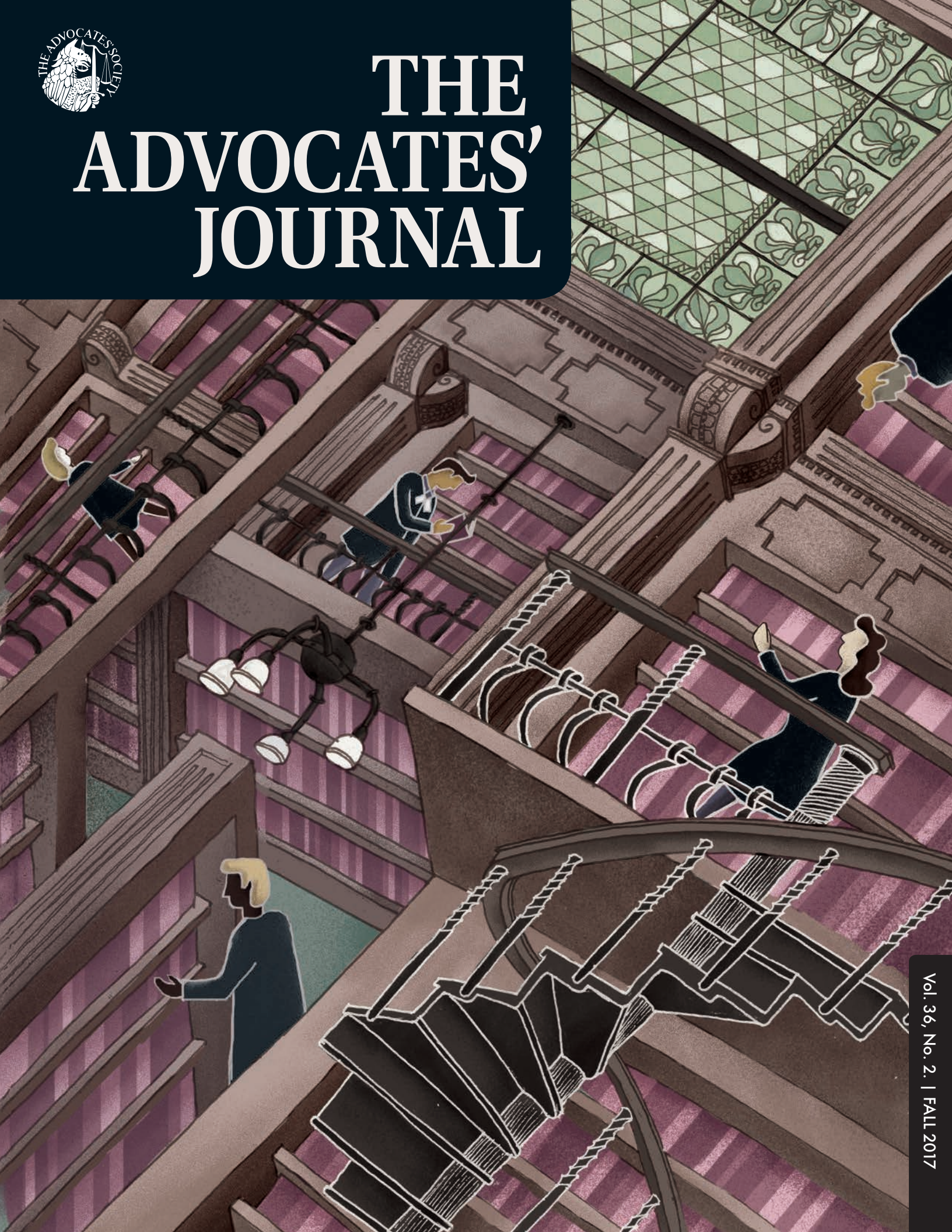
THE ADVOCATES' JOURNAL



Vol. 36, No. 2. | FALL 2017

The Advocates' Journal

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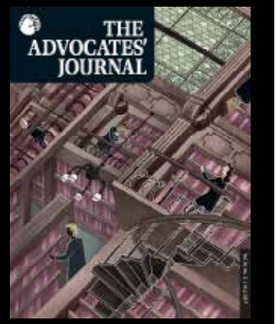

Fall 2017; Vol. 36, No. 2.

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Publications Mail Commercial Sales Agreement No. 40019079
The Advocates' Journal is printed in Canada and is published four times a year by The Advocates' Society, 250 Yonge Street, Suite 2700, Toronto, Ontario, M5B 2L7. Distributed free to all members of the Society.

Plus ça change...

Stephen Grant, LSM

One of the most salient features of our culture is that there is so much bullshit. Everyone knows this.
~ Harry Frankfurt, *On Bullshit*

It was a relatively quiet election night in Paris in May. A few rowdy university students were singing "La Marseillaise" in the 5th arrondissement, where Sandy and I were staying. But little activity was going on around the Champs-Élysées, where we had been earlier in the evening. Despite concerns from French friends that Marine Le Pen would win, France pulled back from the isolationist "narcissistic populism" – as Justice Rosie Abella calls it – that has taken root in Washington and elsewhere ("Supreme Court Judge Abella Worries about the State of Justice in the World," *Toronto Star*, May 22, 2017). Le Pen's problem, as it turned out, wasn't her xenophobic message but, rather, that she couldn't articulate her economic plan to leave the EU – although her strong showing was worrisome enough.

From the time when Sandy and I began spending a part of each year in Paris, half-a-dozen years ago by now, it's become eerie. At our last apartment, outside the door were young military women and men, four or five at a time, toting presumably loaded automatic weapons. The reason? Not that we were next door to a lycée. Rather, there was a Jewish cultural centre across the street. Walking down Boulevard Saint Germain or in the Marais, all of a sudden we saw the same military presence. Eerie and troubling.

Andy Borowitz offered us some much-needed humour about the election. In his Report ("French Annoyingly Retain Right to Claim Intellectual Superiority Over Americans," *New Yorker*, May 7, 2017), pretending (or not?) to canvass French *citoyens* after the votes were counted, he reported, "Pierre Grimange … sipped on a glass of Bordeaux and toasted his nation 'for not being so dumb as the United States after all.'" A few tables away, "Helene Commonceau … admitted that she did not understand what all of the celebrating was about. 'We are smarter than the Americans, true, but they have set the bar very low, no?'"

As the United States moves away from at least a century of social advances – as if suddenly someone switched off enlightenment values – French voters were at the same socio-political crossroads. Instead they chose a path of moderation and tolerance, much like we enjoy here in Canada as we celebrate 150 years of nationhood. Modestly, of course, being Canadians (Stephen Marche, "Canada Doesn't Know How to Party," *New York Times*, June 23, 2017).

About our home and native land, I've always thought that one of our hallmarks of a true social democracy was universal health care. I think that even more so today as the US, for reasons I can't begin to fathom, except cynically – to kowtow to the plutocrats, specifically the Koch brothers? rugged individualism? It certainly can't be cost, especially in proportion to military spending – is on the verge of dispossessing millions of Americans of health coverage. Given that of the 25 wealthiest nations, the US is the only one without basic health coverage, the repeal of the *Affordable Care Act* would be staggering (Steven Rosenfeld, "Compared to Other Countries, America Already Has Horrible Health," *AlterNet*, July 3, 2017).

Sadly, it seems, no one is listening or hearing anyone else anymore, and persuasion is on the wane ("You're Not Going to Change Your Mind," Ben Tappin, Ryan McKay and Leslie van der Leer, *New York Times*, May 27, 2017). But this debate, such as it is, reminds me of the sublime 2014 takedown by Canadian physician and pharmacare advocate Dr. Danielle Martin of Senator Richard Burr of North Carolina. He asked her about Canadians going to the United States to avoid the long waiting lists here. She retorted that she couldn't confirm his statistics but, whatever the number, it paled in comparison to the 45,000 Americans who die each year from lack of medical coverage (https://www.youtube.com/watch?v=iYOf6hXGx6M).

While there are undoubtedly problems with the infrastructure and cost, as an inalienable right, a country can't do better than provide health care coverage for its citizens.

Another reason it's a privilege to live in Canada.

****

As we head into fall, we are showcasing an array of fresh thoughts about advocacy in its many aspects. As well, The Advocates' Society is now reaching across the country in membership and scope, so we are pleased to feature another article from Alberta counsel.

Congratulations to my colleague at the family law bar, Ken Cole, the 2017 recipient of the Catzman Award for Professionalism and Civility.

Nostra culpa: We misspelled the word "counsel" in Spring 2017. If you're first to find it, we have a copy of the book reviewed in this issue as a prize for you. Contest limited to advocates whose initials are not PJL.

Enjoy the changing leaves. We are back in December.

The Honourable Justice Jasmine T. Akbarali
Justice Jasmine Akbarali sits on the Superior Court of Justice in Toronto. Prior to her appointment she was an appellate lawyer in Toronto.

The Honourable Justice David M. Brown
Justice David Brown sits on the Court of Appeal for Ontario. When the mysteries of final and interlocutory orders become too impenetrable, he retreats to outport Newfoundland to seek wisdom from the cod.

Lara J. Draper
Lara Draper is an associate at *Dentons Canada LLP* in Edmonton, practising commercial insolvency law and civil litigation. She has appeared before the Provincial Court of Alberta and the Alberta Court of Queen's Bench and is secretary of the Board of Directors and member of the Advisory and Human Resources Committee of the Kids Kottage Foundation.

Alexander M. Gay
Alexander Gay is a senior litigator, practising primarily in the area of commercial litigation and trade disputes. He is also a part-time law professor at the University of Ottawa Law School where he teaches Civil Procedure.

Matthew R. Gourlay
Matthew Gourlay is a partner at *Henein Hutchison LLP* in Toronto, with a practice focused principally on criminal appeals and professional discipline.

Julianna Greenspan
Julianna Greenspan is a partner at the law firm of ***Greenspan*** *Partners LLP*. She has practised criminal defence law in both the US and Canada for 20 years.

Ken Jull
Ken Jull is counsel at *Gardiner Roberts*, practising corporate compliance, and is presently on an interchange as general counsel with the Competition Bureau. Ken used to be an amateur triathlete, but as they say with judges, "as he then was."

Anna Loparco
Anna Loparco is a member of *Dentons' Litigation and Dispute Resolution* group. As a general commercial litigator, she has a wealth of experience in insurance law, professional liability, administrative and privacy law, product liability, intellectual property and contractual disputes. Anna has appeared before every level of court, including the Supreme Court of Canada.

Matthew Milne-Smith
Matthew Milne-Smith is a partner and the Litigation Practice Group Coordinator at *Davies Ward Phillips & Vineberg LLP* in Toronto. He practises commercial litigation and is already regretting writing an article that advocates for fewer trials.

The Honourable Joseph W. Quinn
The Honourable Joseph Quinn took an early retirement from the Ontario Superior Court of Justice in 2016, following which he and his wife acquired a lively puppy. His Honour is now seeking a reappointment to the bench. He needs the rest.

THE ADVOCATES' JOURNAL
SUBMISSION GUIDELINES

- Content: We value articles about advocacy and advocates that are topical and crackle with currency.
- File format: We accept submissions only in Microsoft Word format.
- Length: Although we appreciate concision, there is no maximum or minimum length for *Journal* articles. The majority of our articles are between 1,500 and 3,500 words (excluding notes), but we will consider articles outside this range.
- Notes: We prefer articles without notes, but whether to include notes is at the author's discretion. (All direct quotations should be referenced, however, whether in the body of the article or in notes.) If you include notes with your submission, we prefer endnotes to footnotes. When reviewing notes after completing the final draft, double-check that cross-references ("*ibid.*," "*supra*") haven't changed because of late additions or deletions of text.
- Citation format: We do not insist on a particular citation style. If you include citations, we trust that you will ensure they are accurate, complete, current and internally consistent. In particular, check that citations to Internet sources refer to web addresses that are valid as of the date of the submission. If a cited web address is no longer valid, we expect you to make note of this in the citation.

Thank you,

Stephen Grant, Editor

Aaron Dantowitz, Managing Editor

Sonia Holiad, Production Editor

Correspondence

No port in this storm

I read with mounting mixed feelings of amusement and embarrassment (I am a Brit, after all) the e-mail exchange compiled in *The Advocates' Journal* concerning "Port to Port" (Summer 2017). I am one of (I suspect) a relative few of your readers with a copy of A.P. Herbert's *Uncommon Law* on my bookshelf. I have now reread "Port to Port" for the first time since I was a pupil barrister in London. It's a hoot, and I hope that one day you will be able to reproduce it!

Best regards,
Graeme Mew, Superior Court of Justice

Advocacy

I just finished reading the piece by Arthur Maloney (Spring 2017). That was the address in my Call to the Bar ceremony, following which I began practice in association with Arthur and a number of others in a new office in the Richmond-Adelaide Centre. I'm not sure what inspired you to reprint that address, but reading it brought back a flood of great memories. As you know, the words on the page only begin to pay tribute to Arthur's eloquence, personal charm and generosity of spirit. Whatever the reason, thank you.

Stephen Richard Morrison

(Editor's note: Justice John Laskin passed the Maloney address on to me, and I thought it was more than worthy of publication.)

Where to draw the line:

Communications with expert witnesses

Anna Loparco and Lara J. Draper

In recent years, there has been a rise in challenges in court against the admissibility of expert reports. This trend has caused a chilling effect in communications with experts to ensure that the metaphorical line with respect to the expert's independence and impartiality is not crossed and resources are not wasted. This article reviews the various issues raised in those challenges and provides a framework, clarification and guidance for practitioners in Alberta with respect to maximizing an expert's credibility and ensuring the admissibility of his or her opinion in court.

Implied waiver of privilege over documents and materials provided to an expert *Upon admission of the expert's evidence at trial*

It is well established in Alberta law that, if an expert testifies as to his or her opinion at trial, privilege is waived over the documents and other materials in the expert's file, where such materials formed the basis of the expert's opinion or were reviewed in the preparation of the opinion. These materials may include draft versions of the expert's opinion and instruction letters from counsel used in preparing that opinion.[1] In *Lamont Health Care Centre v. Delnor Construction Ltd.* ("*Lamont*"),[2] Justice Macklin of the Alberta Court of Queen's Bench, when deciding that an engineering expert retained by the defendant was required to produce his working file (including statements of witnesses and

working papers) at trial, stated:

> [T]he information the expert had in his possession but disregarded or did not rely upon or which he had for other reasons ignored when forming an opinion, may very well be considered by others, including the Court, as relevant to the determination of the issue being considered and, more particularly, the credibility of the expert and the validity of his opinion.[3]

However, the court in *Lamont* notably held that a report, which was marked in the affidavit of records and which was created by the expert at the instruction of counsel for the sole purpose of preparing the defence for the anticipated litigation, would remain privileged even though the expert had testified at trial.[4]

Justice McIntyre of the Alberta Court of Queen's Bench in *Chapman Management & Consulting Services Ltd. v. Kermic Equipment Sales Ltd.* ("*Chapman*") also took this approach, holding that the defendant was required to produce all relevant documents in the possession of the defendant's expert, who had already testified at trial, or of the expert's firm.[5]

Upon pre-trial exchange of reports

While *Lamont* and *Chapman* pertained to applications for disclosure during the course of trial after both experts at issue had already testified, the analysis differs for requests for production of the documents underlying an expert's opinion before trial. For example, in *Chernetz v. Eagle Copters Ltd.*, upon the exchange of expert reports before trial, the plaintiffs sought an order compelling the defendants to produce all documents in the possession of the defendants' experts which were relevant to those experts' opinions, including correspondence to and from counsel, notes on meetings and telephone conversations with counsel and other experts, and claim review notes.[6] The plaintiffs submitted that all relevant documents in the experts' possession should be producible once the expert reports are served in order to promote trial efficiency, whereas the defendants contended that such documents should remain privileged unless and until the expert testifies at trial.[7]

Justice McMahon of the Alberta Court of Queen's Bench concluded that there is no waiver of privilege over the documents and materials reviewed by the expert in forming his or her opinion or over the communications between the expert and instructing counsel which are relevant to the expert's opinion unless and until the expert's opinion is introduced into evidence at trial.[8] Justice McMahon rejected the submission that trial efficiency should weigh in favour of compelling production of related privileged documents upon exchange of expert reports before trial, instead holding that [i]f counsel chooses not to introduce the report into evidence, there is no waiver."[9]

More recently, Master Smart of the Alberta Court of Queen's Bench in *Grammer v. Langpap* ("*Grammer*") considered whether the current *Alberta Rules of Court* AR 124/2010 (the "*Alberta Rules of Court*") impact previous judicial authorities pertaining to privilege over experts' working files before trial.[10] In *Grammer*, the defendant sought production of the documents and notes underlying the report of an expert who had conducted a psychological assessment of the plaintiff prior to trial on the basis that the reports had already been produced and thus the documents underlying those reports were relevant and material and no longer protected by litigation privilege.[11]

... courts have been tasked with the issue of admissibility and credibility of expert opinions at trial.

The defendant pointed to the foundational rules and Rule 5.1 of the *Alberta Rules of Court* (which promote timely and cost-effective process) to contend that trial efficiency should outweigh protection of the documentation underlying expert reports.[12] He also submitted that certain jurisprudence dealing with the timing of the exchange of expert reports indicates a "general evolution towards maximum disclosure and expeditious exchange of information" and that Rule 5.35 of the *Alberta Rules of Court* (which provides that once an intention to rely on an expert report at trial has been expressed, the report shall either be entered into evidence or the expert shall be called as a witness at trial) constitutes an express intention to waive privilege over the working file underlying the expert's report.[13]

Ultimately, Master Smart declined to compel the production of the documents.[14] He found that there was no evidence to the effect that the plaintiffs had indicated an express intention to waive privilege over the working file underlying the expert's report, and he expressed doubt that delivery of expert reports pursuant to Rule 5.35 necessarily amounts to the expression of such an intention.[15] Master Smart further noted that the limited scope of Rule 5.37(1) of the *Alberta Rules of Court* is consistent with the approach of prioritizing the protection of privilege over underlying documents before trial. Rule 5.37(1) permits parties to question each other's experts before trial, which consequently may disclose certain relevant and material documents underlying those experts' opinions, where a party indicates that it intends to use an expert report at trial, *but only if* the parties agree to the questioning or if the court directs the questioning in exceptional circumstances.[16]

In 2016, Justice Goss of the Alberta Court of Queen's Bench confirmed this approach in *Reid v. Bitangcol* ("*Reid*").[17] Justice Goss considered a defendant's application for disclosure of the documents, test protocols and raw test data underlying the expert reports which the plaintiffs had served on the defendants and on which the plaintiffs intended to rely at trial pursuant to Rule 5.35 of the *Alberta Rules of Court*. The defendants contended that these underlying documents and information were relevant and material records not protected privilege and should be produced before trial so that the defendant's expert could use them to complete his rebuttal medical examination report under Rule 5.44 (conduct of medical examinations) in order to avoid unnecessary costs and delay.[18] Referencing *Grammer* and other Alberta decisions, Justice Goss concluded that "this mandatory disclosure [Rule 5.44] does not include disclosure of documents, test protocols and raw data from tests underlying the expert reports."[19]

One should note that *Reid* distinguished certain decisions made pursuant to the old *Alberta Rules of Court*, Alta Reg 390/68 (the "Old Rules of Court").[20] In light of *Andre*, which was distinguished by *Reid*, it appears the rule is that test protocols and original raw data used in medical examinations conducted pursuant to Rule 5.44 of the *Alberta Rules of Court* may be producible before trial if both sides' medical expert reports have been completed and served. The purpose would be to permit both sides to obtain all relevant data underpinning served expert reports prior to trial so that they may prepare accordingly. However, this still would not permit pre-trial disclosure of drafts or expert communications with counsel, which is only an issue relevant for cross-examination to impugn credibility at trial.

Upon pre-trial questioning of an expert

As noted above in the context of Master Smart's analysis in *Grammer*, Rule 5.37(1) of the *Alberta Rules of Court* permits parties to question each other's experts before trial where a party indicates that it intends to use an expert report at trial, but only if the parties agree to the questioning or if the court directs the questioning in exceptional circumstances. The restriction of pre-trial questioning of an expert to cases involving agreement or "exceptional circumstances," being "[c]onditions which are out of the ordinary course of events; unusual or extraordinary circumstances," resulted from a concern that permitting unrestricted questioning of experts would cause undue delay and expense.[21]

In *M. (B.J.) v. M. (S.L.)*, Justice Phillips of the Alberta Court of Queen's Bench considered the scope of such a questioning, in particular what materials the expert may be questioned upon.[22] The applicant contended that such questioning must be limited to the expert's report only and that witness statements, test results and any other material on which the expert based her report remained privileged until the expert was called at trial.[23] Justice Phillips rejected that position, holding that the documents reviewed by the expert in preparing her expert report, including test results and statements from the parties and other witnesses, must be disclosed and the questioning may address those documents in addition to the expert's report itself.[24] The court was of the view that, without disclosure of those underlying documents, the questioning of the expert would be less meaningful and useful and thus the potential to reduce trial time and complexity would be hindered, especially in circumstances in which the expert's credibility and validity of his or her opinion is critical to resolution of the issues.[25] Further, the court found that pre-trial questioning of an expert is akin to an expert giving evidence at trial, as in both cases the expert would be providing evidence under oath and may be tested through cross-examination, and therefore questioning similarly should trigger the waiver of privilege over the documents underlying the expert's report.[26]

Nevertheless, like the court in *Ramirez*, Justice Phillips limited this disclosure by noting that there "still are other documents that need not be produced and may not be questioned upon" before trial, being "working documents" which include any communications, memoranda, calculations, notes, diagrams, drawings and preliminary or draft opinions.[27]

The importance of impartiality and independence of experts to the admissibility and weight of experts' opinions

With the jurisprudence regarding the timing of disclosure of an expert's report and its underlying documents relatively well-established in Alberta, courts have been tasked with the issue of admissibility and credibility of expert opinions at trial. In *White Burgess Langille Inman v. Abbott and Haliburton Co.* ("*White Burgess*"),[28] the Supreme Court of Canada clarified the law regarding admissibility of expert evidence. In particular, it clarified whether the basic standards for *admissibility* (rather than merely the *weight*) of expert evidence should pertain to the proposed expert's independence and impartiality.

Independence and impartiality factors in the framework for admissibility of expert evidence

The Supreme Court of Canada in *White Burgess* outlined the basic legal framework for admissibility of expert evidence,[29] which is a two-stage analysis arising from previous case law, namely *R v. Mohan* ("*Mohan*")[30] and *R v. Abbey* ("*Abbey*").[31] The first stage is the threshold analysis of admissibility, during which the court must determine whether the proposed expert evidence meets the four threshold requirements described in *Mohan* and *Abbey*:

1. relevance, in the sense of logical relevance;
2. necessity;
3. absence of an exclusionary rule; and
4. a properly qualified expert.[32]

A fifth factor, being the reliability of the underlying science for the purpose for which it is put forth, also comes into play during the first stage in instances of expert opinions based on novel or contested science or science used for a novel purpose.[33]

The Supreme Court of Canada in *White Burgess* further noted that "[t]his [first-stage] threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it."[34] To fail at the threshold stage of the admissibility analysis, it must be "very clear" that the expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence, such as where the expert has a direct financial interest in the outcome of the litigation, has a close familial relationship with one of the parties, risks professional liability if his or her opinion is not accepted by the court, or assumes the role of advocate for a party. Anything less than that level of clarity should not lead to exclusion at this stage, but rather should be taken into account in the second-stage cost-benefit analysis of receiving the evidence.[35]

For expert evidence to be admissible at the second stage of the *Mohan* and *Abbey* framework, the court must weigh the evidence and be satisfied that the potential helpfulness of the expert's evidence is not outweighed by the possible risks associated with that evidence. To weigh the evidence's risks and benefits, a court may consider its relevance, necessity and reliability, and the absence of

bias (in other words, the independence and impartiality of the evidence).[36]

With that basic framework in mind, the Supreme Court of Canada in *White Burgess* considered the nature of an expert witness's duty to the court and how that duty fits into that framework.[37] It noted the importance of ensuring that expert witnesses are impartial, in the sense that their professional opinions are unbiased; and independent, in the sense that "their opinion is the product of their own, independent conclusions based on their own knowledge and judgment,"[38] in order to avoid "egregious miscarriages of justice."[39] Specifically, the Supreme Court of Canada indicated that experts have a "special duty to the court to provide fair, objective and non-partisan assistance,"[40] which trumps their obligation to the party retaining them. It articulated a new version of the framework in which impartiality and independence of the expert are relevant to admissibility as well as to weight of the expert's evidence, noting the comment of Justice Binnie in *R. c. J. (J.-L.)*, 2000 SCC 51 at para 28, [2000] 2 SCR 600 that

> [45] … [t]he admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility. [41]

Regarding admissibility, the court held that impartiality and independence should be considered both at the first stage of the basic *Mohan* and *Abbey* admissibility framework during the threshold inquiry and, once that initial threshold is met, at the second stage of that framework during the overall cost-benefit analysis which the court conducts when performing its gatekeeping role.[42]

Scope of communications between counsel and experts and their effect on experts' actual or perceived impartiality and independence

In light of the jurisprudence which establishes that an expert testifying at trial may be required to produce the documents or communications underlying his or her opinion (including briefings and communications with counsel for the party that retained him or her) and the jurisprudence which stipulates that an expert witness's independence and impartiality are essential both to the admissibility and the weight of expert evidence, it is important that lawyers ensure that their communications with experts do not undermine experts' impartiality or independence. Lawyers should be cautious to ensure that they do not disqualify or diminish the admissibility or weight of expert evidence on which they seek to rely by communicating with experts in a manner which may be, or which may be perceived as being, overly influential to the expert opinions provided. Put simply, it is vital for counsel to avoid the result and the perception that an expert is a "hired gun."

This issue came to a head in *Moore v. Getahun* ("*Moore*"), in which Justice Wilson of the Superior Court of Justice of Ontario called attention to the scope of permissible interactions between counsel and expert witnesses.[43] The relevant issue in *Moore* was the propriety of counsel reviewing the draft report of an expert who had been retained to provide an opinion.[44] Defence counsel had reviewed the expert's draft report and had suggested changes for the final report during a one-and-one-half-hour telephone conference call.[45] The expert confirmed to the court that he had sent his draft report to defence counsel "for comments" and that he subsequently made "the corrections" suggested by defence counsel over the telephone.[46] The plaintiff submitted that it was improper for defence counsel to make suggestions to influence the expert's report.

In the context of Rule 53.03 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, which requires an executed acknowledgement from an expert witness of his or her primary duty of independence and impartiality to the court, Justice Wilson admonished the practice of counsel reviewing and shaping draft reports. She indicated that counsel should not play any role in the preparation of an expert's report, absent full written disclosure to opposing counsel of any changes to the report resulting from counsel's input, in order to ensure transparency and to preserve the expert's credibility, independence, impartiality and primary duty to assist the court.[47]

On appeal,[48] the Court of Appeal for Ontario rejected Justice Wilson's statements regarding the propriety of involvement by counsel in the preparation of expert reports, concluding that she had erred in holding that consultation between counsel and experts and the review by counsel of draft expert reports must end. It noted that Justice Wilson's comments in that regard caused "considerable concern in the legal profession and in the community of expert witnesses,"[49] with The Advocates' Society, the Canadian Institute of Chartered Business Valuators, the Holland Access to Justice in Medical Malpractice Group, the Canadian Defence Lawyers Association and the Ontario Trial Lawyers Association, among others, preparing position papers countering Justice Wilson's position and intervening in the *Moore* appeal to oppose Justice Wilson's ruling on the issue.[50]

The Court of Appeal acknowledged "the long-standing practice of counsel reviewing draft reports"[51] and indicated that requiring written disclosure of all communications between consent and expert witnesses is "unsupported by and contrary to existing authority."[52] Counsel play a "crucial mediating role" by explaining the relevant legal issues to the expert and presenting complicated expert evidence to the court; without communicating with the expert during the preparation of the report, it would not be feasible for counsel to fulfill this role.[53] In particular, consultation and collaboration between counsel and expert witnesses is not merely appropriate, but also essential to ensuring that experts frame their reports in a way that is responsive and restricted to the relevant issues in the litigation; understand their duties to the court; ensure that their reports comply with the applicable civil procedure rules and rules of evidence; write their reports in a manner and style that is coherent and accessible; understand relevant legal matters (e.g., the distinction between the applicable legal burden of proof and scientific certainty); ensure that the facts and assumptions underlying their opinions are clear; ensure that their reports are restricted to matters within the expert's area of expertise; and avoid assuming the court's function as the "ultimate arbiter of the issues," especially in highly technical cases.[54] The Court of Appeal made clear that precluding communications between counsel and expert witnesses or requiring that all such communications and consequent changes to reports be documented and disclosed in written form (as Justice Wilson had proposed) would increase costs and delays in the justice system, which already is struggling to improve the timeliness and cost-effectiveness of adjudication of civil disputes.[55]

It consequently is clear that, while an expert may offer important technical evidence to assist the court, counsel's role in introducing such an opinion in an efficient, understandable and legally relevant manner remains essential.

Further, although this necessary mediation process between counsel and expert may risk loss of impartiality on the expert's part, the Court of Appeal in *Moore* indicated that existing law and practice already protect the independence and impartiality of expert witnesses in numerous ways.

These measures include the ethical and professional standards of the legal profession and of other professional bodies (such as those of engineers, actuarial scientists and business valuators), which oblige their members to be independent and impartial when giving expert evidence; the adversarial court process, particularly cross-examination; and the ability of judges to reject or limit the weight of expert evidence where there is actual evidence that the expert lacks independence and impartiality.[56]

The Court of Appeal for Ontario subsequently considered the propriety of communications between counsel and expert witnesses again in *Fonseca v. Hansen* ("*Fonseca*").[57] While the facts of *Moore* pertained to discussions between counsel and the expert in respect of draft reports which the expert already had prepared, the issue in *Fonseca* was the propriety of discussions between counsel and the expert *before* the expert had prepared any draft report or had even met with the client.[58] The Court of Appeal in *Fonseca* reaffirmed the stance in *Moore* regarding the importance of communications between counsel and experts and indicated that it applies equally to communications between counsel and experts which take place before the expert prepares any draft report or even sees the client.[59] It held that the respondents' counsel's line of questioning of the appellant's expert criticizing the expert's communications with appellant counsel was "undoubtedly improper" and "should not have been permitted" in light of the Court of Appeal's decision in *Moore*.[60]

Based on the foregoing, it appears that the pendulum swing regarding communications between counsel and expert witnesses has settled at the midpoint: recognizing the important role of counsel and the expert in collaborating to ensure that an expert's opinion is ready for the rigours of trial.

Independence and impartiality of experts in the context of independent medical examinations in Alberta

The importance of impartiality and independence of experts, and the consequent scope of proper communications between counsel and experts addressed by *Moore*, is put to a stricter test in Alberta when one considers health care experts who conduct "independent medical examinations" (IMEs) in the course of litigation.

Rules 5.41 to 5.44 of the *Alberta Rules of Court* set out additional safeguards for the conduct of medical examinations by health care professionals. In particular, Rule 5.42 arguably targets the impartiality and independence of experts retained by defendants to perform IMEs over experts retained by plaintiffs to do the same. This rule provides plaintiffs with a *prima facie* right to require that a defence expert's IME be conducted in the presence of a third-party nominee health care professional, be videotaped or be subject to a word-for-word recording (subject to an application by the defendant to modify or waive the plaintiff's *prima facie* right to those conditions), without offering the defence an equivalent *prima facie* opportunity to require that those same conditions be imposed on an IME conducted by the plaintiff's expert.

In a number of decisions in the context of Rule 5.42, the Alberta Court of Queen's Bench has pointed to an inherent lack of independence which characterizes the adversarial IME process, in particular with respect to defence IME experts. For example, in *Lai v. Henry*,[61] Master Smart of the Alberta Court of Queen's Bench indicated: "Although these examinations are often described as an Independent Medical Examination (IME) they are anything but independent. These are one-shot exercises conducted in adversarial circumstances. The aim of the Defendant is to discredit the claim of the Plaintiff."[62]

In *Nguyen v. Koehn*,[63] Justice Moreau of the Alberta Court of Queen's Bench similarly referred to the intrinsically biased nature of defence IMEs in this context, noting that "different considerations apply when a plaintiff is being examined by a doctor of the defendant's choosing rather [than] his or her own physician"[64] and that the plaintiff's presumptive rights under Rule 5.42 are a "means of ensuring accuracy and fair play during an examination ordered and paid for by a party opposite in interest"[65] and a means of confirming that "the medical practitioner's questions were fair and the record of the examinee's answers was accurate."[66]

Justice Read of the Alberta Court of Queen's Bench in *Kohlendorfer v. Northcott* ("*Kohlendorfer*")[67] similarly alluded to the supposed inherent bias of IMES, this time in the context of deciding whether Rule 5.43 of the *Alberta Rules of Court* allows a plaintiff who has obtained a video recording of a defence IME to prevent the defence expert who conducted the IME from reviewing the video recording before finalizing his or her report.[68] Subrule 5.43(3) specifically requires that the video recording be provided to the opposing party as soon as practicable after the IME is completed,[69] but it is silent about what use the defendant may make of the video once received.[70] The court concluded that Rule 5.43 should be interpreted to permit the defence expert to review the video recording before completing his or her report and to allow defence counsel to view the recording.[71] Notably, in arriving at that conclusion, it remarked that videotaping the defence IME would "address other concerns about the partial nature of [medical examinations], including the concerns regarding the questions that the examining doctor may ask."[72]

Justice Ross's commentary in *Gordon v. Taylor*,[73] when distinguishing IMEs from certified medical examinations (CMEs) conducted pursuant to Alberta's *Minor Injury Regulation*, AR 123/2004 (MIR) under the *Insurance Act*, RSA 2000 c 1–3, also highlights this point. In that case, the Alberta Court of Queen's Bench was asked to consider whether the rules regarding IMEs in the *Alberta Rules of Court* provide plaintiffs with a right to require videotaping of CMEs conducted pursuant to the MIR, which says nothing about videotaping CMEs.[74] The court ultimately found that it would be inconsistent with the object and spirit of the MIR to import the entitlement to videotape IMEs from the *Alberta Rules of Court* into the MIR so as to allow videotaping of CMEs.[75] Although the court acknowledged that the provisions regarding IMEs in the *Alberta Rules of Court* and the provisions regarding CMEs in the MIR relate to similar subject matter and both establish a method to obtain a medical examination and report for use during settlement negotiations or as evidence at trial, it found that they each operate in distinct contexts.[76]

IMEs, in the context of the adversarial nature of litigation, purportedly give rise to examinations which are inherently at risk of bias. The court stated: "This context is crucial to the purpose of the *Rules* provision for videotaping of medical examinations ... Videotaping was seen as a less expensive alternative to attending with a medical nominee."[77]

In contrast, the MIR aims to facilitate settlement of motor vehicle injury claims regardless of whether litigation has been commenced.[78] The procedure for selecting a certified examiner to perform a CME thereunder is by agreement of the parties or by appointment by *neutral* third party, which ensures that there is no bias in the selection process and that the selected certified examiner is neutral in relation to the parties.[79] The court found that neutrality of the certified examiner is "clearly central to the MIR scheme."[80] As a result, the court held that the *Alberta Rules of Court* videotaping provisions, which aim to provide protection to the examinee due to the perceived partiality of medical examinations under those rules, have no application, and indeed would jeopardize the neutral CME process under the MIR.[81]

Conclusion

The clarity brought by recent jurisprudence regarding communications between counsel and experts is a welcome development since the Ontario Superior Court decision in *Moore*. It is now well established that the line between counsel and experts favours fair advocacy principles, including the independence and impartiality of experts, without compromising counsel's duty to advocate zealously for their clients and to ensure that the best possible evidence is advanced in a manner that is clear and comprehensible to a court or jury. Notwithstanding, additional precautions have been built into the *Alberta Rules of Court*; namely, Rule 5.42 thereof, which aims to address the perceived inherent partiality of IMEs (particularly those performed by defence experts) by providing the plaintiff with a presumptive right to have defence IMEs monitored, videotaped or otherwise recorded. It is interesting to note, however, that the Ontario courts have rejected imposing such safeguards on defence medical examinations absent some evidence of bias.

In conclusion, some practical tips for lawyers follow.

Instruction letter

Counsel should include language in their instruction letters to experts which emphasizes the expert's role and primary duty to the court to be to be fair, objective and non-partisan and which asks the expert to sign a declaration acknowledging his or her understanding and acceptance of this duty.

Form 25

Counsel should include language in the form enclosing the expert's report (Form 25 pursuant to the *Alberta Rules of Court*) which reinforces the expert's independence and impartiality (e.g., "I have no personal interest in the outcome of this litigation and I am not financially interested in any of the litigants involved").

Other

Counsel should mark prior expert reports that do not form the basis of the final report as privileged in the affidavit of records. As well, counsel should confirm the expert's understanding and acceptance of his or her duty of independence and impartiality during direct examination of the expert at trial.

Notes

1. See *Edmonton (City) v Lovat Tunnel Equipment Inc*, 2000 ABQB 182 at paras 16–32, 260 AR 272.
2. *Lamont Health Care Centre v Delnor Construction Ltd*, 2002 ABQB 1125, [2002] AJ No 1589.
3. *Ibid* at para 12.
4. *Ibid* at para 17.
5. *Chapman Management & Consulting Services Ltd v Kermic Equipment Sales Ltd*, 2004 ABQB 498 at paras 1–2, [2004] AJ No 756.
6. *Chernetz v Eagle Copters Ltd*, 2005 ABQB 712 at paras 2–3, 385 AR 238.
7. *Ibid* at paras 4, 6.
8. *Ibid* at paras 10, 12.
9. *Ibid* at para 11.
10. *Grammer v Langpap*, 2014 ABQB 74, 6 Alta LR (6th) 396.
11. *Ibid* at para 2.
12. *Ibid* at paras 2, 6.
13. *Ibid* at para 6.
14. *Ibid* at para 10.
15. *Ibid* at para 6.
16. *Ibid* at paras 8–9.
17. *Reid v Bitangcol*, 2016 ABQB 122, 36 Alta LR (6th) 407 [*Reid*].
18. *Ibid* at para 7.
19. *Ibid* at para 18.
20. *Ramirez v Brander*, 2007 ABQB 729 at paras 9–12, 162 ACWS (3d) 730 [*Ramirez*]; *Andre v Wiebe*, 2000 ABQB 946, 284 AR 378 [*Andre*].
21. *M. (B.J.) v M. (S.L.)*, 2012 ABQB 731 at paras 27–28, 2012 CarswellAlta 2492.
22. *Ibid* at paras 30–39.
23. *Ibid* at para 31.
24. *Ibid* at para 36.
25. *Ibid*.
26. *Ibid* at para 38.
27. *Ibid* at para 37.
28. *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182 [*White Burgess*].
29. *Ibid* at paras 16–25.
30. *R v Mohan* (1994), [1994] 2 SCR 9, 114 DLR (4th) 419 (SCC).
31. *R v Abbey*, 2009 ONCA 624, 97 OR (3d) 330.
32. *White Burgess, supra* note 32 at para 23.
33. *Ibid*.
34. *Ibid* at para 49.
35. *Ibid*.
36. *Ibid* at para 54.
37. *Ibid* at paras 26–54.
38. *Ibid* at para 11.
39. *Ibid* at para 12.
40. *Ibid* at paras 2, 10.
41. *Ibid* at para 45.
42. *Ibid* at para 34.
43. *Moore v Getahun*, 2014 ONSC 237, [2014] OJ No 135.
44. *Ibid* at paras 47–52, 519–520.
45. *Ibid* at para 519.
46. *Ibid* at para 47.
47. *Ibid* at paras 50–52.
48. *Moore v Getahun*, 2015 ONCA 55, 381 DLR (4th) 471, leave to appeal to SCC refused (2015), [2015] SCCA No 119 (SCC).
49. *Ibid* at para 46.
50. *Ibid* at paras 46–49.
51. *Ibid* at para 53.
52. *Ibid* at para 55.
53. *Ibid* at para 64.
54. *Ibid* at paras 55, 62–63.
55. *Ibid* at para 65.
56. *Ibid* at paras 56–61.
57. *Fonseca v Hansen*, 2016 ONCA 299, 266 ACWS (3d) 104.
58. *Ibid* at para 49.
59. *Ibid* at paras 62–63, 69–70.
60. *Ibid* at para 51.
61. *Lai v Henry*, 2013 ABQB 696, 576 AR 204.
62. *Ibid* at para 13.
63. *Nguyen v Koehn*, 2012 ABQB 655, 550 AR 272.
64. *Ibid* at para 37.
65. *Ibid* at para 36.
66. *Ibid* at para 43.
67. *Kohlendorfer v Northcott*, 2013 ABQB 145, 558 AR 227.
68. *Ibid* at para 10.
69. *Ibid* at para 11.
70. *Ibid* at para 20.
71. *Ibid* at paras 22–24.
72. *Ibid* at para 35.
73. *Gordon v Taylor*, 2014 ABQB 11, 579 AR 387.
74. *Ibid* at para 18.
75. *Ibid* at para 26.
76. *Ibid* at para 24.
77. *Ibid* at para 30.
78. *Ibid* at para 24.
79. *Ibid* at paras 31–32.
80. *Ibid* at para 36.
81. *Ibid* at paras 37–38.

The best way to stay in practice is to not quit

The Honourable Justice Jasmine T. Akbarali

A while ago, I read a Princeton University professor's CV of failures.[1] It included the degree programs he did not get into; the academic positions, fellowships, scholarships and research funding he did not get; and the academic journals that rejected his work.[2] He published it because his successes were visible while his failures were not. He worried that this record led people to think everything had come easily to him and perhaps to attribute their own failures to themselves, instead of understanding that so much of what we do is a crapshoot.

I thought about that CV of failures a lot last fall, in the days and weeks following my appointment to the Superior Court of Justice. As people reached out to me with notes and calls of congratulations, and as I attended events where kind speeches were made about me, my successes were enumerated – the awards I earned, the recognitions I received, the big wins I gained for clients. Those successes are part of my story. I don't mean to, or want to, diminish them.

My successes are also bound up inexorably with my failures and mistakes. The oral argument that didn't go so well paved the way for the one with a better structure. The feedback from a respected colleague made my documents better. Experience teaches all of us. But in my mind, I kept coming back to the big one. The colossal mistake I nearly made that would have changed everything. That time I stumbled badly but was lucky. A wise and compassionate woman caught me before my stumble became a freefall.

I'm talking about the day I tried to quit law.

I was approaching the end of my already once-extended maternity leave with my youngest child. I was in the midst of a huge renovation. I have a lot of kids, and they were all young. My husband was managing a demanding career. We had close family members with health challenges. And I was supposed to go back to work?

I couldn't see a way to resume my professional responsibilities and meet the expectations I set for myself as a mother, wife and lawyer. I didn't want to feel like I was failing at everything all the time. I didn't want to fail at everything all the time.

I couldn't find any options. I concluded I had to resign. So I called Lisa Munro,[3] one of the management partners at Lerners LLP, my firm at the time, and told her I needed a meeting.

Here is the first thing Lisa did. She dodged me for three weeks. She knew where this meeting was going, and she wanted to make sure I had plenty of time to think about what I was doing before I met her. Eventually, I walked into her office, resolute in what I had to do.[4] I sat down and told her I had to resign. Immediately I burst into tears.

Here is the second thing Lisa did. She asked me if I needed to resign because I needed a hard break from the firm to sort things out, or if I just needed more time.[5] This question was important because, in her approach, Lisa did not minimize the pressures I

was under. She respected how I was feeling. She asked me what I needed, and she gave me choices.

I told her I did not need to resign, but I did not want to be unfair to my partners. I now know this is the biggest mistake I made. Going in, I did not ask for what I needed. I was lucky. Lisa offered it anyway.

Here is the third thing Lisa did. She negotiated an open-ended maternity leave with quarterly check-ins. We agreed that if at any point this arrangement stopped working for me or the firm, we'd revisit it and look for another resolution. But in the meantime, I got the room I needed to breathe. I took a second year out of the office,[6] and by then I was itching to get back.

Here is the fourth thing Lisa did. On my return, she supported me in my reintegration into practice. This included making available marketing resources (consultants and funds) and other measures specific to my practice to get me up and running again.

The legal profession agonizes over the retention of women in practice. Lisa's approach was simple and practical: The best way to stay in practice is to not quit. I am not trying to be funny as I write this. What I mean is that the practice of law can be hard ... and demanding. Sometimes it can be awful. Like that week you

worked 80 hours and you missed your son's first-place cross-country finish, and your daughter called you by her nanny's name.

It can also be exciting ... and inspiring ... and rewarding. Like that big win you got which made all the difference for your client; or the day you found your daughter's homework where she wrote about how you are her role model.

Here is the problem: It is hard to remember the great side of practice when all you are feeling is the grind. It is hard to feel inspired when you feel like you are drowning. If you feel like you are drowning, the temptation to leave practice can be overwhelming.

Here is the trick: In those moments of overwhelm, the only thing you have to do to stay in practice is not quit. That's it. You can quit tomorrow if you have to, but you can't un-quit tomorrow if you quit today. So don't quit today.

You don't have to love practice. You don't even have to not hate practice. You just have to hold on and not quit, because it will get better. It really will.

Lisa knew the trick. She got me to hold on a little longer. Just long enough to be able to get back to my practice in a way I could manage.

I know my single anecdote is not data, but I can't help but think there are lessons in my story that might be useful in a broader way.

For firms and employers

Know your assets (your people) and your market (your organization, and your market for services if the two are different). Lisa knew I would not be happy making spelt muffins in the long run. She knew the firm could cover my absence but would miss me while doing it. She understood the crisis I was in was temporary. She believed that, if everyone would just hang on a little longer, it would all be okay.

Be business-minded. Lisa approached our discussions like a discussion between two businesspeople looking to make a mutually beneficial deal. This approach might mean worrying less about policies[7] and more about what makes sense.[8]

Be creative. Any number of arrangements might work in a given situation, like putting a lawyer in a litigation solicitor role, reducing billable hour targets,[9] encouraging a lawyer to work remotely or to work odd hours, or moving a lawyer to a more supportive working group.[10] If you educate your senior people about the cost of training – and losing – good people who may be in a period in their lives that they just need to get through, you will get more support for creative arrangements.

Work at creating a culture of teamwork in your organization, where co-workers support each other. An atmosphere where people look out for each other is not only a great one in which to work, it also provides the depth for people to cover for each other when necessary.

For individual lawyers

Think long and hard about the obligations you need to take on. What can you delegate? Can you outsource your laundry and your meals? What can your assistant or clerk or articling student or nanny do for you that you are currently doing yourself? Your goal should be to pare down your obligations so that you are doing only the things you need to do. Your kid does not need you to fold her laundry or push her stroller; she needs you to be present in her life. Make sure your time with her is meaningful. Make your time meaningful all the time.

Make yourself valuable. It was easier for my partners to offer me an open-ended leave because I had already built goodwill through hard and competent work.

Downgrade your expectations of yourself. There was a time I sent my kids to school with spelt muffins that had to be homemade.[11] It took me a while, but I eventually decided that the downside to my kids of store-bought granola bars is outweighed by the benefits of seeing their mother arguing in court (when I was in practice) or donning her judicial robes (now). I can't do everything. I'm opting for the pursuit of justice over the pursuit of a corn syrup–free existence.[12]

Evaluate your expectations of yourself in context – something that's surprisingly easy to forget to do. One of my former partners put it best when she told me to think about my friends who were at home with their kids or who didn't have demanding jobs. "Is their macaroni and cheese that much better than yours?" she asked me. (It's not. And, more to the point, even if it is, who cares?)

Be flexible. If your firm or organization is willing to work with you on an alternative arrangement, remember it's a business dealing. You need not be obsequiously grateful for it. Presumably it is offered because you have some value to your organization. But you aren't entitled to it either. Law is not a charity. It's not even only a profession. It is also a business. If you have an alternative arrangement, make it work, even if it is sometimes inconvenient for you. If your arrangement stops working for your firm or employer, it stops working. So do your level best to keep it working ... without resentment.

Ask for what you need. You will not get it if you don't.[13] This one is so important, I'm going to repeat it: Ask for what you need.

It's not an overstatement to say that the day I nearly quit was a pivotal day in my career. I'm grateful it unfolded as it did. When I think of the experiences I might have missed – both in practice and now in my judicial role – had I been derailed by the situational difficulty I faced, I feel like I dodged a bullet. But that is what staying in practice is all about. It's not realistic to expect lawyers won't ever be unhappy or overwhelmed. Retention of lawyers in practice is about hanging on through those difficult periods until you get to the other side. Long-term relationships have bumps in the road; so do long-term careers. If we can understand that those trying periods are normal over the lifetime of a career, perhaps we can cope with them better when they come.

There are any number of creative ways of getting through difficult periods in your practice. Don't quit before you figure out the solution that works for you. It might not be easy, but it really is that simple.

Notes

1. Online: <https://www.princeton.edu/~joha/Johannes_Haushofer_CV_of_Failures.pdf>.
2. The list included, among other failures, his "meta-failure" – that his CV of failures has received more attention than his entire body of academic work.
3. Spoiler alert: Lisa is the hero in this story.
4. .Nope.
5. She also gave me tissues.
6. Yes, a second year.
7. Already long before my fourth child was born, Lisa would joke that she had a binder of office policies and a binder of office policies modified for Jasmine. (It wasn't really a joke.)
8. I know your policies are supposed to make sense. They may not always. It doesn't mean your policies are bad. It may mean they don't respond to the situation you are faced with.
9. This solution works best if the lawyer is flexible about how those targets are achieved and there is a fair, honest and transparent approach to compensation.
10. Many of these ideas are not applicable to small firms, where the challenges are heightened; but some of them are applicable or can be adapted to small firms.
11. I know. I can almost laugh at myself now.
12. Sorry, *goop*.
13. Unless you have a Lisa, but you can't count on that.

How to lose an appeal in the Court of Appeal:

The next generation

The Honourable Justice David M. Brown

Almost a generation has passed since Justice Marvin Catzman published his groundbreaking article, "The Wrong Stuff: How to Lose Appeals in the Court of Appeal."[1] In it he offered, in seven succinct tips, surefire ways to lose an appeal. His advice still rings clear and true: (1) Always file an incomprehensible factum. (2) Never begin at the beginning. (3) Never start with your strongest point. (4) Never say the magic words. (5) Always make a speech for the jury. (6) Never answer a question directly or, better still, at all. And (7) Never keep your promises.

Several years' experience on the Court of Appeal has demonstrated to me the enduring legacy and power of Catzman's seven tips for losing an appeal. However, I have slowly realized there are other ways to successfully drive down the road to appeal failure. This article offers some additional losing tips that counsel can use at each stage of an appeal.

Tip #1: Appeal to the wrong court

The fastest way to lose an appeal is to file your client's appeal in the wrong court.

The novice litigator might be forgiven for thinking that choosing the right appellate court is a straightforward matter: If the civil order of a Superior Court judge is final, the loser trots off to the Court of Appeal; if it is interlocutory, off one goes to the Divisional Court. On its face, a distinction of great simplicity.

But "final" means "final" only to the uninitiated.[2] Those better versed in the labyrinth of appellate jurisdictional jurisprudence know they must consult Hendrickson and Ball, *Final or Interlocutory? Theory, Practice and Frustration*, the definitive three-volume work on the topic.[3]

And why the insistence of judges that litigants must pass this threshold existential test of final or interlocutory before presenting the merits of their appeal to an appellate court? The answer lies in the tactile nature of the remedy granted by an appellate court when an appellant, instead of choosing Door Number One for appeal, wrongly chooses Door Number Two. When that occurs, the appeal is quashed. And "quash" is such a viscerally satisfying word for a judge to write. Few words in the judicial lexicon exude onomatopoeia like "quash." One can both hear and feel the terminal nature of the remedy, writing "quashed." And when one's colleagues ask how the day has gone, what more satisfying answer can one give than to say, "We started our day by quashing an appeal." So, go ahead. Make our day.

Tip #2: Forget review and correction – treat appeals as second kicks at the can

Embrace the old saying: "If at first you don't succeed, try, try again." The judge below did not accept the credibility of your client's witnesses? No problem. The beauty of an appeal court is the judges don't see your witnesses. Problem solved.

Ignore the whole notion of appellate standard of review. *Housen v. Nikolaisen*?[4] So passé. Palpable and overriding error? An incomprehensible phrase; best to let it go.

Keep your game plan simple: Argue that every minor mistake or misstatement by the judge below calls out for appellate intervention or else *the world will come to an end*. Argue the non-material and irrelevant in painstaking detail. For justice lies in the irrelevant minutiae of a case, not in the big picture.

Tip #3: Use James Joyce as your model for writing your factum

James Joyce developed the stream of consciousness writing style into a High Art Form, so you should follow his style of writing when putting your factum together, because there is nothing

judges enjoy more, when reading a factum, than participating in an author–reader relationship that incorporates the elements of the High Art Form, even though it may make it difficult for the reader to follow the thread of your argument, but the beauty of the High Art Form, at least in the postmodern world, is that the reader really doesn't matter as much as the writer, and the satisfaction in writing a factum lies not in crafting an argument persuading a judge to your client's point of view on an issue, but in showing the judge you can use the High Art Form and, as such, should be regarded as a cutting-edge, postmodern advocate, even though you don't end up communicating a single idea to the judge, but only put the judge to sleep – no doubt a well-earned sleep – by ensuring that each page of your factum manifests, exquisitely, the High Art Form, and avoids the tainted, bourgeois, but strangely understandable, style associated with the now thoroughly discredited It-Was-Bluebell-Time-in-Kent School of Clear Legal Prose.[5]

Tip #4: Turn your factum into a fun game of *Where's Waldo?*

Reject the requirement in the rules that your factum contain a concise overview statement, describing the nature of the case and of the issues, as well as a statement of each issue raised, immediately followed by a concise argument. Adopt, instead, the *Where's Waldo?* approach to factum-writing.

A losing factum, like a *Where's Waldo?* book, buries the object of the quest in gloriously distracting detail. Where an appeal involves a single issue – a legal error made by the judge below – write so that, like Waldo, the error-at-issue merely pokes its head out of the grocer's store window, lost in the riot of the hundreds of people shown milling about the town's marketplace.

Judges read factums carefully in advance of oral hearings. They enjoy the time it takes to find the "Waldo" issue. Where a factum is an especially fine example of *Where's Waldo?*– writing, judges delight in showing their colleagues the factum, so all can enjoy the fun in trying to find the "Waldo" issue and comparing their guesses.

Tip #5: Overstate your case

In your written and oral arguments, choose hyperbole and exaggeration over accuracy and balance. Spin the findings of fact below into alternative facts. Ensure the responding party can never accept your statement of facts as accurate. And assert that a case stands for a binding proposition of law which will defy discovery upon an actual reading of the case.

Sweep the (inevitable) weaknesses in your client's case under the rug. Pretend they are not there. Or bury them in an obscure footnote in your factum. Follow the adage, "out of sight; out of mind." But do not take offence when the panel does not call on the other side to respond to your submissions. Remember: The object is to lose your appeal, not to win.

Tip #6: Forget the pitch – dazzle them with your wind-up

The conventional wisdom for factum-writing is: Forget the Wind-up and Make the Pitch.[6] Wrong, wrong, wrong.[7]

Losing an appeal is all about dazzling the panel with your wind-up and ensuring you never make the pitch that really counts – identifying where the judge below made the Really Big Reversible Mistake. Emulate Eddie Feigner, the king of "The King & His Court, whose wind-ups dazzled crowds for decades.[8]

Make sure your factum leaves the panel guessing: So, just what is the real issue in this case? Rely on the High Art Form of stream of consciousness factum-writing to work its obfuscating magic.

Tip #7: Talk *to* the court, not *with* the court

Court of Appeal judges have time built into their schedules to prepare for the oral hearing. They use it. They come prepared to a hearing with specific questions about specific issues. They want to focus on those questions and issues. They want to talk with counsel about them.

Rebuff the panel. Stick to your script. Talk *to* the court, not *with* the court. Remind the panel that your client was allocated a certain amount of time for oral argument and you want to use it as you see fit. Stick to your guns on this point. Don't relent. Your client is entitled to no less.

Conclusion

Let me finish by repeating Justice Catzman's final piece of advocacy wisdom: "I hope that you will find these tips helpful in significantly lowering your batting average in the Court of Appeal. If they do, console yourself by remembering that winning isn't everything."

Notes

1. Justice Marvin Catzman, "The Wrong Stuff: How to Lose Appeals in the Court of Appeal," in 19:1 *The Advocates' Society Journal* (Summer 2000).
2. Watch the Monty Python "Argument Clinic" sketch on YouTube, substituting the word "final" for "argument," and "interlocutory" for "contradiction."
3. Hendrickson championed the School of Simplicity: A final order finally disposes of the rights of the parties. *Hendrickson v Kallio*, [1932] OR 675 (CA) 680. By contrast, Ball championed the Issue-by-Issue School, which enjoys multiple trips up to the Court of Appeal during the life of a lawsuit. For Ball, final orders include those that finally dispose of an issue raised by the defence, even if they do not finally dispose of the rights of the parties. *Ball v Donais* (1993), 13 OR (3d) 322 (CA) 324.
4. [2002] 2 SCR 235 at paras 8, 10, 23, 36.
5. From the judgment of the master of the style, Alfred Lord Denning, in *Hinz v Berry*, [1970] 2 QB 40 at 42.
6. Justice John Laskin, "Forget the Wind-up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums," in 18:2 *The Advocates' Society Journal* (Summer 1999). Available online on the Court of Appeal website: <http://www.ontariocourts.ca/coa/en/ps/speeches/forget.htm>.
7. Of course, it is right, right, right. But only if you want to win an appeal. This article strives to teach you how to lose your appeal. So ignore the right advice.
8. On reflection, perhaps not the best example. I saw *The King & His Court* (three other players; The King always used a four-man team) at work in Iron River, Michigan, one summer at the local rodeo. The King's dazzling wind-up always led to a devastating pitch. In a 1960s celebrity charity softball game, The King struck out, in order, Willie Mays, Willie McCovey, Brooks Robinson, Roberto Clemente, Maury Wills and Harmon Killebrew. To enjoy The King, watch the YouTube clip labelled "Eddie Feigner Newsreel."

After *Jordan*:

The fate of the speedy trial and prospects for systemic reform

Matthew R. Gourlay

On July 27, 1843, Captain Thomas Kinnear and his housekeeper, Nancy Montgomery, were murdered at Kinnear's farm in Richmond Hill, Ontario. Servants Grace Marks and James McDermott were arrested for the murders and, in early November of that year, put on trial. Convicted after a trial lasting two days, McDermott was hanged on November 21, less than four months after the killing. (Marks spent much of the rest of her life in the Kingston Penitentiary.) Margaret Atwood wrote a fascinating novel based on these events and their aftermath.[1]

In 2008, Barrett Richard Jordan was charged with drug trafficking. His trial did not conclude until February 2013. It took another three and a half years for the Supreme Court of Canada to conclude that his trial had taken too long. Unless Samuel Beckett is restored to life, there will be no novel written about any of this.[2]

Between these two extremes, surely there is a happy medium to which the Canadian justice system in 2017 can aspire, and maybe even achieve.

In *R. v. Jordan*, decided last July, a majority of the Supreme Court decided to do what it could about this reality.[3] It took direct aim at the "culture of delay" that in its view had taken hold of the system. The *Jordan* decision established "presumptive ceilings" beyond which delay will be unreasonable and require a stay of proceedings absent a showing of exceptional circumstances. As cases are stayed and various policy changes are proposed, we are only now beginning to understand the implications of this jurisprudential shift. The court's follow-up decision in *Cody*, released this June, confirmed that the court is not backing down; all of us in the system are going to have to adjust to this new reality.

As I'll explain, I think *Jordan* has been a force for good insofar as it has shaken policymakers out of complacency and spurred some productive debate about systemic reform. I'm less sanguine about *Jordan*'s status as sensible judicial doctrine, however. Lower courts, and probably the Supreme Court itself eventually, will have to figure out how to deal with the unanswered questions that lie in between *Jordan*'s ostensibly bright lines. More importantly, policymakers are going to have to think creatively about what the criminal justice system can and should be engineered to achieve within these newly imposed constraints. But that is mainly good news, in my opinion. As I'll explain, I see it as an opportunity to go beyond procedural tinkering and define what we really want and need the criminal law to do. And we need to go about that task with an awareness that a "speedy trial" is a means to an end – namely, a fair and accurate disposition of a charge – and not an end in itself.

What does section 11(b) require?

As the first example cited above suggests, delay in criminal justice is not in itself a bad thing. Striking while the iron is hot is not a recipe for measured and disinterested justice. I think it's safe to say that, historically, speedy trials have exacted a much greater toll on accused persons – especially innocent ones – than have postponed and protracted trials. But in modern Canada, nobody is at risk of being tried and sentenced before the ink is dry on the indictment. Barrett Jordan's case may have been a bit extreme, but multi-year delays to trial in superior courts are very much the norm. A quarter century after the Supreme Court's landmark decision in *Askov*[4] – which led to 50,000 charges being stayed in Ontario alone – lengthy delays remain common. This reality has long rankled many lawyers who had increasingly come to see section 11(b) as a largely toothless remedy against delay.

Constitutional provisions come in two varieties. Some – a minority – are specific, leaving relatively little room for judicial elaboration. Section 11(f) provides a right to a jury trial "where the maximum punishment for the offence is imprisonment for five years or a more severe punishment." This is pretty clear.[5] Most other provisions, like the section 8 guarantee against "unreasonable" search and seizure and the section 7 affirmation of "fundamental justice," trade in majestic generalities, leaving it up to the courts to put meat on the bones. Usually the courts do this in common-law fashion, elaborating principles and guidelines that constrain judicial discretion to a modest degree but leave the precise dividing line between the constitutional and unconstitutional to be settled on the facts and equities of the individual case.

Section 11(b), which guarantees trial within a "reasonable" time, was for obvious reasons almost universally understood to be a provision of this latter variety. It was hardly necessary to defend the proposition that permissible delay varied with the nature of the case. A particular amount of delay might be perfectly reasonable for a large-scale drug conspiracy case but totally excessive for an impaired driving charge.

Early on, the Supreme Court made two crucial doctrinal decisions: first, that a stay of proceedings was the *only* appropriate remedy for unreasonable delay;[6] and second, that unreasonableness should be assessed on an open-ended four-factor test borrowed from the United States. Early cases like *Smith*[7] and *Askov* adopted a four-factor test (with a number of sub-factors) to provide a modicum of

structure to the analysis. Quantitative guidelines of tolerable institutional delay were developed, leading to a post-*Askov* avalanche of stays. Attempting to mitigate the damage, *Morin*[8] stressed that these guidelines were not limitation periods or fixed ceilings, inaugurating the highly fact-dependent and prejudice-focused approach that held sway until *Jordan*.

The *Jordan* majority, led by Justice Moldaver, decided that the flexible *Morin* approach had contributed to a "culture of delay and complacency towards it."[9] The application of *Morin* was unpredictable and subjective. Lack of actual prejudice to the accused was routinely used to justify delays that were objectively astronomical. Section 11(b) arguments were dominated by retrospective quibbling over which side was responsible for each period of delay. Litigation over delay had become, ironically, a source of over-complexity and delay in itself. In the majority's view, the section 11(b) doctrine had become part of the problem; the judges therefore took it upon themselves to offer a radical new solution.

The majority's gambit, of course, was the creation of new numerical ceilings beyond which delay would be presumptively unreasonable: 18 months from charge to end of trial in provincial court, 30 months for trial in superior court.[10] Micro-counting and prejudice are now out the window. If the net delay – total delay minus any delay caused or waived by the defence – exceeds the ceiling, it's up to the Crown to justify it based on exceptional circumstances.[11]

It's worth pausing to consider how unusual a move this was in terms of constitutional doctrine. Reading a bright-line rule into an open-ended constitutional guarantee is generally embarrassing for courts. It highlights their legislative role, undermining the notion that they are just "interpreting" the constitution and administering neutral justice on the facts of a given case.[12] It's also inescapably arbitrary. Choosing round numbers like 30 months and 18 months reduces the appearance but not the reality of arbitrariness.[13]

While there is some virtue in the candour with which the *Jordan* majority embraced its inevitably legislative role, it seems to me that their approach also highlights the difficulties that can arise when the court goes too far in that direction. The majority assures us that it reached its conclusion by "conduct[ing] a qualitative review of nearly every reported section 11(b) appellate decision from the past 10 years, and many decisions from trial courts." They didn't show their work, however, so we have little idea what this review entailed.

More importantly, why should we expect some notional average of delay across all cases to yield a meaningful assessment of reasonableness in any particular case? I know of no reason why a one-witness sexual assault case should be expected to take the same amount of time from charge to verdict as a multi-accused drug conspiracy or financial fraud. To state the obvious, some cases are vastly more complex than others. Some cases require counsel to digest thousands upon thousands of pages of disclosure to understand a complex series of commercial transactions. Others turn almost entirely on a 25-minute videotaped statement of a sexual assault complainant. Just as importantly, cases vary greatly in their time-sensitivity – from the perspective of the accused, the victim and the public at large. Cases where the accused is in custody, or where the key witnesses are very young or very old, are examples of where a speedy trial is a particularly pressing objective. A document-heavy case where the accused is on a non-restrictive form of release may require less urgency from both the prosecution and defence perspectives. *Any* system, no matter

how well resourced, requires some form of triage or prioritization. It seems to me that the unreasonable delay doctrine needs to recognize this reality. Justice Cromwell made many of these points in his eloquent dissent.

No doubt, Justice Moldaver and his colleagues would reply that the ceilings are not intended to be targets for delay in particular cases, but outside limits on what can generally be considered reasonable. And they would point to the "exceptional circumstances" safety valve as a mechanism by which the particular demands of individual cases can be given effect, to the advantage of either the prosecution or defence. But too much case-sensitivity in either direction would threaten the integrity of the rule itself and re-introduce the *Morin* malleability for which *Jordan*'s rigid limits were supposed to provide the cure.

The aftermath

The *Jordan* majority explicitly crafted its decision to avoid an *Askov*-like tsunami of stays. It provided for a "transitional exceptional circumstance" applicable to cases already in the system when the decision was released, intended to blunt the impact of the new time limits and account for reasonable reliance on the previous delay jurisprudence.[14]

Initial indications are that the transitional provisions have avoided an *Askov* deluge. A study by Dalhousie professor Steve Coughlan of section 11(b) applications in the six months before and after *Jordan* showed only a modest uptick in the number and percentage of stays granted: 26 out of 69 applications (38 percent) in the six months before *Jordan*, and 51 out of 101 (50 percent) in the six months after.[15] A more recent accounting shows 204 11(b) applications being granted across Canada in the 12 months after *Jordan* and 333 being dismissed.[16]

The apparently modest uptick in successful 11(b) applications stands in tension with the near-panic with which policymakers – both legislative and judicial – have greeted *Jordan*. It's possible that the six-month statistics just quoted understate the real impact of *Jordan*; the "transitional" provisions have a limited lifespan, and soon we'll start to see the "ceilings" operate with full vigour. And it's also possible that *Jordan*'s most significant impact will be in *kind* rather than number of cases stayed: At the time of writing, three murder cases have been thrown out[17] – understandably more of a concern to policymakers than the equivalent number of impaired driving or shoplifting charges. Under the flexible *Morin* framework, trial judges usually did their best to avoid granting stays in the most serious cases. *Jordan* leaves little such leeway.

Doctrinally, *Jordan* naturally raises a lot of further questions that will need to be answered by the trial and appellate courts. Among them:

- How does the framework apply to accused persons denied bail pending trial, given that "prejudice" is no longer part of the test?[18]
- Does a lower presumptive ceiling apply to *Youth Criminal Justice Act* cases? If so, what is it?[19]
- How does the framework apply to multi-accused trials? If one accused retains counsel who is not available within the *Jordan* time frame, is the co-accused entitled to severance? Or does one co-accused somehow become bound by the other's waiver?[20]

It remains to be seen whether the bright-line *Jordan* framework will be able to address these and other relatively nuanced questions without producing a Byzantine sub-jurisprudence of its own.

R. v. Cody: No turning back

In *R. v. Cody*, 2017 SCC 31, a unanimous seven-member panel of the court declined a series of entreaties from provincial attorneys general to soften some of *Jordan*'s hard edges. While the panel did not include *Jordan* dissenters McLachlin C.J. and the now-retired Cromwell J., it's worthy of note that Wagner and Gascon JJ. did sit on *Cody* and signed on to the *per curiam* decision.

Like Jordan, Cody was an unexceptional drug case that took five years to get to trial. And like *Jordan*, the record revealed no particular sense of urgency from any quarter – Crown, defence or judiciary – to get things moving. Notably, Cody featured some defence conduct that could be seen as having contributed to the delay. But the Crown did little to get the proceedings back on track. The court therefore declined to enter into a detailed accounting of responsibility for various periods of delay. The total "net" delay of 36.5 months was well above the presumptive ceiling; the case was not particularly complex; and the Crown could not demonstrate reliance on the pre-*Jordan* state of the law. The court therefore reinstated the stay of proceedings entered by the trial judge.

The decision featured a silver lining for the Crown, however, in at least two respects. First, the court emphasized that for "transitional" cases, seriousness of the offence remains a crucial consideration in determining whether the balance of interests favours a stay. This can be read as an implicit signal that the stays of proceedings entered in transitional homicide cases to date may be particularly vulnerable on appeal by the Crown. Second, the court came down hard on "illegitimate" defence conduct, which it described as litigation that is either meritless in substance or pursued in an inefficient manner.[21] While denying any intent to diminish to make full answer and defence, the court also emphasized that the defence conduct in question need not rise to the level of unethical behaviour or professional misconduct to count as "illegitimate" in this context.

No one can reasonably take issue with the principle that the defence can't manufacture its own unnecessary delay, then expect to reap the windfall of a stay. My concern, however, is with the court's encouragement to trial judges to invoke "case management" powers to summarily dismiss defence motions and applications deemed insufficiently meritorious. While this power has been recognized for some time,[22] it has tended to be invoked sparingly – for good reason. Sometimes success depends on convincing the court of a novel legal theory. Sometimes it depends on eliciting evidence from police witnesses in cross-examination that may or may not materialize. While it's fine to say the defence can't benefit from delay caused by litigation steps that turn out to have been ill-conceived, summary dismissal has the potential to unfairly stifle promising avenues of defence in individual cases and hinder development of the law more broadly. After all, many of the court's own landmark decisions, in the *Charter* realm especially, originated in trial-level applications that must have seemed quixotic at the time.

The court's emphasis on the trial judge's duty to take an active role in moving cases forward also carries real risks of misuse, in my view. For example, *Cody* suggests that a court should consider denying an adjournment request that "would result in unacceptably long delay, even where it would be deductible as defence delay." Presumably, even Crown consent would not be decisive in the face of this overriding judicial imperative to get on with it. My concern is that foisting such an active management role on the trial court may sacrifice some of the benefits of party autonomy – that is, control of the case by those who know it best and who have a direct stake in the outcome. While people other than the accused – victims, most obviously – share an interest in speedy trials, the Crown as minister of justice is generally best positioned to be the guardian of those interests. Courts should be slow to second guess the parties' joint judgment on the best way to bring the matter to trial.

These reservations notwithstanding, *Cody* confirms that *Jordan* is the reality with which we are going to be living for the foreseeable future. While doctrinal kinks can be worked out in the case law, the more pressing issue is: What can the system do to adjust to its demands?

Quick fixes?

Some obvious things come to mind. One thing the federal government could have done *immediately* was to fill the dozens of vacancies then existing in the federally appointed courts. The shortage of judges is a completely unnecessary, self-inflicted problem. While I understand the Liberals' desire to reform the appointments process, there was no intelligible justification for largely refusing to make new appointments until the new system was up and running, given that it has had from day one a deep pool of perfectly qualified candidates to choose from. The failure to act was irresponsible, in my judgment. The recent flurry of appointments has likely mitigated the problem for now, but a lot of unnecessary damage was done in the meantime.

Other rather straightforward measures to reduce delay come to mind. In my experience (and probably everyone else's), the production of *Stinchcombe* disclosure from the police to the Crown and then from the Crown to defence is one of the main bottlenecks that ends up causing delay on the path to resolution or trial. A better, standardized process for delivering disclosure in useable digitized format would cut down markedly in the time required to make critical decisions about the case – including the main decision of whether to have a trial at all.

So far, one of the most prominent proposals floated by politicians and even members of the judiciary has been the abolition of preliminary inquiries (or "prelims"). The basic idea, as I understand it, is that the prelim adds months to the overall process without doing much to serve its two main objectives, case screening and discovery. The threshold for committal to trial is low ("some evidence") and most cases easily pass the test; further, full disclosure of the Crown's case has been a constitutional requirement since *Stinchcombe* was decided in 1991, reducing the need for in-court discovery.

That's all true. But the problem is that we don't have any clear understanding of whether and to what extent prelims are a *net* cause of delay overall. Two realities suggest to me that the connection may be overblown. First, a preliminary inquiry takes place in a low percentage of cases. Most cases go straight to trial in provincial or superior court. Second, while relatively few cases are judicially terminated at the preliminary inquiry stage, the prelim often serves as a useful dry run (typically with a shortened slate of witnesses and thus by no means of a similar length as the prospective trial) where both sides can observe the strengths and weaknesses of their case, which can lead to a more focused trial or avoid the need for a trial altogether. Guilty pleas and withdrawal of charges are both common consequences of a prelim. Often both the Crown and defence are satisfied with hearing one or two key witnesses. This can also suffice for the prelim judge to provide input to the parties at an "exit JPT (judicial pre-trial)" – an increasingly used (and one that perhaps ought to be encouraged or become the norm) process that helps the parties identify early on issues that will be a focus at trial, and at times resolve matters entirely.

To my knowledge, however, no one has managed to systematically measure these benefits and compare them to the costs of a prelim in terms of resources and delay. If such data were available, we could have a productive and informed debate about whether any delay caused by prelims is worth the benefit to the accused and to the system in general. In the absence of such information, we're just shooting in the dark. While I think we should resist the impulse to cling to familiar processes and procedures just because they're familiar, I think we should also demand that reform be based on a transparent cost-benefit analysis rather than gut instinct. We need to remember that reducing delay is a means to an end – namely, a more just criminal justice system – and not an end in itself.

The bigger picture: More resources? Fewer charges?

Participants in the justice system like to say that delay is mainly a problem of insufficient resources. More money – for more judges, courtrooms, prosecutors and legal aid – would keep the trials running on time.

No doubt that's partly true. I believe that expanding legal aid eligibility and increasing the rates paid to counsel would make the system more efficient by improving the quality of defence representation and reducing the number of unrepresented accused. Building more courtrooms in locales whose population growth has outstripped judicial infrastructure would cut down on institutional delay.

But this is only part of the story. And we need to be careful what we wish for. The parliamentary budget officer has estimated that, as of 2011–2012, Canada spent about $20.3 billion on criminal justice, about the same as it spends on its military.[23] This works out to about 1.1 percent of its GDP. The same report found that costs had risen

significantly over the prior decade, even though crimes rates had been consistently in decline. I would be skeptical, to say the least, of any suggestion that Canada should spend *more* of its money on prosecuting and imprisoning people. I would think most people knowledgeable about the system, in the long term at least, would like to see us spend considerably less. Criminal punishment, though sometimes necessary, is after all rarely the best or most efficient response to the social and personal problems that find expression in criminal conduct.

It's also important to realize that *any* system has a built-in momentum toward the self-perpetuating use of resources at its disposal. The criminal justice system is no different. If more resources are devoted to policing and prosecution, it's reasonable to expect that more offences will be charged and prosecuted – with only an indirect, attenuated relation to the fluctuations of the crime rates reflected in official statistics. Crimes are everywhere, depending on where and how closely you want to look. An assault is any touching without consent. A fraud is any dishonest advantage-taking. Only a tiny fraction of acts that meet the definition of an offence are ever prosecuted; the scope for charging *more* always exists, regardless of any "actual" increase in crime.[24] Consequently, there's really no such thing as an objective accounting of total crimes committed – as opposed to crimes reported. The media like to report on disturbing estimates of "unreported crime" as if this is capable of objective measurement. But in a real sense, many ostensibly criminal acts are not crimes unless and until someone decides to report them as such.

In fact, there's a good case to be made that too *much* alleged "crime" is being reported and charged. In 2016, there were 39,646 cases in the Ontario Court of Justice disposed of without a trial; of those, about 20,744 were withdrawn or stayed and 18,092 ended with a guilty plea.[25] (Only 4,263 cases were disposed of following trial.) Why were there almost as many stays and withdrawals as findings of guilt? No doubt many were the result of negotiated resolutions between the Crown and defence; others would have been the result of a Crown determination that there was no longer a reasonable prospect of conviction or that it was not in the public interest to proceed to trial. But the number also suggests there is a huge quantity of charges that should never have been in the system in the first place. And this should be a concern for policymakers: both as a readily remediable cause of delay and a source of unnecessary expense and hardship (for the system and for accused people) in its own right.

Notably, in 2014/2015, only 54 percent of cases in Ontario resulted in a finding of guilt. This compares to 72 percent in British Columbia and 73 percent in Quebec.[26] Not coincidentally, both those jurisdictions have pre-charge screening by Crown counsel. In Ontario, the police lay the charges and Crown counsel later decide whether to proceed. Undoubtedly, this results in a lot of "junk" charges in the system – charges that could never be proven, charges that are trivial, charges that are duplicative or redundant.[27] All of them exact a toll on the system in terms of expense and docket-clogging delay before (in all likelihood) being put out of their misery once a sensible prosecutor has a chance to review the file with an eye to the public interest. And again, that is to say nothing of the hardship suffered by the presumptively innocent accused as a result of unnecessary criminal charges. Any extra investment in Crown staffing required to put pre-charge screening into effect seems likely to be more than repaid by savings to the system at later stages of the process.

Getting "junk" charges out of the system is one sensible way to make it leaner and more efficient. Another, more radical approach is to make broader choices about diverting entire offences categories out of the criminal justice system – for instance, by decriminalizing conduct that causes little harm and substituting more efficient, administrative procedures to deal with conduct that needs to be prohibited but doesn't need to be criminal. Marijuana legalization is an example of the first; administrative penalty regimes for low-level drinking-driving offences are an example of the second.

Impaired driving offences constituted about 6 percent of all cases commenced in the Ontario Court of Justice in 2016.[28] For a number of reasons – including the fact of a mandatory minimum penalty and the plethora of available defences – they are much more likely to proceed to trial than most other offences. Consequently, in 2016 there were far more impaired driving trials in the Ontario Court of Justice than trials for any other offence category. British Columbia has diverted the vast majority of these offences out of the criminal process, imposing an "automatic roadside prohibition" scheme with stiff but non-criminal penalties imposed by police and subject to only limited after-the-fact review. The system has been subject to a number of criticisms, upon which I'm not informed enough to adjudicate.[29] But it seems to have produced two very good outcomes which other provinces will want to consider carefully: reducing impaired driving fatalities,[30] and reducing court backlogs. Early reports indicate that British Columbia, despite being the province from which *Jordan* itself originated, has been more successful than other jurisdictions in getting the delay problem under control.[31]

The imminent legalization of marijuana promises to be another opportunity for reining in the scope and ambitions of the criminal justice system. It will, of course, mean that far fewer marijuana-related offences will be prosecuted and directly free up resources on that account.[32] Indirectly, if handled well, it could show a way toward broader decriminalization of banned substances, demonstrating the wisdom of a regulatory, harm-reduction approach over the traditional criminal law model.

This minimalist conception of criminal justice is in tension with a recurring recent theme of public discourse, exemplified by the *Globe and Mail*'s recent "Unfounded" series on police handling of sexual assault allegations.[33] That series has been credited with identifying some troubling discrepancies in how sexual assault cases are handled by police across Canada. But it also seems to jump quickly to a conclusion that vastly more of these offences should be prosecuted. This idea – which appears to be widespread – has received comparably little critical scrutiny. It seems to be premised on unrealistic expectations about the capacity of criminal law to redress harm caused by antisocial behaviour. A system that is necessarily calibrated to acquit a lot of factually guilty people so as to avoid convicting the innocent simply cannot live up to the demands that some activists place on it. Forcing more weak cases into the system would create more backlog with no corresponding benefit, in my view. Like the debate over preliminary inquiries, this discussion will be productive only if it proceeds on a solid base of evidence against which the various alternatives can be judged. And more broadly, my hope is that it would be informed by an understanding – possessed by most of us who work in the system – that criminal prosecution is no panacea for social ills. Very often, less is more. If that turns out to be the legacy of *Jordan*, I will be all for it.

Notes

1. Margaret Atwood, *Alias Grace* (Toronto: McClelland & Stewart, 1996).
2. I do not rule out a film by Antonioni.
3. *R v Jordan*, [2016] 1 SCR 631, 2016 SCC 27.
4. *R v Askov*, [1990] 2 SCR 1199.
5. But see *R v Peers*, 2017 SCC 13, aff'ing *R v Peers*, 2015 ABCA 407, where the enterprising claimant argued that a potential penalty of five years less a day in prison *plus* a million-dollar fine was "more severe" than five years' imprisonment, thus entitling him to a jury trial in a provincial *Securities Act* prosecution. The Supreme Court (for some reason having granted leave) had little difficulty disposing of this claim in a terse endorsement. The provision still means what it says.
6. In the s 11(b) jurisprudence, delay is either reasonable or unreasonable – full stop. If the latter, a stay of proceedings is the only remedial option. In theory, that means there is a particular date on which a delay moves from reasonable to unreasonable. So, for instance, on Day "X" someone can be tried for first-degree murder and be imprisoned for life if convicted; and on Day "X+1" the same person is constitutionally entitled not to be tried at all. This logic is open to question, a point developed by Justice La Forest dissenting in *R v Rahey*, [1987] 1 SCR 588, at 639–641. (See also *R v Mills*, [1986] 1 SCR 863, at 973, *per* La Forest J.) Consider that a search deemed just *barely* unreasonable under s 8 would likely result in admission of the resultant evidence under s 24(2). On the other hand, there is force to the opposing view that a right to trial within a reasonable time entails a right *not to be tried* once the threshold of unreasonableness has been exceeded; see *R v Mills*, [1986] 1 SCR 863 at 947–948, *per* Lamer J. Interestingly, the recent Senate report entitled "Delaying Justice Is Denying Justice" suggests that Parliament legislatively prescribe other, lesser remedies for s 11(b) violations; online: <https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf>. Such legislation would pretty clearly trench on the courts' duty to interpret and apply the constitution and would not likely survive constitutional scrutiny, in my view.
7. *R v Smith*, [1989] 2 SCR 1120.
8. *R v Morin*, [1992] 1 SCR 771.
9. *Jordan*, *supra* note 3 at para 29.
10. The *Jordan* time limits run from charge to the *end* of the trial. This is consistent with prior authority, but I don't really understand it. Trials take as long as they take. The time taken to actually try a case wouldn't count as "delay" in the normal sense of the word. While the trial is in progress it isn't being *delayed*; it's being tried. At that point, it's up to the trial judge to control the proceedings and ensure that they are not unduly prolonged by, for example, repetitive questioning or the tendering of irrelevant evidence. I think the "end of trial" rule is mainly meant to ensure that trials which are adjourned *after* the start of trial – ie, those which don't run continuously – aren't immune from s 11(b) scrutiny. That makes sense.
11. Below-ceiling delay can also ground a stay, but only if the defence can show that "(1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have": *Jordan*, *supra* note 3 at para 82. And the court made clear that it expected this to be rare.
12. Even Antonin Scalia, whose originalist methodology was purportedly meant to constrain judicial discretion in interpreting open-ended constitutional provisions, wasn't immune to this tendency: *Maryland v Shatzer*, 559 US 98 (2010). There, Scalia J (writing for the court) decided that the police must wait at least 14 days before reattempting to question a suspect who had previously invoked *Miranda* but was later released from custody. Why 14 days? Because some number needed to be chosen and, in Scalia's view, it was "impractical to leave the answer to that question for clarification in future case-by-case adjudication." That's a version of the judgment call made by the majority in *Jordan*.
13. For what it's worth, many lawyers I've spoken to think that 18 months is overly generous for a typical straightforward provincial court case but that 30 months may be unduly ambitious for complex superior court prosecutions.
14. *Jordan*, *supra* note 3 at paras 96–104.
15. Tonda MacCharles, "Fears of Widespread Trial Dismissals Not Borne Out, Says Law Professor" (*Toronto Star*, 10 Apr 2017); online: <https://www.thestar.com/news/canada/2017/04/10/fears-of-widespread-trial-dismissals-not-borne-out-says-law-professor.html>.
16. Laura Kane, "More Than 200 Criminal Cases Tossed Over Delays Since July 2016" (*National Post*, 6 Jul 2017); online: <http://nationalpost.com/news/canada/more-than-200-cases-tossed-over-delays-since-supreme-courts-jordan-decision/wcm/b139fd4a-bd1a-43bf-886f-8dfed8648158>.
17. *R c Thanabalasingham*, 2017 QCCS 1271; *R v Picard*, 2016 ONSC 7061; *R v Regan*, 2016 ABQB 561. The Ontario Court of Appeal heard the Crown's appeal of the *Picard* stay of proceedings on 12 Jun 2017. As of writing, the judgment is on reserve.
18. See, eg, *R v Phan*, 2017 ONSC 1308, in which a long period of pre-trial custody was purportedly taken into account but did not seem to materially affect the analysis.
19. In *R v J.M.*, 2017 ONCJ 4, in which Paciocco J (as he then was) held that a ceiling of either 12 months or 15 months should apply to youth cases.
20. Somewhat different approaches to these issues have been taken by Code J in *R v Brissett*, 2017 ONSC 401, and Fairburn J in *R v Ny and Phan*, 2016 ONSC 8031.
21. *R v Cody*, 2017 SCC 31 at paras 31–35.
22. The leading cases are *R v Kutynec* (1992), 7 OR (3d) 277 (CA), and *R v Vukelich* (1996), 108 CCC (3d) 193 (BCCA).
23. Office of the Parliamentary Budget Officer, "Expenditure Analysis of Criminal Justice in Canada," 20 Mar 2013; online: <http://www.pbo-dpb.gc.ca/web/default/files/files/files/Crime_Cost_EN.pdf>.
24. See, generally, William J Stuntz's classic article, "The Pathological Politics of Criminal Law" 11:3 *Michigan Law Review* at 505–600. Stuntz's basic point is that the criminal law catches far more conduct than any jurisdiction could possibly punish, placing the real power in the hands of police and prosecutors who decide which acts and people to target, rather than in the hands of legislators and judges whom we usually imagine to be in control of the system. Canada's aversion to elected judges and prosecutors and its more tempered approach to incarceration as a criminological panacea has, in my judgment, blunted the ill effects of the systemic dynamic Stuntz describes. But the effects are still there.
25. Ministry of Attorney General, "Offence Based Statistics – All Criminal Cases"; online: <http://www.ontariocourts.ca/ocj/files/stats/crim/2016/2016-Q4-Offence-Based-Criminal.pdf>.
26. Ashley Maxell (Statistics Canada), "Adult Criminal Court Statistics in Canada, 2014/2015"; online: <http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14699-eng.htm>.
27. "Administration of justice" offences – mainly failure to comply with court orders like bail conditions – are a major culprit here. They accounted for a staggering 28 percent of cases commenced in Ontario Court of Justice in 2016: Ministry of Attorney General, "Offence Based Statistics – All Criminal Cases," *supra* note 25. Many of these charges arise from conditions and restrictions that should never have been imposed in the first place and prosecuting them serves no purpose other than keeping the accused in the criminal justice system.
28. Ministry of Attorney General, "Offence Based Statistics – All Criminal Cases," *ibid*. For the purpose of these statistics, cases are categorized by the most serious charge on the information.
29. Some of the criticisms were reviewed by the Supreme Court in the course of upholding the scheme's constitutionality in *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 SCR 250, 2015 SCC 46.
30. CBC News, "BC Drinking and Driving Deaths Down Significantly" (24 Feb 2014); online: <http://www.cbc.ca/news/canada/british-columbia/b-c-drinking-and-driving-deaths-down-significantly-1.2549741>.
31. Sunny Dhillon, "BC Courts' 'Culture of Timeliness' on Cases Can Be a Lesson to Other Provinces" (*Globe and Mail*, 12 Mar 2017); online: <http://www.theglobeandmail.com/news/british-columbia/bc-courts-culture-of-timelimness-on-cases-can-be-a-lesson-to-other-provinces/article34277964>.
32. Marijuana prosecutions won't go away entirely; for instance, it appears that the government intends to enact a new offence of selling cannabis to a minor. See: "Canada Takes Action to Legalize and Strictly Regulate Cannabis" (Health Canada news release dated 13 Apr 2017); online: <https://www.canada.ca/en/health-canada/news/2017/04/canada_takes_actiontolegalizeandstrictlyregulatecannabis.html>. Presumably, trafficking marijuana outside the new regulated framework will also continue to be prosecuted.
33. Robyn Doolittle, "Unfounded: Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless" (*Globe and Mail*, 3 Feb 2017); online: <http://www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309>.

The unsettling truth about settling: Part II

The Honourable Joseph W. Quinn

Portions of this article formed the basis of an oral presentation by the Honourable Joseph W. Quinn, Superior Court of Justice (retired), at the annual general meeting of the Canadian Defence Lawyers Association in Toronto on June 8, 2017. The article is a sequel to "The unsettling truth about settling" (Advocates' Journal, Winter 2016).

Once upon a time, in a Kingdom far away, I was a lawyer. I recall that 99 percent of my professional headaches were caused by fewer than 5 percent of my files. A friend of mine referred to those problem files as "movers." He would stack them on a corner of his desk and, every week or so, move them to a different corner. Even today, when I am asked what it takes to be a trial lawyer, I reply, "A big desk with as many corners as possible."

Is there anything more satisfying than settling a problem file without a trial and being paid a nice fee for doing so? What about taking some of those files to trial and getting a successful result? Realistically, if you are light on courtroom experience, a trial is unlikely to happen.

Are you content being a trial lawyer who does not do trials? Really? If, on a golf course, you hit every green in regulation figures but then pick up your ball and walk to the next tee because you do not know how to putt, are you still a golfer? Just asking.

Withering heights

Advocacy skills are withering because trials (in particular, civil trials) are an endangered species headed for the Canadian Museum of History. Even worse, those skills are not being developed in the first instance. There is nothing to wither.

How many lawyers can expect to match the trial experience of, say, Francis L. Wellman (1854–1942), a New York attorney who, it is estimated, examined or cross-examined 15,000 witnesses during his courtroom career? If one were to arbitrarily assume an average of 10 witnesses per trial, it would mean Wellman participated in 1,500 trials. Raise your hand if you are on track to reach that number.

The urological connection

One lawyer I knew was well on his way to Wellman numbers.

Peter Kormos was called to the Ontario bar in 1980. He quickly developed a large criminal practice in the Niagara area. Peter was an avowed anarchist. In keeping with that trait, he took all his cases to trial. Every one. His goal was to create chaos in the courts by tying up the Crown's office with cascading trials. Peter did not sleep much and, for him, cigarettes were a food group. Thus, he was able to juggle trials in circumstances where others would require an intravenous drip.

His try-them-all approach likely would not work in a civil practice, where there are incessant interlocutory proceedings and often crushing disbursements. But it is quite possible in a criminal practice,[1] which in general is not as labour intensive and lends itself to a freewheeling, shoot-from-the-lip approach where the task is not so much to prove *your* case but to find a crack in the *opposing* case.

Fortunately, for the Crown, in 1988 Peter was elected to the provincial parliament as a member of the Ontario New Democratic Party. From 1988 until his retirement from politics in 2011 (a period during which he never lost an election), Peter brought that same talent for courtroom chaos to the halls of government. He died in 2013 at the age of 60, proving that anarchy is destructive on more than one level.

It takes a certain personality to try all one's cases. Who does such a thing? We are given a hint by former Premier Bob Rae. With mixed feelings about doing so, Mr. Rae appointed Peter as Ontario minister of consumer and commercial relations when the NDP came to power in 1990. In his book, *From Protest to Power: Personal Reflections on a Life in Politics*, Rae wrote: "It was better to have [Peter] inside the tent pissing out than outside the tent pissing in. The problem was that he ended up inside the tent pissing in."[2]

So, now we know the magical combination needed to produce a try-them-all counsel: an anarchist with a urological disorder.[3]

Although you probably need not worry about whether you try too many cases, there is room for concern about whether you settle too many cases. I am particularly interested in why you settle and the influence of pre-trial conferences in the settlement process.

The education imperative

Counsel must always be aware of the need to educate their judge. This is particularly important on a pre-trial conference. At trial, you might have several weeks during which you will be able to educate your judge on the legal principles relevant to your case. However, on a pre-trial, neither you nor the judge has the luxury of time. A judge could have six or more civil pre-trials in one day; and you are restricted to what you can fold into a pre-trial brief.

Educating your judge over the course of a multi-week trial is one thing, but having to do so within the confines of a pre-trial conference is almost impossible unless your case is blessed with one or two very narrow issues (and, then, only if those issues fall within an area of the law for which the pre-trial judge has some expertise).

I was a generalist judge sitting in a generalist court, which meant that, as each year passed, I knew less and less about more and more until I reached the point where I knew very little about an awful lot.

When you have a case privately mediated, you properly pick a mediator with the appropriate knowledge of the law for your case. Would you ask a family lawyer or a corporate lawyer to mediate a motor vehicle claim? What about a judge with the same pedigree? Welcome to your pre-trial. Enjoy.[4]

In 2000, I received a letter in circumstances that cannot be conveniently summarized here. It was from the Honourable Mr. Justice Alvin Rosenberg. He died in 2013 at the age of 87. He was appointed to the Trial Division of the High Court in 1983. As you know, that was a circuiting court and, at one point, he was sent out from Toronto to preside at a murder trial in Napanee. Three prisoners, serving sentences in Millhaven, were accused of killing a third inmate with a baseball bat. Justice Rosenberg gave this background in his letter:

> When the preparations were made for the hearing it became obvious that there were real dangers involved in that the alleged murders were the result of an Anglophone–Francophone confrontation in Millhaven. There was concern that the Francophones would attempt to [avenge] the murder of their leader by having outside friends assassinate the accused. There was also concern that friends of the accused would attempt to help them escape while they were being transferred to the courthouse in Napanee. The result was that the prisoners were brought to the courthouse in a snow plough which it was felt could break through any barrier that was erected to try to stop the safe transport of the prisoners to the courthouse. There were helicopters hovering overhead and guard dogs used to assist in escorting the prisoners.
>
> Almost every complication that can arise in such a criminal case arose in this trial, from the selection of the very first juror until the verdict and sentencing.

With that background, let me add three facts to the story: (1) Justice Rosenberg had been appointed to the bench only several weeks before the trial; (2) he had not previously been part of, or witnessed, a criminal trial; and (3) he had never even been present at the selection of a criminal jury.

To complete the picture that I am attempting to paint, the letter from Justice Rosenberg continued:

> I had been advised when I was appointed that all of the members of the High Court and the Court of Appeal were ready to assist whenever a problem arose. I took advantage of this situation and was in touch with John Brooke of the Court of Appeal almost hourly for advice [Justice Brooke sat on the Court of Appeal from 1969 until 1999]. My calls were frequent, even to his home when he was not in court. I once received a message from John while I was on the bench advising me that he was going out to the supermarket for an hour or so and that if I had a problem that arose while he was out, to stall for a while as he would be back shortly.

And you probably thought that the only reason for frequent short adjournments in a trial was a weak judicial bladder. Well, now you have a second working hypothesis: Your judge is seeking advice. On a regular basis judges preside over trials and pre-trials covering areas of the law in which they are less knowledgeable than counsel.

Surely the minimum requirement for an efficient and dependable legal system is to have judges who know at least as much law as the lawyers who appear before them. Those unfamiliar with our courts would be shocked to learn how often this minimum requirement is not met. In the Superior Court of Justice, this requirement, in my opinion, is consistently satisfied only in four instances: (1) the

Family Court branch; (2) class proceedings where certain judges have been designated to handle such cases; (3) matters on the Commercial List in Toronto (established in 1991 for the hearing of actions, applications and motions involving issues of commercial law); and (4) some criminal cases heard by judges with a particular expertise in criminal law who seem to sit only on criminal trials. The rest of us are engaged in on-the-job training.

The fact that Justice Rosenberg survived his experience and went on to enjoy a long and distinguished judicial career does not flatter the system. He succeeded despite the system, not because of it.

Pre-trial conferences and detrimental reliance

In civil actions, some lawyers seem to think they have fulfilled their duty to a client with completion of the pre-trial conference. It is not so.

A crutch or a tool?

Are your pre-trials an excuse for settling or a reason for settling? In other words, do you use pre-trials as a crutch or as a tool?

Civil pre-trials are valuable if they are treated as a tool to uncover weaknesses in your case of which you were unaware. They become a crutch where you blindly rely on the settlement recommendations of the pre-trial judge so as to avoid a trial. I hold to the heretical view that lawyers should not be unduly influenced by a pre-trial. Very good lawyers know their case far, far better than does the pre-trial judge. Such lawyers do not materially benefit from a pre-trial. Typically, lawyers have lived with a file for two or more years before it reaches the pre-trial stage. If your case is scheduled for a 10-day trial, can you meaningfully address the key issues and evidence within the confines of a pre-trial brief? And how can the pre-trial judge, in one hour or so, fairly and reasonably address the resolution of those issues (even assuming the judge has expertise in the relevant area of the law)?

Thanks, Your Honour, but no thanks

I never saw my judicial role in a pre-trial conference to be one of actively seeking a settlement between the parties.[5] Frankly, I was thoroughly disinterested in whether the case was settled.[6] I gave to counsel my views on the issues in dispute and how I thought those issues would be decided at trial. Counsel could figure out for themselves what weight to give to my views and what compromises they were prepared to make. They did not require a judge to determine a midpoint between two positions. Thanks, Your Honour, but no thanks. Anybody with a calculator or a pencil and a scrap of paper could fulfill that function.

All right, show me yours if you wish – but I might not show you mine

When I was in practice, I knew a tough and experienced Welland counsel[7] who once complained to me that he disliked pre-trials because often the judge would identify the weaknesses in his opponent's case and either suggest cures or at least alert the opponent to the need for a cure.[8] I see nothing wrong with that mindset. As I have mentioned, for very good lawyers, pre-trial conferences are of debatable utility. They are merely thumb-twiddling, time-wasting money burners. In a pre-trial conference with a skilled lawyer on one side and a mediocre counterpart, a pre-trial judge effectively becomes co-counsel for the latter.

Why would you reveal your full case on a pre-trial? According to Article 17 under the *Geneva Conventions of 1949*, a prisoner of war is required to provide only his name, rank, serial number and date of birth. There are some pre-trials where you should adhere to Article 17. "Tactics" is not a four-letter word. Litigation is war with rules.[9]

Beware the ambiguity of inscrutable silence

As a lawyer, I assumed judges possessed more knowledge of the law than I did.[10] Why? It was because they sat in inscrutable silence throughout the case and appeared all-knowing. How wrong could I be? Very wrong, it turns out. When I became a judge and sat in silence, it was because I was not comfortably familiar with the area of the law in issue. Why would I ask a question and expose my ignorance? On those occasions when I interrupted and sprayed counsel with questions, it was because I *thought* I knew something. (The exceptions were criminal trials, where I always sat mute. If a fire were to have broken out at the front of the courtroom, I would have remained silent for fear that to do otherwise might upset the carefully crafted strategy of one of the parties.)

How does your judge perform on a muddy track?

Thoroughbred handicappers have the *Daily Racing Form* as their resource for researching the past performances of racehorses under varying conditions. Lawyers have *Quicklaw* and *CanLII* for doing the same in respect of the judges before whom they appear.

How do you gauge the past performance and expertise of your judge? Research. For example, if you checked up on me you would find, I think, that I last presided over a motor vehicle trial in 2003.[11] (This was not by design. It was simply the way the docket unfolded. I had many motor vehicle pre-trial conferences since then, but no trials.) Imagine the learning ladder that I would have to climb if you and I were starting a motor vehicle trial tomorrow. And, if the trial included accident benefits issues, one ladder would not be enough.

In addition to the usual pressures preparing for trial, why should you have the extra burden of my education to worry about? That will always be a problem with generalist judges; and the problem is compounded by the limitations presented by a pre-trial conference.

Tabula rasa: ***A poor business model***

You are well aware (but too polite to mention) that lawyers who never saw, say, a family file or a personal injury file in their law practices are appointed to the bench and preside over such matters. Imagine if this same business model were found in the health care system; we might have the following conversation between a hospital nurse and a doctor recently appointed as head of cardiology:

> Nurse: Congratulations on your appointment.
>
> Doctor: Thank you. Those years of bake sales and fundraising for the hospital paid off for me.
>
> Nurse: The patient in Room 312 is complaining of arrhythmia, palpitations, light-headedness and chest pain. What is your diagnosis?
>
> Doctor: You're asking me? Before I was appointed head of cardiology last Tuesday, I was a urologist. But, gosh, it sounds serious. My neighbour had the same symptoms. He was a nice man. I miss him.
>
> Nurse: Do you have any idea about a diagnosis?
>
> Doctor: It sounds like the heart.
>
> Nurse: That's it? Can you be more precise?
>
> Doctor: I'll have to telephone someone. Do you have the number for Dr. Michael DeBakey?[12]
>
> Nurse: What if something happens to the patient in the meantime?
>
> Doctor: Not to worry. There is a panel of three doctors to whom the patient may appeal, posthumously if necessary.
>
> Nurse: But aren't two of those doctors also former urologists?
>
> Doctor: Good point. And the third used to be a dermatologist.

I once accompanied my wife on a visit to a medical specialist. When the nurse who did the pre-appointment prep-work learned that I was a judge and, as part of my duties, actually presided over medical malpractice cases, she was horrified. "What medical training do you have?" she asked, still horrified. Good question. I explained to her the *tabula rasa* ("blank slate") approach to judging. She was not impressed and remained horrified to the point of distraction. Can you blame her? The only other occupation where people routinely obtain serious employment for which they have no previous experience, learning as they go, is politics.[13]

Well intentioned, but not well informed

If it is your plan to hide behind the recommendations of a pre-trial judge, always be mindful of the need to educate the judge by outlining the legal principles and case law at play in your action so that you receive informed recommendations. As but one example, claims for loss of competitive advantage are common in personal injury actions. In your pre-trial conference briefs, I would like to see you set out the basic governing principles found in the leading cases. No counsel *ever* did this in any personal injury pre-trial conference over which I presided. Surely, from the 858 cases that came up in my last *CanLII* search under "loss of competitive advantage" (at the trial and appellate levels in Ontario), some are useful. If your judge finds all this education to be pedantic and demeaning and says, "You must think that I am an idiot," your reply should be, "No, Your Honour, but we were told that Justice Quinn would be hearing this pre-trial conference."

Judges are not any smarter than you are and although, in an efficient legal system, the judge would always know the law at least as well as counsel, the fact is that, in many cases, I knew less about the law than you knew. I was more well-intentioned than well-informed. In what other field of endeavour do the latter take guidance from the former?

When you step into a courtroom or conference room, educate the judge and you will have a best friend forever. Should you not want to bother doing so, but still require a judicial opinion, bring darts, dice and a Ouija board.

It is a silly system that appoints people to do work for which they have no experience. It is stressful for the judge,[14] it unnecessarily complicates the life of counsel and it can be a disservice to the litigants. Therefore, whether you have a favourable or unfavourable pre-trial conference, it could be immaterial. If your pre-trial judge is inexperienced in the relevant area of practice, you might as well have a urologist conduct the conference; and, if you settle your case on that basis, shame on you.[15]

Forceful, but still not well-informed

The fact that your pre-trial judge may express his or her views forcefully is irrelevant. I know of one judge who adopted the motto, "Sometimes right, sometimes wrong, but never in doubt."

The epitome of futility

Perhaps there is some room for argument over what I have said so far. However, this point is inarguable: Certain issues do not lend themselves to a pre-trial, with the result that the conference is as productive as Question Period in the House of Commons. I will give two examples.

First, liability in a motor vehicle case or in a slip-and-fall case is an issue that the janitor at your courthouse is as equipped as a judge to resolve. Second, credibility issues are a poor fit with a pre-trial. Apart from the difficulty of conveying sufficient information to the pre-trial judge, why would you telegraph at a pre-trial how you intend to discredit a party at trial, thereby giving that party months to prepare and rehearse?

If your pre-trial presents those issues, adjourn the conference and go bowling.

Players and pretenders

You cannot always validly excuse your avoidance of a trial by saying that the case was settled in accordance with the recommendations of the pre-trial judge. It is only where those recommendations reflect the true merits of the case, and where the judge has sufficient expertise, that the excuse is valid.

Some counsel are players and some are pretenders. You cannot be a player if you settle all your cases. A bank loans manager who boasts a zero percent default rate would be fired for not taking sufficient risks. Litigation is all about risks. They must be assessed, reassessed, managed and, sometimes, taken. You cannot become a competent counsel while camped in your office.

Do not fear losing a case. If you win a high percentage of your trials, I suspect you are selling many clients short because you obviously are not litigating the tough cases. Most high-profile counsel in the United States and Canada lose more often than they win. Losing is a part of advocacy – a *big* part. Your willingness, if not eagerness, to go to trial is the most effective weapon in your advocacy arsenal.

Lawyers avoid going to trial for various

reasons. It is important that you honestly identify the basis for your avoidance of the courtroom, because there are both good and bad reasons for doing so. A good reason would be one that takes into account the risks associated with a trial. A bad reason would be fear.[16] The only basis for fear is inexperience, and there is a foolproof cure for inexperience. Another bad reason is laziness. Unfortunately, there is no known cure for laziness.

Why try (cases, that is)?

Try some cases. Be a player.

I assume you do not want to be in the position of having to obtain a Google map to find your way to the courthouse. Apart from that, why should you try cases? I offer several reasons. Although they are obvious, it might be helpful to hear them mentioned out loud.

A professional trifecta

By trying cases with reasonable frequency, you achieve a professional trifecta. You (1) enhance your reputation; (2) protect the interests of your client; and (3) preserve your mental health.

How can you call yourself a trial lawyer if you do not do trials? What does that do to your professional reputation? And how can that be in the best interests of your client? A settlement that does not reflect the risks reasonably associated with taking a case to trial probably is an unreasonable settlement.

Fear snowballs. The longer the gap between your trials, the greater the apprehension and even the fear that results.[17]

I was called to the bar in 1972. Although I had tried several cases in Small Claims Court as an articling student, jury trials were a mystery. I dreaded having my first jury trial. Nothing in my legal education and training had prepared me for a jury trial. And the written precedents of the day (both civil and criminal) were utter garbage compared with the excellent material now available.

I did everything possible to avoid getting stuck with a jury trial. It was a foolish decision, for my anxiety rose to an irrational crescendo. I was drowning in fear.[18] I have no memory of my first jury trial, much like the lone survivor of a plane crash from whose conscious thought the body blocks out all the gory details. Given a second chance, if I were called to the bar on Monday I would arrange a jury trial for Tuesday.

Because advocacy can be learned, it makes sense that watching other counsel argue a motion or try a case will be beneficial. In fact, watching bad lawyers[19] is as enlightening as observing good ones. I rarely see young lawyers linger in motions court after their matter has been heard, and it is equally uncommon to spot such a lawyer serving as a spectator in a trial involving experienced counsel. These are missed opportunities to add to your courtroom toolbox. In 1972, I should at least have sat in on a few jury trials. I have no idea why that did not occur to me at the time.

Taste-test your judgment and analysis

Another reason for taking trials is to periodically test your assessment of what constitutes a reasonable settlement. In doing so, you are honing your judgment and analysis for future settlements. If a chef never taste-tests the food, how does he or she know the dishes are palatable and the correct recipe is being used? A trial is the best way to taste-test your work.

Try steering the bus for a change

Occasionally, a case will present a novel legal issue. What personal price are you prepared to pay to advance the case law and become part of the jurisprudence in your field? Do you not feel even a small duty to your profession? Sorry to hear that.

Are you merely along for the ride? Why not try steering the bus from time to time?[20]

Good news – you are not as important as you think

Inexperienced or otherwise poorly prepared counsel create disorganization and sometimes chaos, but it is difficult to lose a case where the facts are on your side. Injustice is likely to result only where an important witness is not called or a relevant document is not tendered in evidence.

Justice John Sopinka once estimated the importance of counsel to the outcome of a case as follows: at trial, up to 50 percent; on appeal to the Court of Appeal, about 25 percent; and, in the Supreme Court of Canada, 10–20 percent.[21] Thus, you probably are not as important to the case as you think.

A strong case likely will offset your inexperience. Facts should defeat fear.[22]

The young offender grace period

Putting yourself in a position to get early trial experience means you will be doing so at a relatively young age. Judges, even curmudgeons, generally are kind and sympathetic to young, inexperienced counsel.

In the 1970s, the world of fashion suffered a nervous breakdown and I was a willing victim. One morning, I was in motions court in Hamilton. I had been a lawyer for about 12 minutes. I was wearing a green blazer, an orange shirt and a tie that might have glowed in the dark. Mercifully, I have no memory of the colour of my trousers and I can only assume I was wearing shoes. I must have looked like a clown school freshman. The presiding judge did not criticize my physical appearance, but he did chastise Nick Borkovich,[23] a well-known Hamilton lawyer (10 years my senior) who was in court that morning, for wearing a somewhat sporty outfit, and sarcastically asked him when he was due at the yacht club. Much later, Nick was appointed to the bench and, when I subsequently joined him, he never missed an opportunity to complain that it was me the motions judge should have criticized. It was not until I went to the bench and discovered an urge to be protective of young, inexperienced counsel that I realized the motions judge humanely wished to send a message to me about proper courtroom attire without scarring me for life. His Honour had correctly concluded that Nick was better able to shoulder the criticism and it was better to annoy Nick than to scar me.[24]

Young lawyers should have trials early and often, when judicial empathy abounds.

The you-should-know-better phenomenon

Running a trial is not like riding a bicycle (except for the falling-down-and-getting-banged-up part). You can forget.

Senior counsel do not enjoy the same level of tolerance from the bench as that available to junior counsel. It actually is sad to see a senior lawyer conduct a trial in circumstances where his[25] advocacy skills have atrophied. It produces a curious phenomenon: a lawyer who makes mistakes and commits protocol *faux pas* but does so with the panache of someone who does not know what he does not know.

Some final words

Imagine we are on opposite sides of a case. Do you actually think you will get a reasonable settlement offer from me if I know you are an inexperienced or anxious litigator? The truth is that, in fulfillment of the duty to my client (and in furtherance of my predatory nature), I will try to take advantage of your inexperience or anxiety. I will take your lunch money every chance I get (but with a kind word, a smile and civility throughout).

Most counsel do not have enough trial experience. You can attend pre-trial conferences on an hourly basis until you die, but that will not advance your skills as a trial lawyer.

Trial lawyers try cases. Trial lawyers who settle all their cases are social workers.

Declare war on fear.[26] Try your brains out.

Get courtroom experience, even if you must take cases to trial for little or no fees (pick those cases carefully; but *pick* them). Do not view all your files from a financial perspective.[27] Treat some as educational opportunities that will advance your reputation as counsel and may lead to profitable future files.

I must tell you that the quality of advocacy is falling. Although there still are top-notch counsel to be found, they are becoming fewer and the number of mediocre counsel is swelling. Counsel today are as intelligent as their predecessors, but they lack the training and experience to be effective in court.

I was presiding in motions court in St. Catharines a few years ago when a lawyer approached the counsel table as his case was called. He addressed the court by saying, "Hi." How can that happen? How can it possibly happen?[28] Looking back I like to think that, maybe, I was mistaken and he was not a lawyer. Perhaps he was a urologist.

Notes

1. And in a family practice.
2. Bob Rae, *From Protest to Power: Personal Reflections on a Life in Politics* (Toronto: Penguin, 1996), 134.
3. Lyndon Johnson is quoted in *The New York Times* (October 31, 1971), when speaking about keeping J Edgar Hoover (1895–1972) as FBI chief: "It's probably better to have him inside the tent pissing out, than outside the tent pissing in."
4. This does not mean I am opposed to lawyers from a general practice being appointed to the bench. After all, I was such a lawyer. My concern is with continuing as a generalist once on the bench.
5. I was not appointed to the Superior House of Mediation.
6. I was not employed on a piecework basis.
7. Earle A Blackadder, Q.C.
8. His complaint came after a mutual pre-trial wherein the judge had suggested a cure for a flaw in my case in circumstances where I had not even noticed the flaw, let alone crafted the cure (and Mr. Blackadder had been aware of both).
9. Please. Enough with the raised eyebrows.
10. Okay, okay, there were one or two notorious exceptions.
11. *Mercier v Royal & Sunalliance Insurance Co of Canada*, 2003 CanLII 21638 (ON SC); aff'd (2004), 72 OR (3d) 94 (CA), in which I commented that anyone able to understand the world of statutory accident benefits should be entitled to claim bilingual status.
12. Dr. Michael DeBakey (1908–2008) was a Lebanese-American cardiac surgeon, scientist and medical pioneer.
13. And how is that working out?
14. If you want to witness pure fear, look into the eyes of a judge on the morning of his or her first jury trial (civil or criminal).
15. I have just noticed that urology has assumed a curious prominence in this article. I will look into that.
16. Are you uncomfortable hearing that word? Pity.
17. To this point, I have used the word "fear" six times.
18. Seven times.
19. In this article, I am using "lawyer" and "counsel" interchangeably.
20. The overuse of metaphors is a criminal offence. My sentencing hearing is tomorrow.
21. See *The Advocates' Society Journal*, March 1990 at 3.
22. Eight times.
23. (1935–2017).
24. Today, if you were to walk into my clothes closet you would think you had suffered detached retinas because my wardrobe consists of all blacks and greys. Too late.
25. I have not used the pronoun "her" because I have never encountered an inexperienced senior female counsel.
26. Nine times.
27. I am aware that litigation is expensive for clients. "I was never ruined but twice: once when I lost a lawsuit and once when I won one": Voltaire, pseudonym of François-Marie Arouet (1694–1778).
28. I suppose it could have been worse. He might have greeted me with, "Hi, dude."

If we can't trust witnesses, can we trust trials?

Matthew Milne-Smith

Trials are overrated.

Heresy, I know – particularly so when appearing in *The Advocates' Journal*. But hear me out.

A growing body of scientific research indicates that human beings are not very good lie detectors. Drawing on this research, Paul Fruitman persuasively argued in the Summer 2017 issue of this *Journal* that "[o]ur system trusts that witnesses who testify credibly and confidently are telling the truth. It appears that trust is misplaced."

Nor is this problem limited to intentionally untruthful witnesses. Even well-intentioned witnesses who take seriously their oath or affirmation to tell the truth fall prey to reconstructing the past to fit their desired narrative. Every counsel can certainly recall the client or witness who forcefully and credibly insists on a particular version of events, only to be contradicted by contemporaneous documents or physical evidence.

It is difficult to overstate the significance of this problem for our adversarial system of justice, founded as it is on parties leading oral evidence from witnesses, and triers of fact making assessments of credibility based on that evidence. If cases can turn on credibility assessments, and human beings' ability to assess credibility is poor, what does that say about the quality of justice? Unless triers of fact have an innate or acquired ability to assess credibility that far exceeds that of the population at large, the implications are troubling.

There is, of course, an alternative means of adjudicating civil disputes on their merits: summary judgment. Traditionally, the bench and bar have been extremely reluctant to decide cases by way of summary judgment, wary of denying litigants their proverbial day in court. Summary judgment was perceived as a less desirable form of justice reserved for cases so obvious that a proper trial was unnecessary. Trials were necessary for anything but the easiest cases. However, if trials are in fact overrated as a means of determining the

truth and providing justice, our veneration of them may be misplaced.

As a trial lawyer, I do not want to see trials become even less frequent than they already are. Trials are to litigators what the stage is to actors. All the grinding work of preparation is directed to being ready for trial, or at least to the superior bargaining position that comes from being ready for trial. For most of us, trial advocacy is no small part of why we chose to become litigators. Moreover, the difficulty of training young lawyers in trial advocacy has become almost trite. It grows more difficult by the day.

With all that said, trials are dreadful for clients. They are expensive, lengthy and risky. It can take years to get to trial. Our civil justice system is perpetually short of judges, courtrooms or both. The capacity of the civil system to try cases in a timely manner is likely to be strained even further by the demands of the criminal justice system in light of the Supreme Court of Canada's decision in *R. v. Jordan*.

Trials are to litigators what the stage is to actors.

A long-standing reluctance to embrace summary judgment

The historical rules and jurisprudence surrounding summary judgment reflected the veneration of trials as a means of resolving civil disputes. Before 1985, summary judgment was available to plaintiffs only on enumerated claims for a debt or liquidated demand. A defendant could never seek summary judgment, no matter how spurious the case.

The 1985 amendments to the *Rules of Civil Procedure* implemented a modest expansion of summary judgment. Rule 20 permitted defendants as well as plaintiffs to seek summary judgment, but only where the motions judge was satisfied that there is no "genuine issue" for trial with respect to a claim or defence.

The key words were "genuine issue" for trial. Summary judgment was not conceived as a true alternative to trial. Rather, reflecting the traditional skepticism of summary judgment, it was a measure available only where a trial would essentially be a waste of time. There are not many cases where there is *no* genuine issue for trial. Even in cases that turn on the interpretation of a contract, which one might expect would lend themselves to summary adjudication, it is relatively easy to generate a genuine issue for trial given the evolution of the law to recognize that contracts must always be interpreted in light of their surrounding circumstances.

The jurisprudence on summary judgment reflected the skeptical approach embodied in the Rules. While Justice Henry's suggestion in *Pizza Pizza Ltd. v. Gillespie* that the motions judge was to take "a hard look at the merits" gave hope to proponents of summary judgment,[1] those hopes were relatively short-lived. Eight years later, in *Aguonie et al. v. Galion Solid Waste Material Inc.*, the Court of Appeal held that, on a motion for summary judgment, "the court will never assess credibility, weigh the evidence, or find the facts." Rather, the court's role was limited to "assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial."[2]

Recent reforms encouraging summary judgment

In 2007, former Associate Chief Justice Coulter Osborne released his report on making the civil justice system in Ontario more accessible and affordable. One section of his report was dedicated to summary judgment and made a series of recommendations that were ultimately incorporated into the 2010 amendments to the *Rules of Civil Procedure*. Chief among these amendments were ones specifically empowering a judge hearing a motion for summary judgment to (1) weigh the evidence; (2) evaluate the credibility of a deponent; and (3) draw any reasonable inference from the evidence.[3] Critically, however, the motions judge was not to exercise those powers where it was "in the interests of justice for such powers to be exercised only at a trial."

While the initial jurisprudence under the new Rule 20 adopted a more liberal approach to summary judgment, the Court of Appeal quickly reversed that trend with its decision in *Combined Air Mechanical Services Inc. v. Flesch* ("*Combined Air*)."[4] The court's interpretation of whether it was "in the interests of justice" to require a trial was extremely broad and traditional. Echoing the Supreme Court of Canada's paeans to the trial process in standard of review cases such as *Housen v. Nikolaisen*,[5] the court noted that the trial judge "is a trier of fact who participates in the dynamic of a trial, sees witnesses testify, follows the trial narrative, asks questions when in doubt as to the substance of the evidence, monitors the cut and thrust of the adversaries, and hears the evidence in the words of the witnesses."[6]

The Court of Appeal was just as deferential to the role of trial counsel. The court noted that the order in which witnesses are called, the manner in which they are examined and cross-examined, and how the introduction of documents is interspersed with and explained by the oral evidence, is of significance. This "trial narrative" may have an impact on the outcome.[7]

The poetry of the trial process was juxtaposed with the prose of summary judgment:

> The deponents swear to affidavits typically drafted by counsel and do not speak in their own words. Although they are cross-examined and transcripts of these examinations are before the court, the motion judge is not present to observe the witnesses during their testimony. Rather, the motion judge is working from transcripts. The record does not take the form of a trial narrative. The parties do not review the entire record with the motion judge.[8]

Taking these factors into account, the court concluded that summary judgment was available beyond the traditional categories only where "the full appreciation of the evidence and issues that is required to make dispositive findings can be achieved by way of summary judgment."[9]

The Supreme Court reinvigorates summary judgment

The Court of Appeal for Ontario's decision was short-lived. On appeal, the Supreme Court of Canada overturned the "full appreciation test" as being too restrictive and recognized that summary judgment could be "a proportionate, more expeditious and less expensive means to achieve a just result than going to trial."[10]

While the result was welcome, the decision still represented only a limited and conditional embrace of summary judgment that emphasized its expediency and cost-efficiency, not its accuracy. The Supreme Court framed its decision by adopting The Advocates' Society's submission that, given the cost of trial, "the trial process denies ordinary people the opportunity to have adjudication."[11]

Notably, the Supreme Court continued to presume a "tension between accessibility and the truth-seeking function."[12] The more expansive (and expensive) procedures associated with a trial were presumed to be superior at serving courts' truth-seeking function.

The Supreme Court's judgment in *Combined Air* was a welcome corrective to the Court of Appeal's veneration of the trial process. Welcome as it was, the Supreme Court's decision still did not accept summary judgment as a co-equal method of adjudicating cases alongside trials. Rather, summary judgment was effectively acknowledged as merely being "good enough" in light of the goals of proportionality and efficiency.

Not just "good enough"

My suggestion is that, in many civil cases, summary judgment is not just "good enough"; it is "as good as," or "better than," for at least three reasons.

First, as Paul Fruitman's article pointed out, human beings (which, last I checked, included judges) are not nearly as good as we think we are at assessing credibility. By placing so much weight on assessments of credibility, trials are prone to turn not on which side's witnesses are in fact truthful, but on which are successful in projecting truthfulness. These two are often not the same thing.

Second, particularly in commercial cases, the contemporaneous documentary record should usually be far more important than witnesses' recollections (or, more cynically, their *post hoc* rationalizations). This is most obviously true in contract cases, where the witnesses for each side miraculously just happen to recall that the factual matrix was most consistent with their preferred interpretation of the contract. These *post hoc* rationalizations are far less probative than what the relevant parties actually said and did in the contemporaneous documents.

Third, the role of counsel in drafting affidavits is a feature, not a bug. It is hard to reconcile the Court of Appeal for Ontario's distaste for this aspect of summary judgment with its praise for counsel's role in crafting a "trial narrative." The fact is, the skill of counsel will play a role whichever method of adjudication is chosen. If anything, however, the ability of skilful counsel to win a losing case is somewhat mitigated in summary judgment, where the focus is properly on the documents rather than on the witnesses.

An extreme example of a case for summary judgment

The expanded approach to summary judgment that I propose is not limited to straightforward cases involving a handful of documents. It could and should be used in even complex commercial cases. For example, one of the more prominent trials in recent years was the so-called "allocation dispute" arising out of the insolvency of Nortel. Debtor groups from Canada, the United States and EMEA (Europe, the Middle East and Asia) were fighting over the allocation of approximately $7 billion in proceeds from the sale of Nortel's worldwide assets.[13]

Nortel was a unique trial. It was tried in a joint session of the Superior Court of Justice, Commercial List in Toronto and the US Bankruptcy Court for the District of Delaware. Justice Newbould presided in Toronto, and Judge Gross in Delaware. As a result of the joint nature of the proceedings, the parties engaged in American-style depositions, conducting more than 125 depositions of fact and expert witnesses located around the world over a span of several months. This was followed by a 21-day trial and then three days of argument. The parties submitted evidence-in-chief at trial principally by way of affidavits, with brief oral examinations-in-chief followed by full cross-examinations.

At the end of all of this litigating, most witnesses proved to be of little assistance. Much of the evidence at trial consisted, to the obvious and understandable frustration of the trial judges, of witnesses' self-serving interpretations of contracts entered into years or even decades earlier. Even less helpful were cross-examinations that consisted largely of lawyers arguing with witnesses concerning their interpretations of the documents.

Typical of Justice Newbould's frustration with witnesses giving evidence about their interpretations of the relevant agreements was the following description of the parties' position on the Master R&D Agreement (MRDA), the interpretation of which was central to the dispute:

> There was a great deal of evidence led by the U.S. and EMEA interests as to the subjective views of the witnesses, mostly tax personnel, regarding the rights of the parties under the CSA or MRDA or what the witnesses understood the language to mean, or in one case as to the witness's understanding of what others understood the documents to mean. Apart from the latter being inadmissible hearsay, all of this evidence was not admissible as it amounted to subjective views as to the meaning of an agreement. Nor was it admissible under the factual matrix rule permitting objective surrounding circumstances at the time of the execution of the agreement to be considered, and I do not consider it. For example, what Mr. Henderson thought about the rights under the CSA license, that he copied from an earlier version of the CSA, or what others thought the MRDA meant or what they thought the intent of it was is not to be taken into account. See *Sattva*, *supra*, at para. 59.[14]

Throughout the trial and again in his Reasons, Justice Newbould repeatedly referred to the parties' subjective views of the evidence as being inadmissible or irrelevant.[15] Ultimately, Justice Newbould's conclusion was that he did "not consider the surrounding circumstance or factual matrix evidence to provide much clear assistance in construing the meaning of the terms in the MRDA."[16] Even expert evidence was occasionally criticized as being an "inadmissible subjective view as to how the MRDA license should be interpreted."[17]

Where Justice Newbould did give effect to the evidence of witnesses, it was usually on relatively uncontroversial subjects, such as the fact that the MRDA was driven by tax concerns,[18] that Nortel assigned all worldwide patents to one corporate entity as a matter of best practices[19] or that the majority of Nortel's bonds were issued without guarantees.[20] In addressing the important issue of whether a substantive consolidation of worldwide assets would be permissible, Justice Newbould emphasized that the relevant evidence was "clear beyond peradventure," and "clear and uncontested".[21]

In the result, Justice Newbould and Judge Gross agreed on a *pro rata* allocation that was not even advocated by any of the three main debtor groups; rather, it was advanced as a primary argument only by counsel representing Nortel's UK pensioners. No witness gave testimony indicating that a *pro rata* allocation was required by the agreements between the parties; rather, the evidence led in support of this outcome was simply that nothing precluded a *pro rata* allocation, and it was a just solution in the circumstances.

Given this result, it raises the question of whether the extensive trial and pre-trial procedures in Nortel were even necessary. The deposition transcripts were barely referred to at trial or in the judgments. Even the trial evidence was typically relied on only where it was uncontroversial or uncontradicted. Far more important were the documents themselves, and the judges' overall assessment of what was fair in all the circumstances in light of the relatively undisputed underlying facts. Summary judgment would likely have achieved the same result

I believe the same is true in many commercial cases. The evidence of the witnesses is rarely probative of anything unless supported by the contemporaneous documents. Commercial cases are not like, for example, personal injury cases where only the disputed evidence of eyewitnesses can determine what actually happened, and who did what. In commercial cases, the documents are the most important thing, and the documents are presented just as well by summary judgment as they are by traditional trial. Indeed, one might argue they are better presented by summary judgment, without the distracting spectacle of witnesses putting their gloss on the documents.

A process already begun

The move toward summary judgment–style procedures has in fact already begun in various forums. On the Commercial List, it is now routine for evidence-in-chief to be given principally by way of evidence-in-chief.[22] Parties never waste time proving documents through witnesses; a document brief is routinely agreed on in advance of trial.

Arbitration is another forum where summary judgment–style procedures have become routine. Parties routinely submit evidence by way of affidavits, with minimal cross-examinations in court. Rare is the commercial litigator who has not tried any number of cases in this manner.

Finally, the leave-to-proceed test for securities misrepresentation cases under Part XXIII.1 of the *Securities Act* is, in essence, a summary judgment test. While it of course is just a test for whether a case can actually proceed to a trial, if the defendant prevails, it is the final adjudication on the merit of a claim on behalf of, typically, thousands of class members.

Notes

1. (1990), 75 OR (2d) 225 at 237 (Gen Div).
2. (1998), 38 OR (3d) 161 at 173 (CA).
3. *Rules of Civil Procedure*, Rule 20.04(2.1).
4. 2011 ONCA 764.
5. 2002 SCC 33.
6. *Combined Air*, *supra* note 4 at para 47.
7. *Ibid* at para 48.
8. *Ibid* at para 49.
9. *Ibid* at para 50.
10. *Hryniak v Mauldin*, 2014 SCC 7 at para 4.
11. *Ibid* at para 24.
12. *Ibid* at para 29.
13. The author acted as Canadian counsel to the EMEA Debtors.
14. *Re Nortel Networks Corporation*, 2015 ONSC 2987 at para 119.
15. *Ibid* at paras 120–121.
16. *Ibid* at para 157.
17. *Ibid* at para 166.
18. *Ibid* at paras 174, 176.
19. *Ibid* at para 196.
20. *Ibid* at para 230.
21. *Ibid* at paras 222, 223. While Justice Newbould did not order a substantive consolidation or conclude that it was necessary to effect the resolution of the case, he did find that, if his order did amount to a substantive consolidation, it was permissible.
22. *Re Nortel Networks Corporation (Re)*, 2015 ONSC 2987; *The Catalyst Capital Group Inc v Moyse*, 2016 ONSC 5271; *Husky Injection Molding Systems Ltd v Schad*, 2016 ONSC 2297.

Internal investigations and privilege:

Encouraging voluntary provision of impressions, explanations and interpretation of events

Alexander M. Gay and Kenneth Jull

The views expressed in this article are those of the authors and do not necessarily represent those of Mr. Gay's employer, the Department of Justice, or those of Gardiner Roberts, where Mr. Jull is counsel, or those of the Competition Bureau, where Mr. Jull is presently on an interchange.

In this article, we propose a dichotomous approach to privilege in internal investigations by a corporation. The proposed dichotomy respects the division between factual evidence versus impressions, explanations or interpretation of events.

If the company chooses to reveal the results of the internal investigation to the authorities, it may benefit from this disclosure by way of a deferred prosecution agreement in the United States, or a reduced sentence in Canada. The government benefits from the resources spent by the corporation on the investigation, which saves the government money. In some cases in the "zone of non-discovery," the government benefits from discovery of the event itself. For this process to work, it is essential that the investigation be thorough and that it explore the causes of non-compliance and alternative versions or explanations for it. Privilege allows for a comprehensive and objective investigation.

When serious non-compliance or violations of the law are discovered internally, the simple fact is that the reason for the violation is often not that simple. There are often complex reasons and potential alternative views of the reasons for the non-compliance or even debate about the legalities of the issue. To take a hypothetical example, suppose the expenditure of $5 million for a capital project is a smokescreen for a bribe to a foreign public official. It is easy to see this is an illegal act. What may be unclear is whether senior officers in the organization were aware it was a disguised bribe, or whether they were unaware of a scheme to hide the bribe by those within the organization who created the scheme. Complex levels of analysis are required to determine corporate criminal liability and to determine whether senior officers may have failed in their due diligence by missing red flags. Moreover, timeline analysis is important to evaluate when senior officers became aware of the non-compliance and what steps they took and when.

Our proposed approach would take a broad view of privilege as covering the impressions, explanations or interpretation of events by individuals interviewed in internal investigations by legal counsel.

We recognize that privilege claims may be overbroad. Document review by junior lawyers who have little experience may result in overbroad claims, as younger lawyers may err on the side of caution by claiming privilege. In some rare cases, corporations may attempt to hide embarrassing documents or emails by claiming litigation privilege or attempting to cloak them with solicitor– client privilege by copying counsel routinely. Accordingly, our proposed approach would take a much stricter stance in evaluating claims of privilege associated with factual evidence and documentary evidence, including emails.

In our view, the mechanism of a third-party referee to assess the records, who would then report to the court, is a good hybrid solution that balances the values underlying privilege but at the same time ensures that claims for privilege are not overbroad or not substantiated by the proper legal tests.

Canadian cases on privilege in internal investigations: Grey areas

The Alberta Court of Queen's Bench ruled in *Alberta v. Suncor Energy Inc.* (*Suncor*) that an internal investigation into a workplace accident was privileged, and thus protected from disclosure. The court found that, notwithstanding an Alberta *Occupational Health and Safety Act* (OHSA) requirement to carry out an investigation and prepare a report, certain information and records created or collected during the investigation were protected by litigation and legal advice privilege.

In *Suncor*, an employee was killed in a workplace accident. On the day of the accident, Suncor reported the incident under the OHSA. It also began an internal investigation under the direction of in-house counsel. Occupational Health and Safety (OHS) staff also conducted an investigation, during which they collected records and interviewed approximately 15 witnesses. Under the OHSA, Suncor itself had a statutory obligation to "carry out an investigation into the circumstances surrounding" the accident and prepare a report outlining these circumstances and the "corrective action, if any, undertaken to prevent a recurrence." Notwithstanding the furnishing of the report to OHS and the provision of the names of all persons interviewed as well as those making up Suncor's internal investigation team, OHS demanded additional records from Suncor, including copies of witness statements and records taken or collected by Suncor's investigative team. Suncor refused, citing litigation and legal advice privilege.

The court held that Suncor could assert that the "dominant purpose" for the collection of information was to prepare for litigation, stating at paragraphs 45–46:

> [A]lthough Suncor has a statutory obligation under the *OHS Act* to conduct an investigation and prepare a report on the Accident for the Ministry/OHS, that obligation does *not* foreclose or preclude Suncor's entitlement to litigation privilege for all purposes, particularly if the evidence demonstrates that Suncor had taken deliberate steps to cloak documents and information collected in the process of the investigation with the garb of privilege in anticipation or contemplation of litigation.
>
> Denying Suncor its entitlement to claim litigation privilege over information created and/or collected during an investigation, because of an overlapping statutory obligation to investigate and report, would prejudice Suncor's right to defend itself against any potential civil actions, criminal prosecutions or regulatory claims. That result would defeat the policy justification and purpose of the law in relation to litigation privilege. … [Italics in original.]

With respect to legal advice privilege, the court found that Suncor demonstrated it sought and received legal advice from internal and external counsel. In considering whether the specific records over which Suncor asserted litigation and legal advice privilege were in fact protected, given the volume of records at issue, the court ordered Queen's Bench case management counsel to act as a referee in assessing the records. The court would then consider the referee's recommendations in finally adjudicating on the records.

In our view, the mechanism of a third-party referee to assess the records, who would then report to the court, is a good hybrid solution that balances the values underlying privilege but at the same time ensures that claims for privilege are not overbroad or not substantiated by the proper legal tests. Law firms will typically assign more junior lawyers to perform document review and claims of privilege, with elevation to senior lawyers only at later stages. The process of review by a court ensures that the proper legal tests are being applied in a transparent manner.

Commentators have argued that *Suncor* broadens and strengthens the ability of companies to keep internal investigations privileged, even in the face of a statutorily mandated investigation.

On July 4, 2017, the Alberta Court of Appeal upheld the privilege found in *Suncor* and endorsed the mechanism of a referee, but required a more detailed document by document analysis and review:

> The chambers judge erred in finding that the dominant purpose of the internal investigation was in contemplation of litigation and therefore every document "created and/or collected" during the investigation is clothed with legal privilege. Suncor cannot, simply by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" so as to clothe them with solicitor-client or litigation privilege. Where a workplace accident has occurred, and the employer has statutory duties under sections 18 and 19 of the *OHSA* and simultaneously undertakes an internal investigation, claiming legal privilege over all materials derived as part of that investigation, an inquiry is properly directed to a referee under Rule 6.45 to determine the dominant purpose for the creation of each document or bundle of like documents in order to assess the claims of legal privilege. Moreover, the Court of Appeal required that Suncor must independently distinguish the nature of the legal privilege claimed, and the evidentiary basis for the claim, and granted Alberta the right to make submissions before the referee.

A quick review of Canadian cases reveals a balancing test applied to individual fact situations. Canadian courts have been reluctant to recognize a self-audit privilege. With respect to solicitor–client advice in the context of business decisions, the Canadian courts have developed a balancing test as set out in *Pritchard*.[1] Each case is of course factually driven, but in some cases Canadian courts have protected lawyers' interview notes as created for the dominant purpose of anticipated criminal litigation, such as reviewed in the *Dunn* case.[2] The Ontario Court of Appeal reaffirmed the importance of solicitor–client

privilege in reports prepared in anticipation of litigation in the case of *R. v. Bruce Power Inc.*[3]

The grey areas of interpretation of privilege are a temptation to suggest a bright-line test that would be easier to apply. The UK courts have recently attempted to create a bright-line test that has created some considerable controversy.

Recent developments in the UK

On May 8, 2017, the English High Court of Justice handed down judgment in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* ("*SFO v. ENRC*"), which could significantly limit the application of litigation privilege in criminal investigations.[4] The judgment is the first judicial consideration of litigation privilege in the context of voluntary disclosures to the Serious Fraud Office (SFO). Commentators have warned that, if upheld and broadly applied, the judgment could significantly limit the circumstances in which a company conducting an internal investigation prior to initiation of formal criminal proceedings could successfully claim litigation privilege over work product generated during the investigation.[5]

Between August 2011 and April 2013, the SFO and Eurasian Natural Resources Corporation Ltd (ENRC), a multinational natural resources company headquartered in the UK, were engaged in a dialogue over allegations of fraud, bribery and corruption in Kazakhstan and an African country. During this period, ENRC was conducting internal investigations and transactional due diligence into the allegations under the supervision of an external law firm. In April 2013, the SFO terminated the discussions and began a criminal investigation into the activities of ENRC. Under section 2(3) of the *Criminal Justice Act 1987*, the SFO issued notices against ENRC and various other third parties to compel the production of documents. On receipt of the notices, ENRC contended that four categories of documents were privileged and would not produce them.

Category 1: Interview notes prepared by ENRC's external legal counsel of interviews of numerous individuals, including former and current employees of ENRC, and the officers of ENRC and its subsidiaries and suppliers, relating to the events being investigated. The notes were created before the SFO began the criminal investigation in April 2013. ENRC claimed these documents were subject to litigation privilege, as the dominant purpose of the interviews was to enable ENRC's external legal counsel to obtain relevant information to advise ENRC in connection with the anticipated adversarial criminal litigation. Alternatively, ENRC claimed the documents could be characterized as lawyers' work product, and disclosure of such would reveal the trend of legal advice being provided to ENRC.

Category 2: Documents generated by forensic accountants during the same period as part of a books and records review that sought to identify systems and controls weaknesses and potential improvements. ENRC claimed the documents were protected by litigation privilege as the "dominant purpose of the reports was to identify issues which could likely give rise to intervention and prosecution by law enforcement agencies, with a particular focus on books and records offences, and to enable ENRC to obtain advice and assistance in connection with such anticipated litigation."

Category 3: Documents indicating or containing the factual information presented by ENRC's external legal counsel to the ENRC board in relation to the investigation. ENRC's primary case was that these documents were subject to legal advice privilege.

Category 4: Documents referred to in a letter sent to the SFO, including forensic accountant materials as outlined in Category 2 and two emails between ENRC's head of mergers and acquisitions (M&A) and senior ENRC executives. The head of M&A was a qualified Swiss lawyer. ENRC claimed that litigation privilege applied to the forensic accountant materials and that the head of M&A, as a qualified lawyer, was acting in the role of a lawyer and therefore subject to legal advice privilege.

The court held that privilege applied only to the Category 3 documents, which were subject to legal advice privilege. ENRC's other claims of privilege were rejected.

Litigation privilege

In rejecting ENRC's claims for litigation privilege, Justice Andrews considered the early stage of the investigation such that a mere suspicion of a potential compliance problem, even where the company has opted to engage external experts to conduct an internal investigation, is insufficient to give rise to a reasonable contemplation of prosecution. At this early stage, the court was of the view that it cannot be concluded that the real risk of an investigation translates to a real risk of a prosecution.

The court rejected the argument that litigation privilege should extend to third-party documents created to obtain legal advice on how best to persuade the SFO to decline prosecution.

Moreover, the court held that, even if ENRC could satisfy the requirement that prosecution had been reasonably in contemplation, the documents over which litigation privilege was claimed were not created with the dominant purpose of being used in the conduct of the litigation.

Legal advice privilege

Justice Andrews accepted that, regarding the Category 3 documents, the presentations prepared by ENRC's external legal counsel for the specific purpose of giving legal advice to ENRC were privileged, even if they referred to factual information or findings. However, in rejecting ENRC's claims that legal advice privilege applied to the other disputed documents, Justice Andrews honed in on the factual nature of the investigation, in the following respects:

- Fact-finding interviews by external legal counsel were not part of the confidential lawyer–client relationship.
- There was no evidence that any of the people interviewed were authorized to seek and receive legal advice on behalf of ENRC and the communications between the individuals and ENRC's external legal counsel were not communications in the course of conveying instructions to counsel on behalf of the corporate client.
- Regarding the communications involving ENRC's head of M&A, at the time these documents were created, he was acting as a "man of business" as opposed to a lawyer. Substantial weight was put on the nature of the head of M&A's role, which was primarily focused on strategic planning and the execution of transactions, as opposed to being legally focused.

The judgment in *SFO v. ENRC* has generated a lot of discussion. Commentators have predicted the judgment could have a dramatic impact on the practice of internal investigations in the UK, particularly those undertaken to address whistle-blower allegations or compliance concerns absent a formal inquiry from an external regulator.[6]

Some Canadian commentators[7] have described the decision in *SFO v. ENRC* as "both surprising and of concern to corporations who may find themselves subject to potential regulatory investigation."[8]

The documents generated during investigations of ENRC included notes from interviews of 85 individuals undertaken by ENRC's counsel. Best practice for companies that become aware of allegations of wrongdoing has long been to conduct an internal investigation into the allegations. Canadian commentators have noted the distinction between facts and lawyers' notes with privileged information:

> In Canada, most legal experts who pursue internal investigations on behalf of clients agree that facts learned or documents gathered in the course of an investigation are not privileged even if the investigation is pursued by counsel. However, lawyers' contemporaneous notes and work product that contain or reflect bona fide privileged information ought to be protected. For this reason the way an investigation is structured at the outset, and the purpose for that setup, is crucial. The High Court's decision is currently under appeal. Companies and practitioners (both in the UK and Canada) will be monitoring the decision closely on appeal. Should it be upheld, companies will have to be prepared for the possibility that their counsel's work product in carrying out internal investigations may make its way into the public record. This could have significant consequences for the manner in which such investigations are carried out going forward.[9]

If counsel's work product and interview notes in an internal investigation will become public, this development will create a new risk dynamic. A company may decide it is not worth doing an internal investigation if the results are automatically turned over to the authorities. On the flip side, the government may offer fewer deferred prosecution agreements if it can obtain information of internal investigations without making that offer. In short, the decision in *SFO v. ENRC* may put a chill on dialogue with the regulator, which we think would be unfortunate for both industry and the government.

Other Canadian commentators have viewed the decision in *SFO v. ENRC* from the lens of the government regulator.[10] A prosecution cannot be started unless and until the prosecutor is satisfied there is a sufficient evidential basis for prosecution and the public interest test is met. The challenge for the prosecution as it relates to litigation privilege is in establishing the date on which it can be said it had sufficient evidence to begin a proceeding.[11] It is speculated that corporations may decide to wait until there is an actual criminal prosecution before conducting an internal investigation in order to receive the benefit of litigation privilege.

There is some recognition in Canadian courts of the need for a "zone of privacy" when a party or parties are facing an investigation in a regulatory context where the potential penalty is an administrative monetary one. This point was made in *TransAlta Corporation v. Market Surveillance Administrator*,[12] where the Alberta Court of Appeal held there is an obvious need for legal advice and a zone of privacy contemplated by litigation privilege, when a party or parties are facing an investigation that could result in an administrative monetary penalty (AMP).

A dichotomous approach

In this section, we propose a dichotomous approach to privilege in internal investigations. The proposed dichotomy respects the division between factual evidence versus impressions, explanations or interpretation of events.

The need for candid impressions, explanations or interpretation of events

One of the authors of this article has experience with internal investigations that may provide insight into the process.

If senior officers or employees fear that

everything they say in an internal investigation interview will be provided to the authorities, they are not likely to volunteer impressions, explanations or interpretation of events. They may discuss the bare facts, but they may not volunteer nuances or their own thoughts and impressions that are important for providing insight into the reasons for a failure of non-compliance.

During a corporate internal investigation, employees will be advised that the interview is privileged, but the privilege is held by the corporation (or audit committee) performing the internal investigation. The privilege protects communications between client and lawyer, but does not protect the facts underlying the communications.[13]

The employee is told the corporation (or audit committee) may choose to waive this privilege and disclose the results of the investigation to authorities. This warning is commonly referred to as an "Upjohn" warning.[14]

If employees or senior officers believe the results of internal interviews will be turned over to the authorities, it is likely they will be much more circumspect in interviews or may seek legal advice and choose not to co-operate at all.

Any good investigator knows that a basic version of the facts tells only the first layer. Multiple layers and explanations arise only from insight into subjective factors such as motive, personality, opportunity and self-reflection. The truth may require an employee or senior officer to be critical of persons in authority above them, or of the systems in place in the organization. If early impressions, thoughts and insights into these factors are not privileged in an internal investigation, it is not likely individual officers will be forthcoming. The result will be an incomplete picture of what really happened.

A contrary argument might be that employees will be reluctant to tell the whole truth once they hear the Upjohn warning and realize it is not their decision about whether privilege may be waived. It might be asked, from the employees' point of view, what is the difference between the notes being turned over to authorities voluntarily by the company and the notes being compellable and available to the authorities? The answer, in our view, is that a deferred prosecution agreement may also protect individuals from prosecution (subject to the Yates memo approach[15]), and counsel for an employee will likely advise them to co-operate if they intend to remain employed. If the results of the interview will not be protected in any way, counsel for the employee may give different advice.

The risk of documents being hidden under the cloak of privilege

We recognize that privilege claims may be overbroad. Document review by junior lawyers who have little experience may result in overbroad claims, as younger lawyers may err on the side of caution by claiming privilege. More senior lawyers are not immune from pressures from clients to make broad claims of privilege and force government regulators to challenge those claims. In some rare cases, corporations may attempt to hide embarrassing documents or emails by claiming litigation privilege or attempting to cloak them with solicitor–client privilege by copying counsel routinely.

Accordingly, our proposed approach would take a much stricter stance in evaluating claims of privilege associated with factual evidence and documentary evidence, including emails. Regulators should not be afraid to challenge claims of privilege in a court. There must, however, be a transparent mechanism to ensure that the court is not tainted by the privilege review.

A referee

As noted, in *Alberta v. Suncor Energy Inc.*[16] the court ordered Queen's Bench case management counsel to act as a referee in assessing the records. The court would then consider the referee's recommendations in finally adjudicating on the records. The challenge is in devising a mechanism where a third-party referee will be able to assess the documents without necessarily waiving privilege. A court may order a party to provide the information to an independent judge of the same court, who will then be able to report to the presiding judge on the bona fides of the claims. The parties may also come to an agreement, with the blessing of the court, to allow a third party to review the documents for privilege claims, without destroying privilege claims. A limited waiver to serve a specific requirement is always possible. The challenge for counsel is in devising a process that will allow the privilege claims to survive the review. Also, counsel has to keep in mind that there are some privilege claims, such as cabinet confidences or national security claims, that cannot be viewed by the court and for which a third-party referee may not be a solution.

In our view, the mechanism of a referee to assess the records, who would then report to the court, is a good hybrid solution that balances the values underlying privilege but at the same time ensures that claims for privilege are not overbroad or not substantiated by the proper legal tests.

Notes

1. *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809 at para 19.
2. *R v Dunn* (2012), 101 WCB (2d) 264, 2012 ONSC 2748 (Ont SCJ).
3. *R v Bruce Power Inc* (2009), 245 CCC (3d) 315 (Ont CA).
4. Gary DiBianco & Elizabeth Robertson, "English Court Questions the Application of Litigation Privilege in Criminal Investigations," Skadden Arps Slate Meagher & Flom LLP (London, UK: memorandum, 17 May 2017). (*Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB).)
5. *Ibid*.
6. *Ibid*.
7. Lawrence E Ritchie, Kevin O'Brien & Malcolm Aboud,
"UK Court Holds Counsel's Interview Notes During Internal Investigation Are Not Privileged"; online: <http://www.lexology.com/library/detail.aspx?g=001830df-1de6-43d9-81c6-d4550d46c337>.
8. *Ibid*.
9. *Ibid*.
10. Alexander Gay, "Does Litigation Privilege Always Apply to Internal Investigations?" (19 May 2017) CBA National Magazine.
11. *Ibid*.
12. *TransAlta Corporation v Market Surveillance Administrator*, 2014 ABCA 196 (CanLII) at para 40.
13. Grace M Giesel,"Upjohn Warnings, the Attorney–Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony," 65:109 University of Miami Law Review at 127.
14. *Ibid*.
15. In the "Yates Memo," the US Attorney General stated that, absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals: United States Department of Justice, Office of the Deputy Attorney General, "Individual Accountability for Corporate Wrongdoing," memorandum by the Deputy Attorney General, Sally Quillian Yates (Washington: Department of Justice, 9 Sept 2015); online: <https://www.justice.gov/dag/file/769036/download>.
16. *Suncor*, *supra* note 3.

More tough crimes

Julianna Greenspan

William Trudell and Lorene Shyba, eds.; foreword by Hon. Patrick LeSage
More Tough Crimes: True Cases by Canadian Judges and Criminal Lawyers (Calgary: Durvile Publications, 2017)

More Tough Crimes is an apt title for this collection since it is a follow-up to the riveting essays found in *Tough Crimes*, published in 2014 and edited by C.D. Evans and Lorene Shyba. As if the first book's crimes weren't tough enough, the publisher had to come up with a sequel. I am in a uniquely complicated position because my father authored a chapter in *Tough Crimes* and my uncle authored a chapter in *More Tough Crimes*. Therefore, I cannot criticize either book and I cannot say one is better than the other, lest I be accused of sabotage. So although my comments are essentially meaningless in any constructive way, I offer the reader who chooses to continue reading this review a few observations. *More Tough Crimes*, edited by William Trudell and Lorene Shyba, provides yet another collection of some of Canada's infamous criminal cases and includes chapters by prominent lawyers and judges with first-hand knowledge of them. Each author offers insights into a renowned case previously interpreted only by the mass media. For example, the personal experiences of James Lockyer and Donald Bayne, lead counsel in the Truscott appeal and Duffy affair, respectively, provide reflections on cases of national attention. Until this book, those important insights had not been heard.

No theme unites the chapters, other than the obvious – they all deal with tough cases addressing tough criminal justice issues authored, in most instances, by those directly involved. The broad range of topics keeps the reader's interest. Chapters include the dangers of Mr. Big investigations, authored by Mona Duckett; Clayton Rice's and Breese Davies' chapters involving the profound tensions between mental health and the criminal justice system illustrated by the prosecution of Rice's client Kristen Budic for murder and the inquest into the death of Ashley Smith; the frailties of expert evidence in the murders of lawyer Lynn Gilbank and her husband, Fred, authored by Alan Gold; and Brian Greenspan's chapter involving the complex transborder prosecution of Alan Eagleson. Other landmark cases include Brian Beresh's account of the tragedy of Dina Dranchuk, the last woman to be sentenced to death in Alberta in a case that had all the elements of battered woman syndrome before it was an understood and accepted defence and was held in the wake of damning media coverage before judicial recognition of the necessity of juror screening; and the key expansion of the self-defence provision in the *Criminal Code* in cases involving death, authored by the Honourable James Ogle, involving his successful defence of Steven Kesler for murder. Each

chapter references a different intricacy of our judicial system and calls on the reader to appreciate the importance of viewing facts and circumstances from different perspectives.

Not all cases in the sequel are familiar to the non-legal public, but the authors have written *More Tough Crimes* to be more accessible to a broader audience than the original volume. Like the first book, this volume is still replete with legal jargon, but the sequel is more consumable for both lawyers and non-lawyers. Legal terms that may be second nature to those with a law degree are explained for readers without one. It is in its accessibility that *More Tough Crimes* has progressed from its predecessor, while still providing riveting reading for the legal community.

One example of the way this collection covers important legal issues in an accessible writing style is Jonathan Rudin's "The Death of Reggie Bushie and the Eight-Year Inquest." Rudin writes of the unique troubles faced by Indigenous Peoples in setting up an inquest

into the unexplained death of a First Nations youth. Though the body of Reggie Bushie was found in 2007, the inquest was delayed for nearly eight years while attempts were made to properly include First Nations citizens on the jury roll. Tragically, during this period, the bodies of six more First Nations teenagers, all of whom had been attending the same high school in Thunder Bay, were discovered in the same river as Bushie. A Commission of Inquiry into the presence of First Nations residents on the jury roll in Kenora District of Northern Ontario was established and, in 2013, Justice Frank Iacobucci, chair of the Commission, released an important report setting forth 17 recommendations to improve the treatment of Indigenous Peoples. The inquest that ultimately investigated the deaths of all seven young Canadians, made up of a jury that included a First Nations juror, found the cause of all the deaths to be undetermined. In his chapter, Jonathan Rudin makes the following observation about the unique events: "This story shows there is reason for hope, but also that there are huge challenges the country must be willing to confront." This comment crosses all chapter topics, summing up what is the essence of every aspect of our criminal justice system: maintaining hope despite a continual confrontation with enormous challenges.

In his foreword, the Honourable Patrick LeSage reminds us of the ever-present human element in Canada's criminal justice system – one that is, and will always be, subject to error and bias: "We in Canada are the beneficiaries of a framework for justice in which I have faith," LeSage writes. "While in some instances justice is elusive at least for a time, for the most part our system functions well. To paraphrase Winston Churchill, our criminal justice system is a human one and not a perfect system. Nevertheless, even with its blemishes, when compared to others throughout the world, our system is remarkably sound and workable."

We are fortunate to have a legal system that, despite its inevitable frailties, seeks to be just, righteous and good. The chapters in this book are about the indomitable people who never cease striving to ensure our justice system protects us all. *More Tough Crimes* continues to give us hope that such people do exist in our criminal justice system.

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