will keep the parties separate with the mediator carrying information and positions to the parties. Controlling the communication allows the evaluative mediator to shape the conversation and provides the opportunity for the mediator to encourage the parties to consider the weakness of their case without having to do so in front of the other party.

An evaluative mediation can be helpful when there is little time available, when there is an uneven power dynamic, or when the parties are unsure of their positions and would benefit from someone offering suggestions. Evaluative mediations can be particularly effective when one of the parties has difficulties voicing their needs or interests well to the other party directly. Evaluative mediations give the parties the opportunity to consider the strengths and weaknesses of their case in a private setting.

The opposite of an evaluative mediation is a transformative mediation. This would also be considered the newest form of mediation. It provides the parties themselves with the most control over both process and outcome. The underlying goal of transformative mediation is transformation of the conflict itself by empowering the parties to agree. Rather than maintaining control, transformative mediators support resolution by giving the power over the process to the parties. In transformative mediations, the parties are given the time and space to express their emotions, find common ground over personal issues, agree with one another, and heal and preserve their relationships. In a transformative mediation, the role of the mediator is to call attention to the needs, interests, values and points of view of the parties involved. In a transformative mediation, the goal of the mediator is to transform the relationship between the parties, moving the relationship from conflict to a strong and collaborative relationship.

The common characteristics of a transformative mediation include:

- **No opinion** – in a transformative mediation, the mediator will not provide any opinion about the strengths or weaknesses of a party's case, which allows the parties to maintain their confidence about their opinions and decisions.
- **Encourage evaluation** – a transformative mediator will encourage the parties to evaluate their position vis a vis the other party's position. This allows and encourages parties to come to their own conclusions about the strengths or weaknesses of their case.
- **Following** – rather than leading the process, transformative mediators will follow the lead of the parties allowing them to control the process and encourage them to continue to participate.
- **Empathy** – a transformative mediator encourages empathy and acknowledgement of the other party's position which in turn allows for an understanding of the needs of all parties.
- **Guide** – rather than acting as an authority figure, a transformative mediator will act as a guide, moving the parties towards settlement and giving the parties agency.
- **Joint sessions** – in a transformative mediation, joint sessions are used almost exclusively as the parties are driving the mediation and controlling how information is relayed.

A facilitative mediation is the most common type of mediation and can really be considered the middle ground between evaluative and transformative. A facilitative mediation is one in which the mediator exerts control over the process but contrasted with evaluative is one in which the parties very much control the outcome of the mediation itself. Facilitative mediators use both evaluative and transformative techniques, including asking questions, offering perspectives, and providing policy and procedure support to both parties. There is much less evaluation involved in a facilitative mediation. In a facilitative mediation the parties have more flexibility in finding ways to be creative about their case and finding ways to bring their ideas closer to a settlement while still having a mediator establish the procedure and boundaries for the parties to work within. A facilitative mediation gives more agency back to the parties. Some of the common characteristics of a facilitative mediation include:

- **Collaboration** – the facilitative mediator is looking for a solution that both parties are fully comfortable agreeing to. In a facilitative mediation, rather than the mediator driving the mediation through an evaluation of the case, the parties will shape the outcome of the mediation.

- **Questions** – a facilitative mediator will ask questions of the parties that will help them articulate their underlying interests and identify what is driving their demands. The questions will give the parties a better understanding of what they need to settle and an the opportunity to be creative with their suggestions.
- **No opinion** – typically in a facilitative mediation the mediator will not give an opinion about the case unless it is absolutely necessary that the parties hear that opinion in order to settle the case.
- **Diffusion** – a facilitative mediator, while recognizing the often strong emotions that run through a case, will work to diffuse the emotions and focus the parties on civility. This helps to keep the parties on track and focused on the issues that require resolution.
- **Acknowledgement** – a facilitative mediator will encourage the parties to acknowledge and understand the other parties' position.
- **Caucuses and joint sessions** – rather than simply shuttling between the parties, a facilitative mediation will often involve joint sessions that provide the opportunity for the parties to communicate directly with each other.

The advantages of facilitative mediation include that the parties are able to drive the outcome of the case and the process itself encourages the parties to be creative in their approach to settlement and the outcome. This is the most common type of mediation style used today, and it can work in a variety of types of cases and with various types of parties. This style of mediation works best when the parties are already on the road to settlement and understand what they need. It will also work best when the parties are comfortable sharing their needs or goals with the other party.

To summarize, mediation can be designed to meet the needs and requirements of the parties through both the process and the style that the mediator uses. Further, it is not uncommon for a mediator to move from one style to another during the mediation. Each style of mediation has its benefits, and depending on the parties, the nature of the dispute and where the parties are at in the negotiation, a mediator should be encouraged to move from one style to another. As counsel, you should be familiar with the different styles of mediation, and you should not hesitate to tell the mediator what your client needs, both before the mediation and in the course of the mediation. [V](#)

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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 articulated 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 fourth sitting of the 42nd Parliament with an active beginning to the year. Below I have featured the pieces of legislation I expect to be of greatest import to my fellow trial lawyers as well as an update that the Benchers have signalled to the government that they are prepared to move forward on paralegal regulation.

Bill 12, *Intimate Images Protection Act*

Introduced by Attorney General Niki Sharma, this bill creates a scheme for civil redress for the unlawful distribution, or threat of distribution, of intimate images. The proposed legislation covers intimate images, near-nude images, videos, livestreams and digitally altered images in which an individual has a reasonable expectation of privacy. Once passed, it will create a new and faster process to obtain legal decisions and orders to stop the distribution or threat of distribution of intimate images without consent.

The legislation provides recourse for minors to pursue legal action to stop distribution of their private images as well as applications on behalf of a deceased person. There is a presumption that the deceased person did not consent to the distribution of the intimate image.

The burden of proving an image is not intimate because the individual depicted did not have a reasonable expectation of privacy falls on the person who distributed or published the image.

Orders can be directed at the published or a third-party intermediary who may be directed to remove, delete or destroy the image and de-index it from any search engines. The decision-maker can also make any other order they consider to be just and reasonable in the circumstances, including monetary damages.

Individuals may also revoke their consent to the distribution of intimate images at any time. After communicating to the individual who distributed the image, the person who distributed the intimate image must make every reasonable effort to make the intimate image unavailable to others.

The legislation creates a fast-track process that will work within the Civil Resolution Tribunal.

Bill 13, *Pay Transparency Act*

BC is one of the few provinces in Canada without any pay equity or transparency legislation. Notably, the government managed to introduce legislation that does little to address either. While acknowledged as a baby step, it has received little support from anyone.

The legislation requires that information about pay be included in publicly advertised job postings and prohibits seeking pay history information about job applicants. It also prohibits employers from disciplining employees who share pay information with applicants or co-workers. Discipline on such grounds is pretty shaky regardless.

The BC Human Rights Codes already bans discrimination based on gender, but people may be unwilling to bring forward a complaint against their current employer for fear of reprisal. Or, the fact that it takes years to get a remedy and if an employee believes they are being treated unfairly they will likely move on by then.

Under the proposed legislation, BC employers will gradually be required to make public reports on their gender pay gap in steps: as of November 1, 2024 employer with 1000+ employees; November 1, 2025 employers with 300+ employees; and November 1, 2026 employers with 50+ employees. The Act creates a Director of Pay Transparency to support employers to comply with their obligations, receive reports of non-compliance, prepare annual reports, publish reports and “other prescribed responsibilities”. Notably missing is enforcement and repercussions.

Women in BC earned an average of 17 per cent less than men according to 2022 data released by Statistics Canada, tied with Alberta for the worst in Canada. The gap was even greater for Indigenous women, visible minority women and immigrant women. The criticism is that it is unclear how this legislation does anything to address this. A coalition of over 125 BC academics, labour leaders and organizations signed a letter to the government days after the legislation was introduced imploring the government to include a robust enforcement regime or the responsibility will remain on women and those individuals who are typically marginalized to fight for equal pay, now with just slightly more information.

There is a private member’s bill that has also been introduced by the BC Liberals on the issue of equal pay [M 205, *Equal Pay Reporting Act*]. This is substantively the same bill that has been introduced by Liberal representatives six years in a row, however in the past the government has not elected to call the bill forward for debate. It is likely the current private member’s bill will receive the same fate.

Private Member’s Bill M 215, *Non-disclosure Agreements Act*

In May 2022, Prince Edward Island became the first jurisdiction in Canada to restrict non-disclosure agreements (“NDAs”) in cases of discrimination and harassment, including sexual misconduct, with Nova Scotia and Manitoba introducing bills with similar legislation. Ontario has introduced a bill specifically aimed at limited NDAs for post-secondary employees who may seek to work at a different institution. Now the BC Green Party has introduced a bill to severely restrict the use of NDAs in cases involving harassment or discrimination.

The legislation makes NDAs illegal unless: the agreement is the expressed wish and preference of the relevant person (typically complainant); the relevant person has received a reasonable opportunity for independent legal advice; there are no undue attempts to influence the relevant person to enter into the NDA; the agreement includes an opportunity to waive confidentiality; and, the agreement is of a set and limited duration. The language must also be plain and understandable. Contraventions of the Act would see fines of up to \$50,000.

The global move (Can’t Buy My Silence) to ban the “misuse” of NDAs stemmed out of the #MeToo movement, where victims of sexual harassment revealed their voices had been taken from



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them to protect their abusers. As every employment lawyer in the province is aware, NDAs are generally standard practice in matters involving discrimination or harassment. Ultimately this is typically the compromise for settling outside of a costly, invasive hearing.

In February 2023 at the Canadian Bar Association annual general meeting, a resolution pushing for NDAs to no longer be used as a tool to silence those who come forward after experiencing abuse, harassment and discrimination, passed by a margin of 94%. We of course represent the best interest of our respective clients, but it's unfortunate when the government is required to legislate morality.

The BC NDP has previously indicated support for legislation limiting NDAs in cases of harassment, abuse and discrimination. So, while this is a private member's bill, which is typically less likely to pass into legislation, when combined with the existing global momentum it is likely a version of this bill will become law.

LSBC: Paralegal Licensing

On March 10, 2023, the Benchers unanimously agreed to ask the government to bring amendments into force to allow for the licensing of paralegals. These amendments are in relation to bringing into force the amendments to the Legal Profession Act in Bill 57 – 2018 *Attorney General Statutes Amendment Act*, 2018.

At the December 4, 2018 annual general meeting, lawyers voted 74% in favour of a resolution that requested the BC Benchers ask the government to refrain from forming any regulations relating to licensed paralegals until the Benchers had a greater period to consult on the issue and, secondly, not to proceed with licensing paralegals in the family law practice area. The argument was that licensed paralegals would not be able to handle complex family law issues without a combination of experience and legal training that non-lawyers could not achieve.

At the AGM on June 22, 2022, a resolution to oppose bringing the legislation into force was passed by 69% of the vote. This was geared more towards a single regulator in relation to notaries.

These resolutions are non-binding and are part of a problem identified in the Report of a Governance Review of the Law Society of British Columbia as discussed in this column in Issue 173. While it is clear the majority of lawyers are not in favour of a single regulator and with extending the jurisdiction of paralegals and notaries, the primary responsibility of the Benchers is to consider what is in the public interest.

The patience exercised by the bench when handling claims involving self-represented individuals is admirable, but also painfully inefficient. Unbundled services, "legal coaching" and the expansion of the roles and paralegals and notaries are all initiatives to move forward access to justice. This is the direction our province is heading. By working with the government, the Benchers will hopefully be able to speak into a system that both protects and advances the public interest.

Now, reversing course on our archaic return to in-person appearances would also be a nice nod towards access to justice, but c'est la vie.

Concluding Remarks

The interpretation and commentary on government legislation and bench 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. **M**

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FROM PAGE 30

trial. However, the time for determination of whether refusal of an offer was unreasonable is the time frame when the offer was open for acceptance and not the date of trial. The wife was gainfully employed in 2013 with an income that actually exceeded that of the husband. She became disabled in 2015. Therefore, the husband could not reasonably have been aware at the time of the 2013 offer that he would have future exposure to liability for spousal support arising from the wife's later disability. It was therefore not unreasonable for him to decline the 2013 settlement offer at that time. However, the information available to the husband changed in 2014. In January 2014, the wife obtained a separate appraisal of the home. It was provided to the husband after withdrawal of the 2013 offer. The wife then made a further settlement offer in April 2014 which was essentially identical to the 2013 offer. The 2014 offer was left open for almost an entire year, when it was withdrawn in March 2015. Although the terms of the 2014 offer were essentially equivalent to the terms of the 2013 offer, the information available to the husband to enable him to assess the reasonableness of the offer at the time had materially changed. It was then apparent that the offer to settle was more than reasonable under the circumstances at the time and should have been accepted. Approximately a year after the expiry of the 2014 offer, the husband made a settlement offer that was materially worse for him than the offer made by the wife in the 2014 offer. The wife would have ordinary costs up to April 25, 2014, and double costs thereafter. *Nagy v. Csuka* (<https://www.bccourts.ca/jdb-txt/sc/22/21/2022BCSC2146.htm>) S.C., Taylor J., 2022 BCSC 2146, Kelowna E94929, December 8, 2022, 18pp., [CLE No. 78747] • See also 2022 BCSC 565, [2022] C.D.C. 77009 (CLE) • W.T. Clarke, for claimant; C.A. Miller, for respondent. Principal case authorities: *Chapman v. Chapman*, [2021] C.D.C. 73229 (CLE), 2020 BCSC 1896 — applied. *Fotheringham v. Fotheringham*, [2001] Civ. L.D. 538; [2001] Fam. L.D. 193; [2001] C.D.C. 22144 (CLE), 2001 BCSC 1321 — applied. *Hartshorne v. Hartshorne*, [2011] C.D.C. 47174 (CLE), 2011 BCCA 29 — considered. *Primeau v. L'Heureux*, 2018 BCSC 2200, [2019] C.D.C. 68437 (CLE) — applied. *Sebok v. Babits*, 2022 BCCA 2, [2022] C.D.C. 76317 (CLE) — applied. *Smithies Holdings Inc. v. RCV Holdings Ltd.*, [2017] C.D.C. 64234 (CLE), 2017 BCCA 177 — applied.

COSTS — Nature of litigation • Plaintiff Trial Lawyers Association of British Columbia (“TLABC”) and several plaintiffs in motor vehicle claims challenging provincial legislation vesting the Civil Resolution Tribunal with jurisdiction over the resolution and disposition of certain motor vehicle accident claims — Plaintiffs succeeding at trial — Appeal court allowing appeal and upholding the legislation — Court finding the TLABC was a public interest litigant and ordering parties to bear own costs of trial and appeal. In 2018, the province passed legislation and regulations vesting an administrative tribunal, the Civil Resolution Tribunal (“CRT”) with jurisdiction over the resolution and disposition of certain

motor vehicle accident (“MVA”) claims. Aspects of the jurisdiction were exclusive and others shared with the Supreme Court. Under the scheme, the CRT had exclusive jurisdiction to classify “minor injury” claims, which were capped at the tribunal’s limit of \$50,000. The Trial Lawyers Association of British Columbia (“TLABC”) and several plaintiffs in motor vehicle claims challenged the scheme. They argued in part that the grant of jurisdiction to the CRT offended s. 96 of the Constitution Act, 1867, by impermissibly infringing on the jurisdiction of the superior courts. That claim succeeded in the Supreme Court. The defendant Attorney General of BC and individual defendants in motor vehicle claims appealed. TLABC cross-appealed, asking for an order that the provision of the regulation that set the tribunal limit amount to \$50,000 was unconstitutional and of no force and effect. The court allowed the appeal and struck out the declarations below. The court found that the core jurisdiction of the Supreme Court remained in place even in the face of the new scheme, and that the grant of jurisdiction to the CRT did not offend s. 96. The constitutionality of the monetary limit was addressed as part of the entire implementing scheme, and the cross-appeal was dismissed. The TLABC and the other respondents asked the court to exercise its discretion to depart from the usual rule that costs follow the event. They sought an order that the parties bear their own costs, at trial and on appeal, and, in the alternative, that they should share one bill of costs. The Attorney General and the MVA defendants sought costs for both proceedings at the ordinary scale, and further asserted that two sets of costs were appropriate. Held, parties to bear their own costs on appeal and in the court below. Section 44(1) of the Court of Appeal Act provides that, in the absence of an order to the contrary, a party who succeeds on appeal is entitled to the costs of the appeal. Here, at the heart of the question was how to characterize the public importance of the proceedings and, relatedly, the respondent TLABC’s interest in them. TLABC would characterize itself as a public interest litigant bringing a matter of constitutional importance before the court on behalf of thousands of MVA victims, having itself no pecuniary interest in the outcome. The appellants, on the other hand, would characterize it as “a large group of lawyers pooling resources...to challenge a law perceived as a threat to their business”. The issue was whether, on the facts, the usual costs rule would be unsuitable and whether the interests of justice were served by variation from the rule. While recognizing that departures from the usual rule are exceptional, all levels of court in Canada have observed that public interest litigation attracts special considerations beyond the rationale of indemnification. Those considerations have led courts to adopt and develop factors to guide the exercise of their discretion to make exceptional costs orders. Those factors have been articulated slightly differently for different circumstances. Here, the respondents framed their arguments using the five factors affirmed in *Guide Outfitters Assoc. v. British Columbia*

(Information and Privacy Commissioner), 2005 BCCA 368, namely: (a) The proceeding involves issues the importance of which extend beyond the immediate interests of the parties involved. (b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if they have an interest, it clearly does not justify the proceeding economically. (c) The issues have not been previously determined by a court in a proceeding against the same defendant. (d) The defendant has a clearly superior capacity to bear the costs of the proceeding. (e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct. The parties focused their submissions on the first, second and fourth factors as the most relevant to the case. Taking into account those factors and the parties' submissions, variation from the rule was warranted. *British Columbia (Attorney General) v. British Columbia (Trial Lawyers Assoc. of British Columbia)* (<https://www.bccourts.ca/jdb-txt/ca/22/03/2022BCCA0354.htm>) C.A., Bauman C.J.B.C., Bennett & Butler J.J.A., 2022 BCCA 354, Vancouver CA47320; CA47332, October 21, 2022, 13pp., [CLE No. 78406] • Supplementary to 2022 BCCA 163, [2022] C.D.C. 77225 (CLE) • S.A. Bevan and M.A. Witten, for appellant/respondent on cross appeal Attorney General of B.C.; R.D.W. Dalziel, KC and A.P. Calvert, for respondents/appellant on cross appeal; A.M. Gunn, KC, R.W. Parsons and R.J.B. Gage, for respondents. Principal case authorities: *Barclay (Guardian ad litem of) v. British Columbia (Attorney General)*, [2006] C.D.C. 36033 (CLE); 2006 BCCA 434 — considered. *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] C.D.C. 58005 (CLE) — considered. *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, [2005] C.D.C. 32759 (CLE), 2005 BCCA 368 — applied. *Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue*, 2007 SCC 2; [2007] C.D.C. 36848 (CLE) — considered. *McDonald v. University of British Columbia*, 2004 BCSC 412, [2004] C.D.C. 29197 (CLE) — considered. *Victoria (City) v. Adams*, [2010] C.D.C. 44285 (CLE), 2009 BCCA 563 — considered.

COURTS — Jurisdiction generally — Prevention of abuse of process • Wife recovering judgment against husband for almost \$800,000 in a civil action for damages for assault — At opening of trial of wife's family law action, wife applying for a finding that as a result of issue estoppel or abuse of process, the husband should not be permitted to re-litigate facts that were found by the court after the 16-day civil trial of the tort claim — In light of husband's conduct over prolonged litigation between the parties, court relying on doctrines of abuse of process in allowing wife's application. The parties' relationship ended after the respondent husband assaulted the claimant wife in September 2018. He was charged with assault and he pleaded guilty in November 2020. The wife sued the husband for damages for her injuries. He responded to the claim and counterclaimed for injuries that he alleged he suffered in the same altercation. After a 16-day trial—in which both parties testified, were vigorously cross-examined, and called other evidence that was also tested by cross examination—

the court awarded the wife damages of close to \$800,000 and, subsequently, costs, including some special costs. The husband had commenced an appeal the merits and costs decisions. He did not seek a stay of either decision. The appeal was scheduled to be heard in November 2022. Based on his appeal factum, the husband's challenge to the merits decision was with respect to the judge's credibility findings. He was asking for a new trial and to admit fresh evidence. In the current family law proceedings, the parties had engaged in extensive pre-trial litigation, resulting in more than 20 orders since the wife filed her notice of family claim. The husband filed a significant number of applications. He was represented by three different counsel at different points and was self represented at times. Despite an order that he pay child support, he had not done so since the fall of 2021. He had also not contributed to the children's special expenses. At the commencement of the family trial in September 2022, counsel for the wife applied for a finding that as a result of issue estoppel or abuse of process, the husband should not be permitted to re-litigate facts that were found by the court after the 16-day civil trial of the tort claim. The parties agreed that the civil trial judge's overall assessment and conclusion about the parties' credibility was not binding at the family trial, and that the court would need to assess the credibility of the witnesses who testified. The husband opposed the wife's application and said that it would be unfair for him to be unable to challenge the civil trial's findings in the family proceeding. He said the focus of the evidence in the civil proceeding was the damages to which the wife was entitled if it was found that he assaulted her. In the family proceeding, apart from the financial issues, the focus was on the wife's application to relocate with the parties' children as well as the parenting arrangements and responsibilities regardless of the outcome of the relocation application. Held, for wife. This case involved a clear example of the need for judicial economy and consistency and invoked the integrity of the administration of justice. It involved a highly contentious dispute between a married couple over the parenting of their two children. Allowing the husband to re-litigate the findings of fact in the civil action would violate the principles of judicial economy, consistency, finality, and the integrity of the administration of justice, and amount to an abuse of process. In particular, it would be an abuse of process to re-litigate the judge's factual findings in: (a) 2021 decision, where she declined to adjourn the civil trial on the husband's fourth application to do so, brought on the first day of trial; (b) 2021 BCSC 2209 (the "merits decision"), where she made findings on the merits of the civil action, as outlined in the wife's opening statement; (c) 2022 BCSC 455 (the "costs decision"), where she assessed costs and special costs. The court would reach that conclusion on abuse of process despite the fact that the husband had appealed the merits and costs decisions. The parties agreed that there were two branches of res judicata that might arise from a previous judgment: issue estoppel and cause of action estoppel. The parties also agreed that the branch that would be engaged here was issue estoppel.

Issue estoppel operates when three conditions are met: (1) the same question has been decided; (2) the judicial decision which said to create the estoppel was final; and, (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. There is some inconsistency in the caselaw as to whether a decision under appeal is “final” for the purposes of issue estoppel. Here, it was not necessary to resolve that issue because it was more appropriate to consider the application under the abuse of process doctrine. That doctrine engages the court’s inherent power to prevent the misuse of its procedure in a way that would be manifestly unfair to a party or bring the administration of justice into disrepute. Here, the husband’s conduct over the course of the civil and family proceedings was sufficiently serious to attract the application of the abuse of process doctrine. In light of his past actions, the court would conclude that his present opposition to the wife’s application was another example of his attempt to frustrate the court process. Allowing him to re-litigate the findings in the merits decision would amount to an abuse of process. *P. (K.S.) v. P. (J.T.)* (<https://www.bccourts.ca/jdb-txt/sc/22/17/2022BCSC1727.htm>) S.C., MacNaughton J., 2022 BCSC 1727, Vancouver E162647, October 3, 2022 (oral), 26pp., [CLE No. 78243] • See also 2021 BCSC 2209, [2022] C.D.C. 76176 (CLE) and 2022 BCSC 1508, [2022] C.D.C. 78019 (CLE) • A.M. Ouellet, for claimant wife; M. Witzman, for respondent husband. Principal case authorities: *Barendregt v. Grebliunas*, 2022 SCC 22 — considered. *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 201 D.L.R. (4th) 193 — considered. *Giles v. Westminster Savings Credit Union*, [2006] Civ. L.D. 895; [2006] C.D.C. 36272 (CLE); 2006 BCSC 1600 — considered. *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 — applied. *Toronto (City) v. C.U.P.E.*, Local 69, 2003 SCC 63 — applied.

DEFAMATION — Remedies — Damages • Defendants publishing defamatory article online stating that plaintiff had been sued by his former employer for making fraudulent claims on his corporate expense card, but failing to mention plaintiff’s denials in his response to civil claim or to post disclaimer that allegations had not been proven — Trial judge finding plaintiff entitled to general damages only, assessed at \$60,000 — On plaintiff’s appeal, court finding trial judge erred in failing to consider range of defendants’ circulation of the defamatory article by hyperlink, since defendants’ broader circulation of hyperlinks to their own defamatory article was relevant to damages, and trial judge should have drawn inference as to extent of publication from the newsletter’s circulation — Trial judge also erring in reducing damages on basis that plaintiff’s reputation had already been tarnished by another article, because prior publication of the same or similar libel cannot be taken into account in mitigation of damages — Court substituting award of \$120,000 in general damages — Reasons summarizing correct approach to damages in defamation cases. The defendants were found liable for defamation of the plaintiff in

regard to an online article, written by the defendant M and published by the defendant KMI, on the basis that they did not fairly report on a lawsuit brought against the plaintiff by his former employer, V Inc., where the article failed to state the allegations were unproven, and failed to mention the plaintiff’s response to civil claim in which he denied the allegations, or his counterclaim in which he claimed wrongful dismissal and breach of contract. The defendants also did not seek the plaintiff’s comment before publishing. Prior to the publication of the KMI article, two articles in another publication, “BIV”, referred to V Inc.’s lawsuit against the plaintiff. The first BIV article summarized the allegations in V Inc.’s claim, and stated that the allegations had not been proven in court, and that the plaintiff had not yet filed a response. The second BIV article was the subject of another lawsuit by the plaintiff against BIV which had yet to go to trial. On the assessment of damages, the plaintiff claimed \$2.5 million and special costs. The trial judge rejected the argument that award for general damages should be reduced under s. 11 of the Libel and Slander Act on the basis that the plaintiff had also sued BIV. He awarded general damages of \$60,000. He declined to award aggravated or punitive damages, or special damages. The plaintiff appealed, arguing that the trial judge erred: (i) by failing to consider the defendants’ distribution of the defamatory article via hyperlink; (ii) by considering irrelevant factors in mitigation of damages; (iii) in not awarding aggravated and punitive damages despite finding the defendants were reckless; (iv) in requiring expert evidence of a mental disorder; and (v) in requiring proof of lost employment opportunities to a standard of certainty. Held, appeal allowed in part; general damages increased to \$120,000. The trial judge erred in failing to consider the respondents’ circulation of the defamatory article by hyperlink in assessing damages, and in relying on irrelevant factors, particularly the previously published BIV article with similar content, to mitigate the damages. The primary remedy for defamation is an award of general damages, which are presumed from the publication of a false statement, and are awarded “at large”. Aggravated damages, which are compensatory, may be awarded where the defendant’s conduct has been “particularly high-handed or oppressive, thereby increasing the plaintiff’s humiliation and anxiety arising from the libellous statement”. An award of aggravated damages requires a finding that the defendant was motivated by actual malice which increased the injury by spreading the damage to the plaintiff further afield or by increasing the plaintiff’s distress and humiliation. Punitive damages may be awarded where the defendant’s conduct is so malicious and high-handed that it offends the court’s sense of decency. Punitive damages are in the nature of a fine meant to deter the defendant and others from engaging in similar conduct, and are only awarded where the amount of general and aggravated damages is insufficient to achieve the objectives of punishment and deterrence. A plaintiff may also recover special damages for defamation that have been pleaded and proved, including actual pecuniary loss caused by the defamatory publication. Such

damages are rarely claimed in defamation cases and are often difficult to prove. However, where a plaintiff cannot prove actual pecuniary loss, an award of general damages may include compensation for possible economic damages, including business losses, that result from the defamation but cannot be specifically proven. In regard to the alleged errors, first, the trial judge erred in law in failing to consider the full scope of the defendants' distribution of the defamatory article in assessing damages, and in failing to give any weight to the breadth of circulation of the KMI newsletter. The mode and extent of publication is a factor relevant to the assessment of general damages for defamation, including aggravated damages, and is of particular importance in the Internet context where communication is both instantaneous and far reaching. Excluded from the trial judge's analysis was the fact that KMI directly sent a hyperlink to the defamatory article to its 32,000 newsletter subscribers, along with a provocative "teaser" and encouragement to recipients to "READ THIS". The defendants' distribution of the article to the 32,000 newsletter subscribers was relevant to the extent of viewership of the article. The decision in *Crookes* does not stand for the proposition that a defendant's conduct in increasing the circulation of their own defamatory publication by hyperlink is irrelevant to the assessment of damages. The trial judge could, and should, have drawn an inference about the extent of publication from the newsletter's circulation. Second, the trial judge erred in law in his approach to mitigation by reducing damages on the basis of factors that either were not directly relevant to the reputational harm suffered by the plaintiff as a result of the defamatory article, or could not be taken into account in mitigation as a matter of law. Reducing damages on the basis that the plaintiff's reputation had already been tarnished by the second BIV article was contrary to the common law rule that prior publication of the same or similar libel cannot be taken into account in mitigation of damages. The defendants published the whole libel, and were liable to pay the whole damage flowing from it. That M had copied content previously published elsewhere was not a mitigating factor. Further, since the trial judge found that the defendants could not rely on s. 11 of the Libel and Slander Act, it was not open to them to lead evidence of the second BIV article in mitigation of damages. The trial judge did not make the other alleged errors. He did not decline to include compensation for mental injury in the award of general damages on the basis of an absence of expert evidence. In defamation law, a plaintiff is not required to prove a recognized psychiatric disorder in order for compensation for mental suffering and distress to be included within the "at large" award of general damages. The trial judge said that expert evidence would be required to find that the plaintiff suffered from a depressive disorder, a recognized psychiatric diagnosis; he did not say that expert evidence was needed to claim compensation for mental suffering. On the contrary, he clearly accepted that the defamatory article caused the plaintiff mental suffering and distress, and found this should factor into the award of general damages. The trial judge also did

not err in not awarding aggravated or punitive damages. Reading his reasons as a whole, he found that the defendants' recklessness increased the harm to the plaintiff and that this had to be reflected in the award of general damages. There was no error in that approach; it is within the discretion of the trial judge to include a component of aggravated damages within the assessment of general damages rather than make a separate award. The finding that the defendant's conduct did not reach the threshold required for an award of punitive damages was supported on the record and entitled to deference on appeal. Finally, the trial judge did not err in finding that the plaintiff failed to prove a claim for special damages in relation to lost employment opportunities, and that that possibility should be factored into the assessment of general damages. He did not conclude that the plaintiff had to prove loss of employment to a standard of "certainty"; rather, he found that he had not proven a loss relating to his inability to secure work that was sufficiently specific to the defamatory article to establish a claim to special damages. He accepted that it was plausible that the plaintiff had lost employment opportunities due to the defamatory article, and noted he could consider "economic damage that cannot be expressly proven" as part of the assessment of general damages. As for remedy, the two errors in the assessment of general damages had a material impact on the assessment of the plaintiff's general damages. The record was sufficient to permit damages to be fairly and properly assessed without the need for further litigation. Analogous authorities established a range of general damages, after adjustment for inflation, of \$100,000 to \$150,000. With the errors corrected, \$120,000 was a proper assessment of the plaintiff's general damages. *Pineau v. KMI Publishing and Events Ltd.* (<https://www.bccourts.ca/jdbtxt/ca/22/04/2022BCCA0426.htm>) C.A., Frankel, Bennett & Horsman J.J.A., 2022 BCCA 426, Vancouver CA47876, December 16, 2022, 38pp., [CLE No. 78789] • Appeal from Kirchner J., 2021 BCSC 1952, [2021] C.D.C. 75673 (CLE) • M.B. Funt, for appellant plaintiff; J.A. Morris and J.B. Lee, for respondent defendants. Principal case authorities: *Bent v. Platnick*, 2020 SCC 23 — considered. *Best v. Weatherall*, [2010] C.D.C. 45242 (CLE), 2010 BCCA 202 — considered. *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, 126 D.L.R. (4th) 609 — considered. *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027 — considered. *Crookes v. Newton*, [2011] C.D.C. 48985 (CLE), 2011 SCC 47 — considered. *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 — applied. *Malak v. Hanna*, [2019] C.D.C. 69167 (CLE), 2019 BCCA 106 — considered. *Northwest Organics, Limited Partnership v. Fandrich*, [2019] C.D.C. 70256 (CLE), 2019 BCCA 309 — applied. *Ojanen v. Acumen Law Corp.*, 2021 BCCA 189, [2021] C.D.C. 74513 (CLE) — distinguished. *Saadati v. Moorhead*, [2017] C.D.C. 64395 (CLE), 2017 SCC 28 — considered.

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EMPLOYMENT — Wrongful dismissal — Defences — Misconduct

- Plaintiff superintendent of defendant city's utilities division dismissed after he used municipal wash facilities to wash his personal truck and trailer — Court finding response of dismissal disproportionate in the circumstances — Plaintiff entitled to contractual damages as agreed at \$57,910, but court finding no basis for claim for punitive damages. The plaintiff had worked for the defendant city since 2013. In the spring of 2018 the plaintiff, then still a unionized employee, was seen using the defendant's wash facility to wash his personal truck and trailer, and was told not to use municipal facilities for personal purposes. In September 2018, following the dismissal of seven unionized employees for their participation in an elaborate scheme involving the theft of scrap copper, the defendant created an exempt position of superintendent to replace the unionized foreman III positions. The plaintiff was appointed superintendent. He was the operational leader of three subdivisions, and responsible for 10 to 20 employees. In November 2020, on a non-work day, the plaintiff used the municipal wash facility to rinse off his personal pickup truck and recreational trailer. Five days later the defendant terminated his employment for cause, citing its policy that employees are not permitted to use municipal facilities for their personal use, and the prior warning to the plaintiff not to use the facility to wash his

personal vehicle. The plaintiff sued for wrongful dismissal. The issue at trial was just cause. The parties had agreed on the quantum of contractual damages. The plaintiff also claimed punitive damages. Held, judgment for plaintiff for \$57,910 less required statutory deductions. Though the plaintiff breached the defendant's policy and his conduct reflected poorly on his leadership skills, summary dismissal was not a proportionate response to the misconduct. Viewed objectively, his misconduct was not so egregious that it effectively destroyed the employment relationship. His misconduct was not inherently dishonest or deceitful. He did not steal from the defendant, and he did not lie to his supervisors. The response was disproportionate even taking into account the surrounding circumstances of the copper theft scheme. The plaintiff was entitled to the agreed contractual damages, but there was no basis for punitive damages. The defendant acted in good faith in response to misconduct by a senior employee, gave him an opportunity to be heard, had reasonable grounds to discipline him, and consulted appropriately with colleagues before making the decision to dismiss. *Stevens v. Port Coquitlam (City)* (<https://www.bccourts.ca/jdb-txt/sc/22/20/2022BCSC2090.htm>) S.C., Elwood J., 2022 BCSC 2090, New Westminster 235365, December 1, 2022, 19pp., [CLE No. 78698] • M. Viksne and J. Hankinson, for plaintiff; T. Topliss, for defendant. Principal case authorities: *George v. Cowichan Tribes*, [2015] C.D.C. 58476 (CLE), 2015 BCSC 513 — considered. *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, 2008 SCC 39 — applied. *McKinley v. BC Tel*, [2001] 2 S.C.R. 161; [2001] C.D.C. 21500 (CLE), 2001 SCC 38— applied. *Ogden v. Canadian Imperial Bank of Commerce*, [2014] C.D.C. 55229 (CLE), 2014 BCSC 285 — considered. *Ojanen v. Acumen Law Corp.*, 2021 BCCA 189, [2021] C.D.C. 74513 (CLE) — considered. *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1, [2015] C.D.C. 57717 (CLE) — considered.


GIFTS — Resulting trusts — Rebuttable presumption • Undue influence — Six months before her death at age 88, deceased adding names of her adult two sons to bank accounts previously held in her sole name — At the time, plaintiff suffering from significant dementia — Court finding sons failed to rebut presumptions of resulting trust and undue influence and ordering that funds be paid to TC's estate. The plaintiff was the daughter and POA of TC and also the executor of her will. TC died in 2017 at the age of 88. Prior to 2010, when TC executed her will, she gifted various properties to the plaintiff. She also gifted properties to her two sons, the defendants IC and AC, and the plaintiff's daughter. TC intended all the properties to be held in the joint names of herself and the gift recipients. However, for reasons she ascribed to IC's illicit motives, she was not listed on title to the property gifted to IC. Her 2010 will directed that the residue of her estate be divided equally among her three children. She also explained in her will that the property in IC's name represented the whole of his inheritance and stipulated the residue was not to include any properties registered in joint tenancy. Following the

death of her husband in 2014, TC's cognitive health declined and her behaviour grew increasingly erratic. She began seeing a man who responded to her companion want ad and was insistent on giving him large sums of money, contrary to her history of fiscal prudence. In 2016, her condition was evaluated by a psychiatrist who concluded C was suffering from dementia syndrome. The parties met with TC to discuss adding the defendants to some of TC's bank accounts, but nothing was accomplished except to agitate TC. Six months prior to her death, TC added IC's name to three bank accounts and AC to another. The plaintiff was relieved by this, as she believed "110%" her brothers would protect their mother against financial exploitation. Several hours before TC died, when IC knew TC was on her deathbed, IC drained the funds from one joint account. The plaintiff had the other joint accounts frozen. She now sought a declaration that the funds withdrawn by IC were held in trust for TC's estate and an order that the frozen funds be paid to the estate. Held, orders granted. Credibility was a central issue. IC's strong feeling that he had been treated unfairly and his animus against the plaintiff coloured all of his testimony. (AC did not testify.) The addition of the defendants as joint account holders was gratuitous, and the presumption of resulting trust applied. Here the defendants' evidence failed to establish TC intended to gift the funds. IC was in a dominant position in his relationship with TC and the presumption of undue influence also applied. Starting in 2014, IC took steps to persuade TC that the plaintiff and her family had taken advantage of her, and that the provisions of her will and the distribution of her properties were unfair. IC was well aware of his mother's impaired cognition, her vulnerability, her increasing dependence on others, including IC, for daily activities, and her risky financial behavior. The fact he accompanied TC to the bank when she made her changes to her accounts supported the presumption and also the conclusion that that the changes were not the result of TC's full, free and informed thought. *Campbell Estate, Re v.* (<https://www.bccourts.ca/jdb-txt/sc/22/21/2022BCSC2184cor1.htm>) S.C., *Lyster J.*, 2022 BCSC 2184, Nelson 21261, December 14, 2022, 54pp., [CLE No. 78800] • M.D. Scheffelmaier, for plaintiff; Defendants on their own behalf. Principal case authorities: *Bradshaw v. Stenner*, 2010 BCSC 1398, [2010] C.D.C. 46396 (CLE) af 'd 2012 BCCA 296, [2012] C.D.C. 50781 (CLE) — considered. *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, [2018] C.D.C. 67001 (CLE), 2018 BCSC 859 — considered. *Edmondson v. Payer*, [2011] C.D.C. 47212 (CLE), 2011 BCSC 118, af 'd [2012], C.D.C. 49956 (CLE), 2012 BCCA 114 p135 — considered. *Gef en v. Goodman Estate*, [1991] 2 S.C.R. 353 — considered. *Kolic v. Kolic*, 2019 BCSC 1463, [2019] C.D.C. 70291 (CLE) — considered. *McMaster Estate v. McMaster*, 2021 BCSC 1100, [2021] C.D.C. 74757 (CLE) — considered. *Pecore v. Pecore*, [2007] 1 S.C.R. 795, 2007 SCC 17 — considered. *Unger v. Unger Estate*, [2017] C.D.C. 65468 (CLE), 2017 BCSC 1946 — considered. *Williams v. Williams Estate*, [2018] C.D.C. 66818 (CLE), 2018 BCSC 711 — considered.

INSURANCE — Actions — Duty to defend • Student suing plaintiffs' son for assault he allegedly committed at school, and suing plaintiffs in negligence for failure to prevent violence by their son — In this action plaintiffs suing defendant insurer claiming right to defence and indemnity under homeowners insurance policy with defendant — On thorough review of authorities, court finding policy provisions excluded coverage for failure to take steps to prevent assault, and that negligence claim against plaintiffs was not derivative of the assault claim against their son — Action dismissed. The plaintiffs and the defendant insurer entered into a homeowners' insurance contract under which the plaintiffs' minor son, IR, was also an insured. The policy included general liability coverage for sums payable by the insureds as compensatory damages because of unintentional bodily injury or property damage. The policy had an exclusion for claims arising from or in relation to "sexual, physical, psychological or emotional abuse, assault, molestation or harassment, including corporeal punishment by, or at the direction of, or with the knowledge of any insured; or failure of any insured to take steps to prevent sexual, physical, psychological or emotional abuse, assault, molestation, harassment or corporal punishment". IR was alleged to have assaulted ZS at school, and ZS, by her litigation guardian, sued IR, his parents, the school district and some school district employees. ZS's claim alleged an intentional assault and battery by IR. As against the plaintiffs, it alleged that the assault was contributed by their negligence in, inter alia, failing to reasonably anticipate another occurrence of violence by IR, failing to take reasonable steps to avoid a recurrence of violence from IR, failing to properly supervise IR, and failing to adequately discipline IR for past violent behaviours. The plaintiffs sought coverage from the defendant pursuant to the policy. The parties agreed there was no coverage for IR due to the exclusion of liability for intentional acts, and that the "with knowledge exclusion" did not apply to the plaintiffs. The defendant's position was that the "failure to prevent" exclusion in the policy applied. The plaintiffs sued for coverage. The defendant applied for a summary trial of the issue of whether its insurance policy provided or excluded coverage for the claims alleged in the lawsuit against the plaintiffs. Held, action dismissed. The matter was suited to summary disposition. Given the terms of the exclusion clause, the defendant was not under a duty to defend. Applying the three-part test set out by the Supreme Court of Canada for interpreting insurance policies in the context of a duty to defend and right to indemnity, first, ZS's claim was properly pled against IR for battery, an intentional tort, and against the plaintiffs in negligence. Second, the negligence claim was not derivative of the intentional tort. The plaintiffs' actions did not arise out of IR's alleged assault of ZS on a specific date. The plaintiffs' actions were clearly separable. Third, the properly pleaded, non-derivative claims could not potentially trigger the defendant's duty to defend in light of the "failure to prevent" exclusion. The reference to "failure of any insured to take steps" was clear and unambiguous. The allegations against the plaintiffs was that they failed to take

various steps to: anticipate another occurrence of violence, take reasonable steps to avoid a recurrence of violence, and supervise and discipline their son. There was no basis to distinguish two authorities which found that an exclusion clause that was materially the same would exclude coverage for negligently failing to prevent abuse. The exclusion excluded coverage for negligently failing to prevent an assault. *Reeves v. Co-Operators General Insurance Co.* (<https://www.bccourts.ca/jdbtxt/sc/22/22/2022BCSC2258.htm>) S.C., Forth J., 2022 BCSC 2258, Vancouver S217365, December 23, 2022, 17pp., [CLE No. 78860] • C.H. Lee, for plaintiffs; A. Bookman, for defendant. Principal case authorities: *C. (R.) v. Western Assurance Co.*, 2022 ONSC 100 — considered. *Co-operators General Insurance Co. v. Kane*, 2017 BCSC 1720 [2017] C.D.C. 65235 (CLE) — distinguished. *Dube v. BCAA Insurance Corp.*, [2013] C.D.C. 51997 (CLE), 2012 BCSC 1958 — applied. *Durham District School Board v. Grodesky*, 2012 ONCA 270 — distinguished. *E. (D.) v. Unifund Assurance Co.*, 2015 ONCA 423 — applied. *Lemieux v. Laclair*, 2007 CanLII 27755 (ON SC) — considered. *Lemieux v. Laclair*, 2008 ONCA 263 — considered. *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 SCR 551, 2000 SCC 24 — applied. *Unrau v. Canadian Northern Shield Insurance Co.*, 2004 BCCA 585, [2004] C.D.C. 30917 (CLE) — distinguished.


MOTOR VEHICLE INSURANCE — No fault benefits — Deductibility • COSTS — Offer to settle — Court allowing deductions pursuant to Insurance (Vehicle) Act, s. 83, and Regulation Part 7 with respect to total temporary disability benefits paid pre-trial and for one year post-trial only, and allowing 80% deduction from award for future care costs to leave 20% contingency for care costs not covered by Part 7 benefits — Court finding plaintiff's offer to settle, made 7 weeks before trial, which was significantly higher than net damage award, ought reasonably to have been accepted by defendant — Plaintiff allowed double costs after date of offer. About seven weeks before trial the plaintiff offered to settle her personal injury claim for \$432,171 less \$60,000 in total temporary disability benefits [TTDs] paid. After trial the plaintiff was awarded personal injury damages of \$541,271. The defendant applied pursuant to s. 83 of the Insurance (Vehicle) Act for a deduction of \$166,729 from the award respect of benefits paid or payable to the plaintiff by ICBC pursuant to Part 7 of the Insurance (Vehicle)



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Regulation. The plaintiff acknowledged that \$73,421 should be deducted for: \$65,024 TTDs paid to the date of trial, \$4,672 TTDs paid since the conclusion of trial, and \$3,724 for special damages. She said there should be a contingency deduction of 25 percent applied to the amount the defendant said should be deducted from the future care award, and objected to any deduction for future loss of earning capacity for future TTDs. The plaintiff applied for double costs based on her offer to settle. Held, award reduced by \$95,533; double costs to plaintiff. With respect to the award of \$14,500 for future care to cover the cost of kinesiology and psychological therapy, the deduction under s. 83 of the Act would be \$11,600, to allow the plaintiff a 20 percent contingency in case some of the care costs contemplated by the award would not be covered by Part 7 benefits. In regard to future TTD benefits, there would be a deduction of \$10,512 from the loss of earning capacity award based on ICBC's unconditional commitment to pay TTDs for the first year post-trial; this amount represented the remaining 36 weeks of the first year post-trial. However, there would be no further s. 83 deduction for TTDs, as the defendant failed to establish that the plaintiff was likely to receive TTDs after the first year post-trial. Therefore, the award would be reduced by \$95,533, resulting in a net damage award of \$445,737. The plaintiff was entitled to double costs from the date of her offer to settle. She provided the rationale for her offer when it was made, including the expert and other evidence that would be led at trial. The net award exceeded the amount of the offer by a significant margin. The defendant was in a position to be able to evaluate the offer, which ought reasonably to have been accepted. *Buezo v. Ng* (<https://www.bccourts.ca/jdb-txt/sc/22/20/2022BCSC2071.htm>) S.C., Lamb J., 2022 BCSC 2071, New Westminster M213609, November 28, 2022, 10pp., [CLE No. 78661] • Supplementary to 2022 BCSC 857, [2022] C.D.C. 77314 (CLE) • C.J. Carta, for plaintiff; P. Di Tomaso, for defendant. Principal case authorities: *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, [2020] C.D.C. 72290 (CLE), 2020 BCSC 953 — applied. *Fan (Guardian ad litem of) v. Chana*, [2010] C.D.C. 44018 (CLE), 2009 BCSC 1497 — considered. *Tompkins v. Meisters*, [2022] C.D.C. 77792 (CLE), 2022 BCSC 1289 — applied.

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PERSONAL INJURY QUANTUM — Arm • TORTS — Assault — Damages — Annoyed by engine noise from plaintiff's car disturbing him in early morning hours, defendant striking the car many times with a piece of wood, breaking windows and striking plaintiff's arm, causing long term pain and some restriction on his activities — Court awarding \$75,805 in damages for assault, including \$60,000 for non-pecuniary damages, \$3,000 for aggravated damages and \$8,000 in punitive damages. At about 5 a.m. one day in January 2018, the plaintiff was sitting in his car in a store parking lot, using the store's internet signal. After about 15 minutes, he was ready to leave. He backed across the parking lot to a spot right beside the home of the defendant. He tried to go forward but his car would not move. Being a cold morning, he thought his car would not move because the engine was cold. He sat in that spot revving his engine in an effort to warm it up. The defendant was awoken by the loud revving of the engine. He got out of bed "not happy", got dressed and went outside. On his way out the door, he grabbed a piece of wood similar to a 2x4. Wielding the piece of wood like a baseball bat, he repeatedly struck the plaintiff's car, shattering the front and rear windshields and denting the window frames. He then struck the driver's side window, breaking it and hitting the plaintiff's arm. As the defendant wound up to strike the driver's side window, the plaintiff put his left arm up, crooked at the elbow, to shield his face and head. When the defendant broke through the window, he struck the plaintiff in the elbow. Glass flew into the plaintiff's car hitting him on the left side of his neck and cutting his skin. He immediately felt a sharp pain in his wrist. He told the defendant that he had broken his elbow. When he was able to drive away, the plaintiff immediately went to hospital. Emergency room records indicated abrasions to his left neck and elbow. Glass had to be cleaned from the elbow. A photo depicted his left elbow area as bruised, swollen and abraded. The plaintiff sued for damages. Held, judgment for plaintiff for \$75,805. The defendant did not deny causing the injury. As a result of the injury, the plaintiff reported being in constant pain. He could no longer do things that he enjoyed including cycling and off-road biking. He became fearful of the defendant and continued to experience anxiety. He was no longer able to fix bikes which, beyond being a

source of income, gave him a sense of contributing to the tight community of Tofino. He felt that he was supplying the people of Tofino with good bikes for a reasonable amount. When he could no longer salvage parts and rebuild bikes, he lost his purpose. His enduring injury to his wrist was corroborated by his family doctor, who testified that she had prescribed prescription drugs, ordered an MRI, and had the plaintiff seen by an orthopaedic surgeon. The clinical records of both doctors were filed as exhibits. Non-pecuniary damages would be assessed at \$60,000. He did not fail to mitigate by not attending physiotherapy. It was not available in Tofino and he had no car. To attend, he would have to travel by bus and stay overnight in a hotel. The court was unable to conclude that it was unreasonable for him to not attend physiotherapy given the length of the trek and the expense. An award of \$3,000 for aggravated damages was appropriate. As a result of the defendant's attack, the plaintiff's emotional state had been wounded. He suffered nightmares. His sense of self-esteem and confidence had been impacted. He no longer felt safe. There would also be an award of \$8,000 in punitive damages. The award would convey to the defendant the message that his behaviour would not be condoned. On all of the evidence, the court was unable to find, to the standard required, that the plaintiff suffered a loss of income as a result of the assault. Accordingly, there would no award for past loss of income. The plaintiff testified that at the time of the assault he was supplementing his monthly disability allowance by picking mushrooms, selling things on eBay and fixing and rebuilding bikes and selling them. His evidence regarding his income from the bike business was vague. No records were filed. He testified that the injury did "not necessarily" impact his ability to earn. His claim of \$200,000 for loss of earning capacity would also be denied. Special damages would be allowed at \$355. The defendant would also have to pay, pursuant to s. 16 of the Health Care Cost Recovery Act, the amount of \$2,197 and \$2,252 pursuant to ss. 15, 16 and 17 of the Crime Victim Assistance Act. *Giesbrecht v. Hansen* (<https://www.bccourts.ca/jdb-txt/sc/22/16/2022BCSC1673.htm>) S.C., Murray J., 2022 BCSC 1673, Victoria 193646, September 23, 2022, 21pp., [CLE No. 78198] • M.H. Martin, for plaintiff; M. Plett, for defendant. Principal case authorities: *Dahliwal v. Greyhound Canada Transportation Corp.*, 2015 BCSC 2147, [2016] C.D.C. 60285 (CLE) — applied. *Dornan v. Silva*, [2021] C.D.C. 74748 (CLE), 2021 BCCA 228 — applied. *Gregory v. Insurance Corp. of British Columbia*, [2011] C.D.C. 47594 (CLE), 2011 BCCA 144 — considered. *Karst v. Foster*, [2019] C.D.C. 69860 (CLE), 2019 BCSC 1043 — applied. *Ojanen v. Acumen Law Corp.*, 2021 BCCA 189, [2021] C.D.C. 74513 (CLE) — applied. *Rab v. Prescott*, [2021] C.D.C. 75563 (CLE), 2021 BCCA 345 — applied. *Thomson v. Friedmann*, [2008] C.D.C. 40431 (CLE), 2008 BCSC 703 — applied.

PERSONAL INJURY QUANTUM — Multiple injuries • Psychological injury • Chronic pain • Headaches • Loss of homemaking capacity • Future care costs • In-trust awards — Plaintiff, then age 32, suffering multiple injuries in 2015 motor vehicle accident while employed as

a driver examiner by ICBC — At trial in 2022, plaintiff continuing to suffer chronic myofascial pain syndrome, thoracic outlet syndrome, irritation of the jaw, chronic headaches, somatic symptom disorder, chronic adjustment disorder, and persistent depressive disorder, with an overall poor prognosis — Court assessing damages at \$2,237,639, including non-pecuniary damages at \$220,000, past income loss at \$290,000, future loss of earning capacity at \$1,040,000 and future care costs, including housekeeping costs, at \$618,932 — Court making an in-trust award of \$50,000 for services provided by plaintiff's husband The plaintiff, then age 32, was injured in a motor vehicle accident in March 2016. At the time, she was employed in the ICBC drivers licensing office in Burnaby. Her annual employment income in 2015, the year before the accident, was \$57,739. The accident occurred when she was administering the road test component of a driving exam to the defendant, P. After she entered an intersection, the plaintiff directed P. to proceed. P. accelerated and overturned to the left, driving towards a vehicle that was stopped at a stop sign. In response, the plaintiff pressed as hard as she could on the passenger side brake pedal available to her in the driving school Toyota. She turned in her seat, reached across and grabbed the steering wheel with her right hand. She pulled the wheel hard to the right. She was able to alter the Toyota's course away from the driver's door of the other vehicle. The front driver's side corner of the Toyota collided with the back wheel well of the other vehicle. She said she started to feel discomfort in her neck (right side), upper right shoulder, trapezius, and chest wall at the scene of the accident. She directed P. to return to the ICBC office. Upon arriving at the office, she took an Advil and started to complete a form to report the accident but found it difficult to gather her thoughts. Her father picked her up from work early and drove her home. She saw her family doctor, Dr. R., in the evening on the day of the accident. Dr. R. prescribed an anti-inflammatory, a muscle relaxant, and extra-strength Tylenol. She recommended the plaintiff stay off work for two weeks. She suffered severe post-accident headaches. A few months later, Dr. R. referred her to a physiatrist, who recommended ultrasound-guided occipital nerve block injections as a treatment for the headaches. Between October 2016 and August 2017, she received five such injections. She said the process was very painful. She said she experienced some relief, but the effect was not long-lasting. In May 2017, on recommendation of Dr. R., she started attending a pain clinic. At the clinic she had counselling and also underwent trigger point injections, chiropractic treatments, and two medial branch nerve block injections in her facet joints. The nerve block injections were not helpful and the process was painful. She underwent a Botox treatment for the headaches in October 2017. She said the severity of her migraines was reduced but the effect soon wore off. She became pregnant in October 2017. She stopped taking all medication while pregnant and her pain symptoms worsened. She did not return to her medications. She said the side effects (leaving her feeling like a Zombie) outweighed the benefits. In August 2018

she started seeing a neurologist. He tried some treatments that were ineffective. In June 2019 he administered a large number of Botox injections into various areas of her head, neck, and shoulders. She said the injections gave her significant relief. She returned for additional Botox injections every 10 weeks. She exhausted her sick time in May 2016 and then went on short-term disability. She attempted a graduated return to work program at ICBC in January 2017, encouraged by Dr. R. However, it was Dr. R.'s view that she was not able to safely work as a driving examiner due to her limited range of motion and impaired concentration. As a result, she started working on reception and then moved to counter work. Initially, she worked two four-hour shifts a week. After about six weeks, she tried to increase her hours, but she was not able to manage. Dr. R. wrote several letters requesting an ergonomic assessment and a change of hours to allow the plaintiff to work mornings, but the requests were not accommodated. In May 2017, ICBC notified the plaintiff that the return to work plan was being terminated. She qualified for long-term disability, but those benefits were terminated in May 2018 when the insurer concluded that she was no longer disabled from all occupations. She then began receiving CPP disability benefits. In September 2021, the plaintiff started working part-time for a technology consulting firm owned by a close friend. In anticipation of her employment, the plaintiff completed an introductory project



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management course at BCIT. She earned an “A” in the course. Most of her work was computer based. The position was highly accommodated and entirely flexible. The plaintiff set her own hours and worked when she felt able (usually about 12 hours a week). She was paid \$34 an hour. Most often she worked from home. At the trial to assess damages, the plaintiff quantified her claim at \$2,990,000. The defence quantified the claim at \$936,169. Held, judgment for plaintiff for \$2,237,639. There was no material disagreement in the expert medical evidence concerning the nature of the plaintiff’s physical injuries, or their cause. The court would accept the plaintiff’s account of the nature, severity, and progression of her symptoms, and the impact they had on her functionality and enjoyment of life. On the evidence as a whole, including the largely consistent expert medical evidence, the court would find that: (i) the plaintiff sustained soft tissue injuries to her neck and right periscapular region; (ii) those injuries left her with chronic myofascial pain in her neck, right shoulder, and right arm; post-traumatic thoracic outlet syndrome causing neurological symptoms in her right arm and fingers; chronic headaches attributed to the neck injury; irritation of her jaw; somatic symptom disorder; and chronic adjustment disorder that led to major depressive disorder; (iii) she continued to suffer pain in her neck, right shoulder, and arm on a daily basis; tingling in her right arm and numbness in her fourth and fifth fingers several times a week; and, with her current Botox regime, one to two severe headaches per week; (iv) the psychological conditions left her suffering from distress, anxiety, and depressive symptoms; (v) the ongoing symptoms impaired the quality of her sleep and her functionality; and (vi) the depressive symptoms had responded to medication, but the distress and anxiety associated with the somatic symptom disorder continued to impair her functionality. Dr. R.’s prognosis was “guarded”, a descriptor she testified she used interchangeably with “poor”, meaning she did not think the plaintiff would get better. The only disagreement concerned the recommended treatment for her headaches. Taking all of the expert medical evidence into consideration, the court would find that with cognitive behavioural therapy, ongoing medication management for depression, and active rehabilitation, the plaintiff’s symptoms of depression would improve. It was likely that the anxiety and distress associated with the somatic symptom disorder would be managed at current levels, there was a high probability that she would retain her current functionality (not worsen), and there was a reasonable prospect of modest improvement in her function because there was some prospect of improvement in her headaches. In assessing non-pecuniary damages, the most significant factors were the plaintiff’s relatively young age; the severity and constancy of her ongoing symptoms; the near certainty that she faced many years of ongoing debilitating pain and suffering; the fact that her prognosis for improvement was guarded with a best case scenario of modest improvement in the headaches which, if it transpired, would modestly improve her ability to function; the profound impact her injuries had on every

aspect of her life, including the impairment of all her personal relationships; and the severe emotional suffering she had endured. Having considered all the authorities, non-pecuniary damages would be assessed at \$220,000. Accepting the evidence of an economist as to what the plaintiff would have earned in the period between the accident and the trial had the accident not occurred, then her past loss of income or income earning capacity would be assessed at \$275,000. While it was possible that she would have secured a promotion in the period prior to trial, the probability of that contingency was fairly low, particularly given the intervening maternity leave. In the circumstances, the court would assess past loss of income or income earning capacity at \$290,000, which reflected the real and substantial possibility (albeit a relatively low probability) that she would have secured a modest promotion at some point after her maternity leave. It was beyond dispute that the plaintiff established a potential future event that could lead to a loss of capacity. The evidence overwhelmingly demonstrated that the injuries she sustained in the accident had limited her functional capacity and that the limitations were likely permanent. As a result, she had become less valuable to herself as a person capable of earning income in a competitive labour market; she was less marketable or attractive as an employee to potential employers. There had been an impairment of the capital asset. The plaintiff was very intelligent and articulate, and she had a good work ethic and marketable skills, including computer skills and communication skills. By the time of the trial she was working about 12 hours a week and performing her duties well. There was a real and substantial possibility that she would lose her position in the event that her employer sold the business or brought on a partner. Her need for extensive accommodations would significantly narrow the pool of potential employers which, in turn, would likely lead to periods of unemployment. Taking the various contingencies into account, a comparison of the plaintiff’s



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likely without-accident future earning capacity (\$1,700,000) and her likely with-accident future earning capacity (\$660,000) would lead the court to assess her damages for loss of future earning capacity at \$1,040,000. Future care costs would be assessed at \$618,932, including \$122,860 for neurologist/ Botox injections, \$50,990 for medications and supplements, \$14,134 for occupational therapy and \$361,465 for homemaking. The court would allow the “in trust” claim of \$50,000 for homemaking services performed by the plaintiff’s husband in the period between the accident and the trial. Special damages would be allowed at \$18,707. *Boal v. Parilla* (<https://www.bccourts.ca/jdb-txt/sc/22/20/2022BCSC2075.htm>) S.C., Warren J., 2022 BCSC 2075, Vancouver M176205, November 29, 2022, 59pp., [CLE No. 78677] • A.C.R. Parsons, G.S. Hoff and E. Sadowski, for plaintiff; J.P. Cahan, B. Devlin, L. Morgan, Articled Student and A. Bhangoo, Articled Student, for defendants. Principal case authorities: *Bradshaw v. Stenner*, 2010 BCSC 1398, [2010] C.D.C. 46396 (CLE) af ‘d 2012 BCCA 296, [2012] C.D.C. 50781 (CLE) — considered. *Bystedt v. Hay*, 2001 BCSC 1735, [2001] C.D.C. (CLE) — applied. *Dhillon v. Singer*, 2017 BCSC 414, [2017] C.D.C. 63853 (CLE) — applied. *Dornan v. Silva*, [2021] C.D.C. 74748 (CLE), 2021 BCCA 228 — applied. *Leung v. Draper*, [2020] C.D.C. 71458 (CLE), 2020 BCSC 219 — distinguished. *Moges v. Sanderson*, [2020] C.D.C. 72861 (CLE), 2020 BCSC 1511 — applied. *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217, [2022] C.D.C. 77486 (CLE) — applied. *Stapley v. Hejslet*, [2006] Civ. L.D. 109; [2006] P. Inj. L.D. 28; [2006] C.D.C. 34091 (CLE); 2006 BCCA 34 — applied. *Steinlauf v. Deol*, [2022] C.D.C. 76817 (CLE), 2022 BCCA 96 — applied. January 30, 2023 • Issue No. 5 • Page 29 of 48 Experts: Dr. Chris Babbage, psychiatrist — rejected. Darren Benning, economist — considered. Louise Craig, functional evaluator — considered. Dr. P. Janke, psychiatrist — rejected. J. Lawless, vocational assessment — considered. Dr. Colleen Quee-Newell, clinical counselor and vocational consultant — considered. Dr. Claire Robinson, family physician — considered. Dr. Gordon Robinson, neurologist — considered. Dr. Anthony Salvian, vascular surgeon — considered. M. Szekely, economist — considered. Dr. Heather Underwood, physical medicine & rehabilitation — considered. Claudia Walker, occupational therapist — considered. Tracy Witty, occupational therapist — considered. Dr. Andrew Wolfenden, neurologist — rejected.

PRACTICE — Appeals — Security • COSTS — Security for costs — Plaintiff suffering brain injury and serious disability as an infant said to have been caused by negligence of the 3 defendant physicians — Trial judge finding one defendant not negligent — Judge finding negligence against the other 2, but dismissing action on issue of causation — Plaintiff commencing appeal — Defendants applying for security for trial and appeal costs — Appeal court chambers judge finding that to require security would likely stifle the appeal — Application dismissed. The plaintiff’s appeal arose out of a medical negligence action alleging that between the plaintiff’s birth on July 29, 1996, and her transport to BC Children’s Hospital on August 6, 1996, she received negligent medical care and treatment from the respondent physicians. That negligence was said to have caused or contributed to brain damage and other severe injuries. The trial judge found that the defendant Dr. P. met the

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standard of care expected of a reasonably prudent physician in her assessment and treatment of the plaintiff. As such, there was no basis for liability against her. The judge made contrary findings in respect of the other two defendant physicians. Despite those findings, the medical negligence claims against those physicians were dismissed. The judge found the plaintiff did not prove that their failure to meet the requisite standard of care contributed to the debilitating injuries she sustained. The defendants applied for orders, including: (a) that the plaintiff post \$19,500 in security for costs of the appeal; (b) that the plaintiff post \$147,000 in security for costs of the trial. Held, application dismissed. Jurisdiction to order security for costs is found in s. 34(1) of the Court of Appeal Act. The guiding principles are well-established. Specific to costs of the appeal, the appellant bears the onus of showing why security is not required. The overriding question is whether it would be in the interests of justice to order security. Factors that inform the interests of justice analysis include: (a) the appellant's financial means; (b) merits of the appeal; (c) timeliness of the application; and (d) whether costs will be readily recoverable. Security for costs of the trial are treated differently. In this scenario, the applicant bears the onus of showing that security is warranted. The applicant must show prejudice if the order is not made. In assessing the interests of justice, the court must consider the merits of the appeal and the effect of an order for security on the appellant's ability to take their appeal forward. As a general rule, the court will not order security for costs against an appellant who has a meritorious appeal, but no financial capacity to post funds that would allow the respondent to recover some or all of their costs in the event the appeal does not succeed. However, if the appeal is "virtually without merit", security for costs may well be ordered even though an appellant is impecunious. In its practical effect, that would mean that the appeal likely does not proceed; however, a "successful [party] should not be required to respond to an unmeritorious appeal when there is no real prospect of recovery". Here, while it appeared that the appeal would not be easy for the plaintiff, it could not be said there was "virtually no merit" to the appeal. However, to order security for costs of the appeal would effectively preclude the plaintiff from challenging the trial judgment and seeking a remedy for profoundly debilitating injuries in the face of clear findings that as an infant, she was not provided with the level of care she was entitled to. On balance, and in the particular circumstances, an order for security for costs of the appeal was not in the interests of justice. *Hanson-Tasker v. Ewart* (<https://www.bccourts.ca/jdb-txt/ca/22/04/2022BCCA0411.htm>) C.A., DeWitt-Van Oosten J.A. (In Chambers), 2022 BCCA 411, Vancouver CA48233; CA48239, November 22, 2022, 13pp., [CLE No. 78705] • On appeal from 2022 BCSC 432, [2022] C.D.C. 76857 (CLE) • C.E. Hunter KC, and C.V. van Wiltenburg, for plaintiff/appellant; J.A. Morris, for respondents/defendants. Principal case authorities: *Crouch (Guardian ad litem of) v. B.C. Women's Hospital & Health Centre*, [2002] Civ. L.D. 600; [2002] P. Inj. L.D. 152; [2002] C.D.C. 24506 (CLE) (B.C.C.A.) — applied. *Hacopian-Armen Estate v. Mahmoud*, 2021 ONCA 545 — considered.

PRACTICE — Class actions • Evidence — Expert reports — Admissibility — In proposed class action, plaintiff serving report by a specialist in economic analysis and price marketing — addressing data and various methodologies to assess economic harm — Certification hearing adjourned pending present application by defendants to exclude report as inadmissible — Application dismissed — Report being proper reply report and not splitting plaintiff's case — Issues raised in report not causing defendants prejudice and any prejudice arising from late filing of report offset by adjournment of certification hearing. The plaintiff initiated a proposed class action for negligence, breach of the Competition Act, Food and Drugs Act and consumer protection legislation, and unjust enrichment. She alleged the defendants manufactured and distributed flushable wipes that contained harmful bacteria and had to be recalled. The defendants applied to strike an expert report on which the plaintiff intended to rely at the certification hearing. The report was prepared by a specialist in economic analysis and price marketing and was organized to provide opinions on the same questions that the defendants' expert was asked and to comment on the answers of that expert. The defendants' maintained the report: contained opinions on matters that the plaintiff could have adduced as part of her evidence in chief and violated the rule against case-splitting; was not a true reply report; and did not satisfy the conditions for admissibility. Held, application dismissed. In form, the report was a proper reply report. The rule against case-splitting addresses the requirement to lead evidence on issues on which a party bears the burden of proof but does not require a party to lead every piece of evidence that might be germane. A plaintiff could lead evidence that satisfies its burden, and the opposing party could lead evidence on a topic not specifically addressed by the plaintiff that undermines the cogency of the plaintiff's evidence. The plaintiff can reply to that evidence without case-splitting. Here, it was not obvious that the plaintiff needed evidence on the topics addressed in the impugned report to meet her burden on the certification application. The report did not opine on the law; it simply provided marketing theories and methodologies for assessing economic harm and did not assert what methodologies were, or should be, acceptable in law. The report was not inadmissible for lacking "specifics". A court's "gatekeeper" role on the threshold issue of admissibility must be informed by the use to which the opinion evidence will be put. A plaintiff is not required to prove, at certification, that the expert has confirmed the availability of data proposed to be used in a methodology to prove class wide harm in order for the court to accept that there is "some basis in fact" that there is a methodology and data to be used in it. If the opinion evidence is acceptable to meet the certification standard of proof without specifics confirming availability, then it is not inadmissible for failing to provide reference to such specifics. Finally, the report did not raise issues prejudicial to the defendants; the issues were the same as those raised by the defendants' expert and which the defendants had been considering for the many months in preparation for the certification hearing. Furthermore,

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the certification application had been adjourned pending determination of the present application; accordingly, the defendants suffered no prejudice as a result of the late-filing of the report. *Bowman v. Kimberly-Clark Corp.* (<https://www.bccourts.ca/jdbtxt/sc/22/18/2022BCSC1864cor1.htm>) S.C., Matthews J., 2022 BCSC 1864, Vancouver S2010566, October 25, 2022, 12pp., [CLE No. 78435] • S. Turner and J. Giovannetti, for plaintiff; J.S. Yates and K. Hanowski, for defendants. December 5, 2022 • Issue No. 49 • Page 29 of 43 Principal case authorities: *Cantlie v. Canadian Heating Products Inc.*, [2014] C.D.C. 57216 (CLE), 2014 BCSC 2029 — considered. *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, [2019] C.D.C. 69615 (CLE) — considered. *Tietz v. Afinor Growers Inc.*, [2022] C.D.C. 78117 (CLE), 2022 BCCA 307 — considered. *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 186, [2021] C.D.C. 71728 (CLE) — considered. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 — considered.

PRACTICE — Discovery of documents — Privilege • Following a motor vehicle accident, ICBC adjuster instructing an independent adjuster to conduct an investigation regarding the nature of the plaintiff's alleged head injury — Defence later asserting litigation privilege over the independent adjuster's report, saying litigation was its dominant purpose — Master noting that, although report also included the writer's opinions on whether

the interviewed subjects would make good trial witnesses, that did not necessarily mean that the report's dominant purpose was litigation — Plaintiff entitled to production of the report. *Franco v. Nissan Canada Inc.* (<https://www.bccourts.ca/jdb-txt/sc/22/17/2022BCSC1710.htm>) S.C., Master Hughes, 2022 BCSC 1710, New Westminster M209098, October 3, 2022, 8pp., [CLE No. 78229] • O. Hui, for plaintiff; L. McClanaghan, for defendants. Principal case authorities: *Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.) — applied. *Raj v. Khosravi*, 2015 BCCA 49, [2015] C.D.C. 58044 (CLE) — applied. *Sauvé v. Insurance Corp. of British Columbia*, [2010] C.D.C. 45549 (CLE), 2010 BCSC 763 — applied. *Spent v. Reemeyer*, 2013 BCSC 1394, [2013] C.D.C. 53745 (CLE) — considered. *Stevanovic v. Petrovic*, [2007] C.D.C. 38724 (CLE), 2007 BCSC 1392 — considered.

PRACTICE — Evidence — Expert evidence — Admissibility • Court holding voir dire to determine admissibility of interpretation of single-photon emission computed tomograph (“SPECT”) scans as an adjunct or primary diagnostic tool to diagnosis traumatic brain injury (“TBI”) — Parties agreeing that the use of SPECT scans to diagnose or assist in diagnosis of a TBI should be characterized as novel science for purposes of assessing admissibility — Court finding admissibility not established. At the trial of her personal injury action, the plaintiff intended to rely upon an expert report from Dr. M., whom opined that the plaintiff suffered from a post-concussion syndrome and post-traumatic stress disorder (“PTSD”). The defendant intended to rely upon an expert report from Dr. O., who opined that the plaintiff suffered from PTSD, major depressive disorder, and anxious distress. Dr. C. performed a single-photon emission computed tomograph (“SPECT”) scan on the plaintiff and provided the following interpretation: “impression: cerebral perfusion study consistent with known previous head injury, involving the temporoparietal cortex bilaterally and the parietal-occipital cortex over the convexity, as well as the left infero frontal cortex. Increased perfusion to the deep structures is associated with posttraumatic stress disorder.” That interpretation was provided to Dr. M., who opined: “The SPECT scan results confirm the clinical findings of concussion and post-concussion syndrome.” The parties were in agreement that

the use of SPECT scans to diagnose or assist in the diagnosis of a traumatic brain injury (“TBI”) should be characterized as novel science for purposes of assessing admissibility. The court held a voir dire to determine the admissibility of the interpretation of SPECT scans as an adjunct or primary diagnostic tool to diagnosis traumatic brain injury (“TBI”). Held, report inadmissible. Though expert evidence is presumptively inadmissible, it is admissible when two steps are satisfied. A precondition at Step One is: “For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be judged legally reliable for that purpose.” There have been thousands of articles published on SPECT. However, the key issue was the use of SPECT on TBI; specifically as a diagnostic tool. The voir dire focused on four articles: two by author Jacobs, one in 1994 and one in 1996; one by author by Raji in 2014; and one by author Amen in 2015. The articles were marked for identification. SPECT imaging has also been the subject of several guidelines, including the European Association of Nuclear Medicine Neuro-imaging Committee’s guidelines, 2009; the American College of Radiology’s Wintermark Committee, 2015; the American College of Radiology generally (2016 and 2020); and the Canadian Association of Nuclear Medicine’s (“CANM”) guidelines, 2021. The findings made with respect to the articles were derived from the court’s assimilation of the expert evidence contained in reports and oral testimony.

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The same was true for the guidelines, but the court had also relied upon the specific wording contained in the guidelines which were entered as numbered exhibits. The court was able to make the following findings at Step One: (i) A consensus of the state of empirical knowledge with respect to the use of SPECT and TBI as of 2015 is set out in the Wintermark Blue Ribbon Committee. It did not support the use of SPECT for individual clinical diagnostic purposes; and (ii) None of the subsequent relevant published guidelines on the use of SPECT endorsed the use of SPECT for individual clinical diagnostic purposes. However, that did not resolve the issue. The critical issue was to determine how reliable was the use of SPECT as a tool to assist in the diagnosis of TBI. Dr. C.'s position that it was appropriate to use SPECT for that purpose was based on the Jacobs articles, the Raji review and the Amen study. The Jacobs articles concluded that SPECT may have a prognostic value for persistence of neuropsychological sequela. That did not support the use of SPECT for diagnostic purposes. The Raji review demonstrated that the state of knowledge on the use of SPECT for TBI had not changed significantly following the Jacobs articles. That did not support the utilization of SPECT for diagnostic purposes. The Amen study simply was not designed to assess the diagnostic capabilities of SPECT for TBI; it was designed to distinguish TBI from PTSD. Assuch, it was not appropriate to use the results of the Amen study for diagnostic purposes as proposed by Dr. C. That was consistent with the Wintermark Committee recommendations and with all of the relevant guidelines, including the CANM guidelines which were primarily authored by Dr. C. SPECT remained a very sensitive test for TBI. Unfortunately, the specificity was not sufficient to provide legally reliable information for diagnostic purposes in a setting where the issue was to distinguish brain injury from other psychiatric disorders and/or conditions. Given those findings, it was unnecessary to proceed to Stage Two. *Gutfriend v. Case* (<https://www.bccourts.ca/jdb-txt/sc/22/20/2022BCSC2055cor1.htm>) S.C., Thomas J., 2022 BCSC 2055, Prince George M1955412, November 25, 2022, 21pp., [CLE No. 78647] • D. Byl, for plaintiff; L.A.J. Dunn, KC, and P. Collins, for defendants. Principal case authorities: *R. v. J. (J.-L.)*, 2000 SCC 51, [2000] 2 S.C.R. 600 — applied. *R. v. Mohan*, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402 — applied. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 — applied.

PRACTICE — Pleadings — Striking out • MOTOR VEHICLE INSURANCE — Legislation • NEGLIGENCE — Public officials — Plaintiff suing a claims examiner employed by ICBC, alleging the defendant committed negligence, bad faith, and tortious conduct in the administration of her no-fault accident benefit coverage and intentionally induced a breach of contract or interfered with the performance of the contract between the plaintiff and ICBC — Court finding the Insurance Corporation Act, ss. 30(2) and (3) barring action against any person except ICBC for claims arising out of the discharge of their duties in the ordinary course of their employment — Court also finding that any action in relation to the

insurance coverage provided by ICBC must be brought against the corporation — Court allowing defendant's application to strike the action against him. *Brar v. Feng* (<https://www.bccourts.ca/jdb-txt/sc/22/17/2022BCSC1719.htm>) S.C., Elwood J. (In Chambers), 2022 BCSC 1719, New Westminster S231912, September 6, 2022, 6pp., [CLE No. 78239] • B. Yu, for plaintiff; J. Morris, for defendant. Principal case authorities: *Frank v. Kalokina*, 2014 BCSC 1866, [2014] C.D.C. 57039 (CLE) — applied. *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia (1994)*, 30 C.C.L.I. (2d) 149 (B.C.S.C.) — applied. *Rizzo & Rizzo Shoes Ltd.*, Re, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 — applied.

PRACTICE — Trial — Adjournment • COSTS — Conduct of counsel • Costs of motions — Costs in any event of the cause — When counsel unable to agree on trial date of personal injury fast-track action, plaintiff's counsel unilaterally setting trial for dates he knew defence counsel was not available — Court granting defendant's application for adjournment, finding prejudice to defendant in not having counsel of choice, who was familiar with the file, was greater than unspecified prejudice to plaintiff in the adjournment — Given uncivil conduct of plaintiff's counsel to defence counsel in correspondence, and defence reasonable efforts to find trial dates, defendant awarded costs of the application in any event of the cause, fixed at \$750. The personal injury action arose from a February 2017 rear-end motor vehicle accident between the vehicle driven by T in which the plaintiff was a passenger and the vehicle driven by the defendant W. A fast-track action, it was scheduled for trial on March 6, 2023. T had also sued W for damages; her action was set for a ten-day trial commencing April 3, 2023. The setting of the March trial date had been fraught. Originally scheduled to proceed in June 2022, it was removed from the trial list due to lack of a judge. Correspondence followed between counsel regarding setting a new date. Plaintiff's counsel, DM, advised defence counsel that he had reserved five days in March 2023. W's defence counsel, RJ, immediately advised that she was unavailable due to another trial commitment, and proposed seven alternate trial dates. DM responded that he was unavailable on all the proffered dates, and filed a notice of trial for the March 2023 dates. Further correspondence was exchanged. RJ attempted to schedule a CPC, and, having received no dates from DM, RJ reserved October 18 for the CPC, later re-scheduled to November 4. The CPC proceeded with no orders resulting. In DM's correspondence with RJ, he made various comments such as, "[u]nlike you, being a trial lawyer, I do not have the luxury of responding to mundane correspondence as promptly as you tend to generate it"; and that she had "lied by omission" to the master at the CPC. That accusation was repeated in the plaintiff's submissions on this application. W applied for an order to adjourn the March 2023 trial date. If granted, the plaintiff sought an order that her action be tried at the same time as T's action. Both parties sought costs payable forthwith in any event of the cause. Held, adjournment granted; costs to applicant in any event of the cause. Though the applicant's evidence consisted

almost entirely of correspondence and documents exhibited to a legal assistant's affidavit, the evidence was not "fatally flawed" in this case. There was no evidence that the applicant had misused the court process or delayed the proceeding. To the contrary, the applicant was the first party to seek available trial dates after the June 2022 trial could not proceed. With respect to grounds for the adjournment, RJ was previously committed to another trial when the plaintiff took out the notice of trial. The only reason for the adjournment was to allow her to remain W's counsel. Barring other factors, a party is entitled to be represented by counsel of her choice. The adjournment application was brought in a timely manner. The plaintiff was aware of the applicant's position on the March 2023 dates before the notice of trial was filed. The plaintiff argued she would be prejudiced by any further delay but did not identify any specific prejudice. Further, it did not appear that the plaintiff had taken advantage of R. 15-2(14), which would have been expected if the speedy resolution of this proceeding was of critical importance. The prejudice to the defendant of the loss of her chosen counsel, who had already prepared for a trial and was familiar with the evidence and arguments, if the trial was not adjourned was greater than that to the plaintiff if it was adjourned. With respect to the argument for a term that the two trials be joined, the plaintiff did not meet the burden of proof, and in any case there was no authority provided that an order may be made under R. 22-5(8) as a term or condition to an adjournment, or that the joinder of a fast track and non-fast track action may be permitted. As to costs, the usual order would be costs to the applicant in the cause. However, the lack of civility of plaintiff's counsel was relevant. This application would not have been needed had the plaintiff, through her counsel, been less rigid and more civil with respect to the setting of trial dates. Given her success on the application and the fact that she made reasonable efforts to fix an alternative trial date, the applicant was entitled to her costs of this application in any event of the cause, but not payable forthwith, fixed at \$750 inclusive. *Tol v. Whitney* (<https://www.bccourts.ca/jdb-txt/sc/23/00/2023BCSC0009.htm>) S.C., Master Bouck, 2023 BCSC 9, Victoria 194087, January 4, 2023, 11pp., [CLE No. 78895] • S. Missaghi, agent for D.D. McKnight, for plaintiff; R. Johal, for applicant defendant. Principal case authorities: *Jones v. Broadway Driving School Ltd.*, [2023] C.D.C. 77778 (CLE), 2022 BCSC 1288— applied. *LeRoy v. TimberWest Forest Corp.*, [2018] C.D.C. 66426 (CLE), 2018 BCSC 364 — considered. *Parti v. Pokorny*, [2011] C.D.C. 50287 (CLE), 2011 BCSC 955 — applied. *Sharda v. Moran*, [2016] C.D.C. 61292 (CLE), 2016 BCSC 538— considered. *Westenberg v. Dhandra*, [2007] C.D.C. 38480 (CLE), 2007 BCSC 1243 — considered.

PRACTICE — Trial — Adjournment • Evidence and procedure at trial • PERSONAL INJURY QUANTUM — Evidence — Plaintiff seeking adjournment of trial after receiving recommendations from medical professionals to avail herself of more testing regarding injuries sustained in 2 motor vehicle accidents — Defendant opposing adjournment, suggesting delay would

cause prejudice — Court finding plaintiff might suffer prejudice if forced to attend trial with incomplete picture of her injuries, their cause, and suggested treatment options — Court granting adjournment, finding in circumstances, adjournment in the interests of justice. *Cross v. Piddington* (<https://www.bccourts.ca/jdb-txt/sc/22/19/2022BCSC1931.htm>) S.C., Master Robertson (In Chambers), 2022 BCSC 1931, Vancouver M1812197, September 9, 2022 (oral), 7pp., [CLE No. 78489] • J.M. Cameron, for plaintiff; D. Machat, for defendant. Principal case authorities: *Navarro v. Doig River First Nation*, 2015 BCSC 2173, [2015] C.D.C. 60324 (CLE) — considered. *Sidorof v. Joe*, [1992] B.C.J. No. 2776 (C.A.) — considered.

WORKERS' COMPENSATION — Workers' Compensation Board — Judicial review • Petitioner filing complaint with WCB alleging bullying in her workplace — WCB occupational safety officer investigating and concluding that the employer's response to the matter was compliant with WCB requirements — Review officer affirming that decision — Petitioner applying for judicial review — Court finding the WCB investigation was not compliant with WCB policy and fell short of what was required — Matter remitted for proper investigation. In June 2020, the petitioner complained to the Workers Compensation Board that she was a victim of harassment and bullying in the form of workplace mobbing, i.e., coordinated personal attacks in the form of unsubstantiated and generalized false accusations. It was a complaint that, by tolerating mobbing, her employer, D. Co., was failing to fulfill its obligation to provide a safe workplace. In a questionnaire accompanying her complaint, she named four co-workers she thought were responsible for the mobbing. The WCB assigned an occupational safety officer to look into the complaint. The officer concluded that the employer's response to the matter was compliant with WCB requirements. The petitioner sought a review of that determination. The review officer received substantial written submissions from the petitioner and the occupational safety officer. In May 2022, she issued a six-page decision in which she confirmed the occupational safety officer's decision. The petitioner applied for judicial review of the review officer's decision. Held, application allowed. There was no dispute that D. Co.'s Respectful Workplace Policy satisfied the requirements of relevant WCB policy. The petitioner's complaint was that D. Co. failed to satisfy its obligation to apply its policy in its investigation of her mobbing complaint. The heart of her argument was that D. Co. failed to investigate her complaint to a conclusion by interviewing her and the subjects of her complaint and determining whether in fact she was made the subject of false accusations as she maintained. The review officer found that D. Co. failed to complete its investigation of the complaint, but found that was reasonable having regard to three considerations. The first was that the petitioner was on medical leave from June 28, 2020 through September 20. D. Co. described a medical leave of absence as a 'protected leave' during which it was inappropriate for the company to contact its employee. However, the petitioner's

absence on leave from June 30 to September 20, 2020 offered no explanation for D. Co.'s failure to pursue investigation of the complaint after September 20. The second consideration was that the complaint was impaired by "labour relations proceedings", which had to be a reference to the grievance filed by the petitioner and pursued by her union until it was settled in September 2020. The difficulty, again, was that the grievance was resolved prior to September 20 without any finding as to the facts underlying the grievance. The third consideration referenced by the review officer was the termination of the petitioner's employment on September 23, 2020. It was not clear how or why the termination would have prevented D. Co. from pursuing its investigation of the complaint. The purpose of an investigation of the complaint was not a determination of entitlement on the part of the petitioner. Its purpose was to ascertain whether her co-workers engaged in bullying and harassment in the workplace. That enquiry remained pertinent after her termination. WCB policy required that an investigation should be "as thorough as necessary in the circumstances" and "focused on finding facts and evidence, including interviews of the complainant, the subject, and any witnesses". The review officer placed a gloss on the relevant policy guideline. It was not clear that she would have come to the same conclusion had she not done so. The decision under review was unreasonable and would be set aside. The mobbing complaint would have to be reconsidered by a review officer. *Pereira v. British Columbia (Workers' Compensation Board)* (<https://www.bccourts.ca/jdbtxt/sc/22/16/2022BCSC1654.htm>) S.C., Gomery J.

(In Chambers), 2022 BCSC 1654, Terrace L21416, September 22, 2022, 19pp., [CLE No. 78183] • Petitioner in person; M. Bruneau, for respondent WCB; J. Penner, for Attorney General of B.C. Principal case authority: *Ahluwalia v. British Columbia (Workers' Compensation Board)*, 2022 BCCA 165, [2022] C.D.C. 77272 (CLE) — applied.

WILLS & ESTATES — Costs — Outcome of litigation • Before her death in 2018, V. transferring real estate to one of her 4 children, the defendant — In action brought by V.'s other 3 children, court finding the defendant held the assets on a resulting trust for V.'s estate, the presumption of resulting trust not having been rebutted — On application as to costs, court finding the plaintiffs had enjoyed substantial success and it would be wholly unreasonable to effectively deprive the plaintiffs of the benefit of their success by exercising the discretion to order costs payable from the estate — Court awarding plaintiffs' costs to be assessed at Scale B. *Simard v. Simard Estate* (<https://www.bccourts.ca/jdbtxt/sc/22/21/2022BCSC2137.htm>) S.C., Fleming J. (In Chambers), 2022 BCSC 2137, Duncan S18364, February 24, 2022, 9pp., [CLE No. 78731] • See also 2021 BCSC 1836, [2021] C.D.C. 75546 (CLE) • R.B. McDaniel, for plaintiffs; A. Berns, for defendant. Principal case authorities: *Fotheringham v. Fotheringham*, [2001] Civ. L.D. 538; [2001] Fam. L.D. 193; [2001] C.D.C. 22144 (CLE), 2001 BCSC 1321 — applied. *Gold v. Gold*, [1993] B.C.J. No. 1792 — applied. *Jung v. Lee Estate*, [2008] C.D.C. 39259 (CLE), 2007 BCSC 1740 — applied. **VI**

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