# THE ADVOCATES' JOURNAL

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# The Advocates' Journal

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# Bordeaux, baseball and civil justice


**Stephen Grant, LSM, ASM**


I read the news today, oh, boy …
"A Day in the Life," *Sgt. Pepper's Lonely Hearts Club Band* (1967), The Beatles

For more than a hundred years, Bordeaux (claret, as the British call it) was the connoisseur's choice of wine. Not only was it long-lived, but it tended to rise in value over time. The Brits would say, "Buy three cases, sell two and drink the third for free." But the Bordelais failed to read the market and priced themselves out of reach for most consumers; hence, the staggering rise of Yellow Tail and all the other cutely labelled and accessibly priced wine available today. Bordeaux still clings to the rigid 1855 classification of growths: only one addition to the first growth category since then, Mouton-Rothschild (*quelle surprise*). And the prices remain relatively stratospheric while consumers look elsewhere.

According to wine-searcher.com, the average price of a 750 ml bottle of 2015 Château Lafite Rothschild is $921. A bottle of Yellow Tail cabernet is $10.95 at the LCBO. (If you are interested, the marsupial on the bottle is a yellow-footed rock wallaby, a relative of the kangaroo.)

Closer to home but along similar lines, before the embarrassing 1994–95 baseball strike, the club owners assumed the fans would keep moving through the turnstiles as they had done for more than a century. Parsimony ruled, at least in relation to the fans. Balls hit toward the stands and retrieved by the ball boys and girls would be thrown into a bag to be used later in batting practice or some such, ignoring the pleas of young (and old) fans for a souvenir. After the strike, the fans (including me, but for other reasons) stayed away in droves – at least until the hopped-up, steroid-infused late 90s, when sluggers were hitting home runs at a prodigious pace and pitchers pitched with seemingly bionic arms.

But by then, *mirabile dictu*, the owners had begun appreciating the fans for gate receipts and other revenue streams, especially as the value of player contracts escalated. Now, players themselves are more accommodating, the ball boys and girls are told to find youngsters to whom to give the baseballs and all is well on the diamond. (That is, except in Toronto, where the corporate ownership has managed to squander the enthusiasm and goodwill of the Encarnación/Bautista years. But that's for another diatribe.)

Except for recent, too little too late efforts, the civil justice system has become like the Bordelais, not the ball club owners. Hence, the meteoric rise of mediation – born decades ago in the labour law context – and its adjunct, arbitration (sometimes, med/arb). While undoubtedly attractive as an *alternative* dispute resolution process – if nothing else, parties are forced to *listen to and hear* each other – the default to mediation has adverse, often unintended, consequences.

Lawyers of my generation negotiated cases. If the negotiations cratered, they tried the case. This is what lawyers knew and judges were appointed to do. Pre-trials to narrow or settle some of the issues were fine, if a little light on substance, as many judges didn't really make the effort. That lawyers knew or ought to know how to settle cases themselves was the theory. The evolution of the law remained dynamic, not stagnant. While this ongoing diminishment of jurisprudence is itself a problem, the default to mediation is creating a class of counsel who lack trial skills, which are necessary even in arbitration proceedings. (Interestingly, there appears to be a neurological aspect to mediation. See Advocate Daily.com, "Neuroscience Knowledge Boosts Settlement Chances"; online: <http://www.advocatedaily.com/eric-gossin-neuroscience-knowledge-boosts-settlement-chances.html>. Who knew?)

As trials themselves may be waning, these skills remain essential for those cases that either don't settle or, as importantly, warrant a trial. As a full-time ADR lawyer suggested to me recently (but asked that I not attribute), it's the fear of trying a case from lack of skill and/or experience that may cause counsel to settle a case unfavourably for the client.

Having fewer trials may be useful as a societal goal. But the lack of the opportunity to garner trial experience doesn't bode well for the future of advocacy in a courtroom setting or elsewhere – let alone for civil jurisprudence.

***

Among the thoughtful gems in this issue of the *Journal*, Earl Cherniak's reminiscences hark back to a seemingly less frantically paced time in practice. There were no emails or even answering machines but rather pink message slips, seen now as prehistoric. Trials typically took a few days at most. (My longest was about a month.) There were many smart but irascible judges, both on the trial bench and at the Court of Appeal. In many ways, it was the heyday of litigation. But that was then, this is now, and we rush along at breakneck speed.

**Miriam Anbar**
Miriam Anbar is an associate at *Rodney Employment Law* in Thornhill, Ontario. She handles a broad spectrum of workplace matters including wrongful dismissals, discrimination and harassment, and fascinating workplace investigations. In 2004, she participated in (and won) a reality TV show while studying abroad.

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**Earl A. Cherniak, Q.C., ASM, LSM**
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Marie is a senior associate at *Moodie Mair Walker LLP*, practising in civil litigation with a focus on professional errors and omissions, product liability and insurance defence litigation. She speaks to legal professionals about self-awareness and mindfulness practices. Stay tuned for her launch of *The Power of Presence for Professionals*.

**Erin C. Cowling**
Erin C. Cowling is a former "Big Law" litigator turned freelance litigator and founder of Flex Legal Network Inc., a network of freelance lawyers. Erin spends half her time practising as a freelance lawyer and the other half explaining to people what a freelance lawyer is.

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Paul Fruitman is a partner at *Lax O'Sullivan Lisus Gottlieb LLP*. His focus is on commercial litigation and other legal curiosities. If loving your cases is wrong, he doesn't want to be right.

**Megan Hodges**
Megan Hodges is an associate at *Blaney McMurtry LLP* practising commercial litigation, and a recent graduate of McGill law. When she's not waxing lyrical about summary judgment motions, Megan can be found exploring the great outdoors with her pup.

**Orestes Pasparakis**
Orestes is a lawyer with *Norton Rose Fulbright* in Toronto.

**Ronald Slaght**
With mixed feelings and considerable trepidation, but embracing the residual hope that the musings of someone whose first trial was in 1972 might still have some interest, Ronald agreed to answer some of the Editor's questions, as you will see in the *Journal* Conversation.

**Rafal Szymanski**
Rafal Szymanski is a partner at B*laney McMurtry LLP*. When he's not defending professional negligence or personal injury claims (or playing squash), Rafal goes to the park with his four-year-old son to test how long they can fly a kite without getting it tangled in a tree.



## THE ADVOCATES' JOURNAL SUBMISSION GUIDELINES

- Content: We value articles about advocacy and advocates that are topical and crackle with currency.
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- 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.
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Thank you,

Stephen Grant, Editor
Aaron Dantowitz, Managing Editor
Sonia Holiad, Production Editor

Is your case ripe for summary judgment?

# How to get your motion past the gatekeeper

**Rafal Szymanski and Megan Hodges**

Scheduling a summary judgment motion is no longer the routine exercise it once was. More and more, judges are invoking their "gatekeeper" function and stopping such motions in their tracks by declining to schedule them altogether. Why are these motions being turned away? In this article, we outline the basis of the gatekeeper's role and look at some of the common reasons summary judgment motions are not being scheduled.

Context is everything. The role of the gatekeeper was built into the test for summary judgment as refined by the Supreme Court of Canada in *Hryniak v. Mauldin* ("*Hryniak*"):

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits of a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, *and (3) is a proportionate, more expeditious and less expensive means to achieve a just result*.[1] [Emphasis added]

Judges are focusing on this third factor at the scheduling stage to vet out motions that, on their face, are not in the interests of justice.

In Toronto, early court involvement in the motion is unavoidable. All counsel must attend Civil Practice Court to convince the presiding judge that the motion is appropriate in the circumstances. If the motion is scheduled, timetables are imposed to ensure the matter proceeds in an efficient manner. Elsewhere, the onus rests with the parties to seek the court's assistance. This can be done with a motion for directions under Rule 1.04 or 1.05 of the *Rules of Civil Procedure* or via case management under Rule 37.15. Either way, counsel may ask the court to stay or dismiss a motion as premature or improper, or to seek assistance in keeping lengthy and complex motions moving forward. The Supreme Court of Canada encouraged such early judicial intervention in *Hryniak*.[2]

What factors do judges consider when assessing whether a summary judgment motion can proceed? The overarching goals of efficiency, affordability and proportionality certainly drive the analysis, but how are these goals achieved at the scheduling stage?

Attending Civil Practice Court or a case conference is not merely an exercise in judicial rubberstamping. To ensure that a motion gets past the gatekeeper, counsel would be wise to consider and be prepared to discuss (1) whether the motion presents a severable issue to be determined; (2) whether the motion disposes of all or part of the action; (3) whether the evidence presents minimal factual conflict; (4) whether the motion raises novel or evolving legal issues; and (5) the timing of the motion. Where these factors do not align with the principles of efficiency, affordability and proportionality, the motion may not get through the gates.

**Principle 1: Present a severable issue**

Counsel should tailor their motion to present one or two severable issues that will resolve all or part of the action. As Justice Myers noted, "Summary judgment lies best when the moving party is able to identify a discrete, neat, gating issue that might be resolved on a motion ..."[3]

One example of a severable issue is a limitations defence. In *Vandermarel Investment Corporation v. Silver & Goren* ("*Vandermarel*"), a defendant was permitted to proceed with a summary judgment motion on a missed limitation precisely because the motion presented a severable issue that potentially resolved the litigation with respect to the moving party.[4] The fact that a trial was looming did not pose a barrier to the motion being scheduled. Other examples of a severable issue include simple debt collections, enforcement of loans or the absence of a duty of care owed by a defendant. There are many others.

The focus here is not the complexity of a case, but rather the

presence (or absence) of a discrete issue for the court to decide. Motions that advance multiple overlapping issues with complex facts are more likely to become disproportionate to the overall litigation and denied at the scheduling stage. In those cases, courts prefer a complete trial narrative that is generally not available on a motion.[5]

**Principle 2: Avoid motions for partial summary judgment**

Judges must consider summary judgment motions in the context of the litigation as a whole when assessing the goals of timeliness, affordability and proportionality. Partial summary judgment motions often do not serve these goals because, by definition, the action continues after the motion is concluded. Courts therefore view motions for partial summary judgment as inefficient, as unduly expensive, and as increasing the prospect of duplicative proceedings or inconsistent findings of fact. Such motions are rarely in the interests of justice.[6] A gatekeeping judge is therefore unlikely to allow a partial summary judgment motion to proceed, unless counsel can demonstrate that the issue is readily severable and its determination will facilitate the efficient resolution of the action.

The Court of Appeal for Ontario in *Butera v. Chown, Cairns LLP* ("*Butera*") recently confirmed that partial summary judgments should be used sparingly because they are often not in the interests of justice.[7] First, the motion is likely to delay the resolution of the action, which will proceed regardless of how the motion is decided. Delays may be further exacerbated in the event of appeals. Second, the motion may be very expensive and is likely to compound the expenses the parties will incur as the action moves through the litigation process after the motion is decided. It may be less expensive simply to proceed to trial on all the issues than have one or two issues determined partway through the action. Third, the Court of Appeal commented on the scarce judicial resources available in today's court system and warned that using court resources on motions which will not resolve the dispute is wasteful and thus problematic. Lastly, partial summary judgment raises the spectre of inconsistent findings between the motion and the trial.[8]

Civil Practice Court judges know that civil litigation is an expensive undertaking and will generally decline to schedule partial summary judgment motions for the reasons outlined above. Counsel should therefore heed the guidance of the Court of Appeal when contemplating partial summary judgment: "A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner."[9]

**Principle 3: Present a motion with minimal factual conflict and complexity**

Factual conflict reduces the likelihood that a judge will be able to make the necessary findings of fact in the absence of a full trial narrative. It comes in various forms: (1) a pure disagreement on facts, (2) a challenge to witness credibility or (3) competing experts. These types of disputes should be kept to a minimum and presented in such a way that they can be resolved by the motion judge using the paper record or the judicial toolbox available to make findings of fact. The goal should be to make the judge feel "confident that she can fairly resolve the dispute."[10] By contrast, where there is concern over witness credibility or there are feuding experts, the case may be better off continuing to trial where the judge has the benefit of the full trial record.

***Factual conflict and complexity***

Judges prefer to resolve complex factual issues in the context of a full trial. They are not readily amenable to summary judgment. For example, *Sims v. Zaitlen* is a medical malpractice case in which a summary judgment motion was not scheduled because of the number of complex, conflicting factual issues.[11] There, the plaintiff alleged that a delayed diagnosis exacerbated her medical condition. The defendant doctors sought summary judgment on the issues of causation and whether they met the applicable standard of care. In declining to schedule the motion, the case management judge held that the motion would not serve the principles of proportionality, timeliness and affordability. The issues were complex and, to reach a decision, the motion judge would have to take into account competing expert opinions, uncertainty over the effectiveness of the medication in question, the impact of the alleged delayed diagnosis and the clinical evidence.[12] It was preferable to resolve these issues in the context of a trial. Doing so on a motion was not in the interests of justice.

***Witness credibility***

Credibility contests between witnesses are also problematic for motion judges. This was the issue in *Baywood Homes Partnership v. Haditaghi*, which dealt with a summary judgment motion arising from a complex series of transactions relating to a property. The plaintiff was seeking to enforce a promissory note and relied on a release prepared during the transactions as a bar to the defendant's counterclaim. Competing versions of events were presented on the motion, including evidence that some of the documents were fabricated. Even after a mini-trial, the motion judge determined that a full trial was necessary to decide whether the promissory notes were enforceable. Nevertheless, the release was found to be authentic and summary judgment was granted dismissing the counterclaim on the basis of the release.[13]

On appeal, the Court of Appeal overturned the partial summary judgment finding on the basis considered above in *Butera*. In the course of its decision, the court commented that assessing the credibility and reliability of a witness is "especially difficult" when reading affidavits drafted by counsel which "obscure the affiant's authentic voice."[14] The court warned that a case may not be permitted to proceed to a summary judgment motion where there is a possibility that substantive unfairness will enter the process by way of decontextualized affidavits or transcript evidence.

***Competing experts***

Summary judgment will rarely be appropriate in cases with competing expert opinions, which will almost always require certain findings of fact on which those opinions rely. A trial is often the better forum to address conflicting expert evidence, where the trial judge has the benefit of a full record in which to situate the expert opinion and assess the underlying findings of fact.

In *Marrocco v. John Doe* ("*Marrocco*"), Justice Mew heard a summary judgment motion brought by a third party against a defendant.[15] At issue was whether a 911 dispatcher adequately prioritized a call for assistance in response to a roadside motor vehicle accident. A second and far more severe accident occurred while the parties waited for a response to the first call. The third party sought summary judgment in the third-party claim on the basis that the dispatcher met the requisite standard of care. Both the third party and the defendant presented conflicting expert reports on the applicable standard. Both parties also challenged the qualifications, objectiveness and reliability of the other's expert. Justice Mew determined that the motion was not in the interests of justice for several reasons, one of which was the "inherent difficulty" with conflicting expert evidence presented in this case.[16]

**Principle 4: The law at issue should be settled**

There is mixed jurisprudence on whether summary judgment motions are appropriate for novel or evolving issues of law. Where possible, counsel should frame their motion in the context of settled law to avoid the issue altogether.

In *Marrocco*, Justice Mew declined to grant the motion for summary judgment partially because the liability of 911 dispatchers in Ontario has not yet been thoroughly analyzed. The jurisprudence on the subject is sparse and, for the most part, borrowed from other jurisdictions.[17]

Likewise, the motion judge in *Blanchard v. Parrott* refused to grant summary judgment in part because the motion involved a novel question involving the duty of care in volunteer-organized events where alcohol is served. There, the plaintiff was assaulted by the defendant after a community dance. It was alleged that the defendant was overserved by volunteers. The defendant third partied the volunteer organizers of the dance. In turn, the third parties brought a summary judgment motion, arguing that they were not responsible for the sale or distribution of alcohol at the event. The motion, however, was dismissed in part because it "potentially raises a novel question of law concerning the duty of care in situations of volunteer organized events at which alcohol is served. This is an issue that has not been considered by the courts and it would be inappropriate to determine it on a motion for summary judgment."[18] Generally, courts prefer to determine novel issues on the basis of a complete record, which renders such cases more suitable for trial.

However, in *Wilk v. Arbour*, Justice Faieta rejected the argument that a summary judgment motion was not appropriate for a novel question of law.[19] This dog bite case involved a dispute over the definition of "possession" under the *Dog Owners' Liability Act*. Justice Faieta pointed out that Rule 20.04(4) contemplates that questions of law may be raised on summary judgment and that the rules are to be interpreted broadly, favouring proportionality and the affordable, timely and just adjudication of claims. In that case, where the facts were not in dispute, the motion judge was in just as good a position to determine the question as a trial judge. It was therefore in the interests of justice for the motion to proceed.[20]

**Principle 5: The motion should not be made too close to trial**

Don't wait until it's too late. The proximity of a summary judgment motion to trial can be one of the reasons a gatekeeping judge refuses to schedule the motion.

In *Griva v. Griva* ("*Griva*"), Justice Firestone rejected a plaintiff's request to schedule a partial summary judgment motion in a motor vehicle accident claim six months before trial.[21] The plaintiff sought summary determination of the issue of contributory negligence and general damages, leaving the remaining heads of damages for trial. The motion was rejected for several reasons. On the question of timing, Justice Firestone determined that it would not serve the principles of proportionality, timeliness and affordability to schedule the motion with the trial looming and likelihood that the motion judge would reserve her decision.[22]

By contrast, in *Vandermarel Investment Corp.*, the fact that the motion was six months before trial was not fatal to the motion. There, the moving defendant argued a limitations defence that was independent of the merits of the action. The issue on the motion was not "interwoven to the facts" of the case and could potentially resolve the entire liability claim against the moving party. Allowing the motion to proceed in that case accorded with the principles of proportionality, timeliness and affordability:

> While the trial time may not be significantly reduced, a successful summary judgment motion would narrow the legal issues to be decided by the trial judge, and would also result in [the defendant] reducing or avoiding significant expense associated with attending a trial currently scheduled for seven days.[23]

The opposite conclusions between *Griva* and *Vandermarel* can be explained by the nature of the motions being advanced. *Griva* sought partial summary judgment based on evidence that would have been presented again six months later at trial on the remaining issues. The *Vandermarel* motion was far more contained. It sought full summary judgment on a severable issue that would avoid trial altogether for the moving defendant.

**Conclusion**

Summary judgment motions tread a narrow path in furthering access to justice. On the one hand, successful motions can facilitate expeditious resolution, save thousands of dollars and free up scarce judicial resources. On the other hand, failed motions add delays, increase legal fees and overburden the court system. Gatekeeping judges bear the task of assessing whether a motion falls into the first or second category. Counsel should therefore attend Civil Practice Court or a case conference well prepared to discuss how their motion furthers the interests of justice, making reference to the five principles outlined above.

Notes

1. *Hryniak v Mauldin*, 2014 SCC 7 at para 49 [*Hryniak*].
2. *Ibid* at paras 69–73.
3. *2287913 Ontario Inc. v Blue Falls Manufacturing Ltd.*, 2015 ONSC 7982 at para 10 [*2287923* Ontario Inc.].
4. *Vandermarel Investment Corporation v Silver & Goren*, 2015 ONSC 2773 at paras 49 and 50 [*Vandermarel*].
5. *2287913 Ontario Inc.*, *supra* note 3 at para 11.
6. *Hryniak, supra* note 1 at para 60.
7. *Butera v Chown, Cairns LLP*, 2017 ONCA 783.
8. *Ibid* at paras 30–33.
9. *Ibid* at para 34.
10. *Hryniak*, *supra* note 1 at para 57.
11. *Sims v Zaitlen*, 2017 ONSC 2501.
12. *Ibid* at para 49.
13. *Baywood Homes Partnership v Haditaghi*, 2013 ONSC 2145.
14. *Baywood Homes Partnership v Haditaghi*, 2014 ONCA 450 at para 44.
15. *Marrocco v John Doe*, 2017 ONSC 654.
16. *Ibid* at para 60.
17. *Ibid* at para 64.
18. *Blanchard v Parrott*, 2015 ONSC 6846 at para 11.
19. *Wilk v Arbour*, 2016 ONSC 1179; reversed on other grounds 2017 ONCA 21.
20. *Ibid* at paras 9–12.
21. *Griva v Griva*, 2016 ONSC 1820.
22. *Ibid* at para 20.
23. *Vandermarel*, *supra* note 4 at para 51.

# Managing workplace harassment in the wake of #MeToo

**Miriam Anbar**

The author is grateful for the research and writing assistance of Michelle Kaminski, human resources coordinator.

The harassment and sexual assault scandals that have dominated the headlines in 2017 and 2018 have sparked a debate on what is considered inappropriate workplace behaviour. Powered by the celebrity-associated infamy of Harvey Weinstein, Kevin Spacey, Matt Lauer and numerous others, the conversation – and the associated repercussions – surrounding this inappropriate conduct continues to intensify.

We have felt these reverberations in our own Canadian backyard with public allegations made against Sportsnet analyst Gregg Zaun, Soulpepper Theatre founder Albert Schultz, former Ontario Progressive Conservative party president Rick Dykstra and the Canadian pop-rock band Hedley. Although it is the salacious allegations themselves making the headlines, we would be remiss to ignore what must happen in response to these allegations. In the rush to address harassment, leaders of organizations must understand what steps need to be taken to ensure that due process is not forgotten.

It is critical for employees and employers alike to understand what exactly constitutes inappropriate workplace behaviour and how to manage such situations when they arise. For employers specifically, a delicate balance must be achieved. While taking swift, decisive action is key, it is equally important to provide due process and allow the accused an opportunity to respond to the claims, even in the worst cases.

**What is #MeToo?**

Although the #MeToo hashtag was originally created 10 years ago by activist Tarana Burke, it recently went viral when actress and producer Alyssa Milano used the hashtag to support her friend's allegations of sexual harassment against Harvey Weinstein. The conversation surrounding sexual harassment has become more prevalent because individuals continue to post #MeToo on all social media platforms. The hashtag has encouraged survivors of sexual harassment and assault to highlight the importance of their stories while concurrently providing readers with a better understanding of the issue at hand.

**What about #MeToo in the workplace?**

Harassment of any kind has no place in the workplace. In Ontario, employers are legally obligated to ensure the work environment is safe and free from any form of workplace harassment and to be proactive when it comes to dealing with these issues. While the influence of social media has ignited the public's interest with the "#MeToo" movement, it is important that concrete action and occupational change occur.

In the wake of #MeToo, employers are on high alert and more interested in ensuring that their workplaces are in good shape. Although fear is, at times, the driving factor, companies are realizing that ignoring harassment in the workplace is not an option. Regardless of their motivation, employers understand that they need to be proactive and well-equipped to handle these types of claims.

In Ontario, there are legislated requirements for employers to act. In the last year alone, Bill 132 amended Ontario's *Occupational Health and Safety Act* (OHSA) by specifically addressing sexual violence and sexual harassment and specifically mandating employers to conduct investigations into incidents of alleged workplace harassment. The new legislation was a supplement to the earlier Bill 168, which introduced requirements for risk assessments and policies regarding workplace violence and harassment.

Employers should be mindful that non-compliance with this legislation can come at a significant cost, including substantial fines for both individuals and corporations, and even potential imprisonment.

**Workplace harassment policies, programs and training**

It is imperative that companies have proper policies and procedures in place to address workplace harassment and violence. It is equally critical that managers and leaders in the organization undergo effective training in this area. Having a written "Respect in the Workplace" policy and program in place, in consultation with the company's joint health and safety committee (if applicable), is essential for all workplaces.

These policies and programs should be reviewed annually – this is a legislated requirement if there are five or more employees working in the organization. The policies and programs should provide employees with information about their rights as employees and educate them on the proper steps and precautions to take if ever witnessing or becoming the subject of an incident of harassment or assault.

Training is a critical part of this process. If a manager does not understand how to deal adequately with a harassment complaint, it will likely affect the organization in a direct and negative way. Claims of a "toxic" or "poisoned" work environment often stem from a company's failure to act effectively in these situations.



**Workplace investigations**

Given today's complex corporate environment and the myriad amounts of legislation that supervisors and managers are required to follow, many different situations may justify a workplace investigation. Companies must be mindful of their legal duty to take all reasonable precautions to protect their employees and ensure a safe, healthy and harassment-free environment. Employers are legally obligated to investigate *all* complaints of violence, workplace harassment or workplace sexual harassment.

As part of these investigations, it is essential that employers understand the importance of due process and ensure that the designated investigator obtains all sides of the story. A key aspect of the investigation is to maintain an accurate record of the statements and documentation pertinent to the complaint. An effective investigation will begin with interviewing the complainant to gain a more comprehensive appreciation for the complaint that has been lodged. Subsequently, all material witnesses should be interviewed in a fair and objective manner. Lastly, the respondent should be given an opportunity to respond to each of the claims and provide his or her version of the events.

Although companies sometimes opt to handle workplace investigations internally, in many situations it makes sense to hire an external professional workplace investigator. This initiative also helps to ensure that all the necessary steps are followed, and that due process is achieved.

At the close of the investigation process, the organization or third-party investigator will need to make a determination based on the investigation findings and prepare a comprehensive investigation report. After the investigation is complete, a summary of the findings of the investigation must be communicated to the affected parties (alleged harasser and complainant). At this time, remedial measures or recommendations stemming from the report may need to be implemented.

**Final takeaways**

In this #MeToo landscape, there is no question employees and employers are more aware that harassment of any kind is not acceptable in the workplace. Employers are recognizing that it is a basic requirement to ensure their work environment is safe and healthy for employees. This responsibility includes being proactive in the face of any form of workplace harassment.

Each incident should be dealt with cautiously and seriously and must always be investigated. At times, these situations are not black and white, and in many instances employers must navigate a complex grey zone. Situations involving more serious conduct and more senior level or high-profile employees are often complicated and more challenging for employers to get right.

Addressing the issues head on and continuing the conversation around harassment can stop a situation from escalating and mitigate potential risk. In the face of a harassment complaint, it is in everyone's best interest for employers to plan properly, engage effectively and respond in a timely and effective manner. It's always a good idea to seek expert advice from an employment lawyer or seasoned human resources professional.

At a minimum, companies must abide by their legislative requirements and have policies and programs in place. More importantly, organizations need to become part of the solution by standing behind their policies and actively protecting their people.





# Laskin's legacy

**Robert A. Centa**

The Honourable Justice John I. Laskin retired from the Court of Appeal for Ontario on January 26, 2018.[1] For 24 years, Justice Laskin was a leading light on the greatest appellate court in the country.[2] He made significant doctrinal contributions to every area of the law within the jurisdiction of the court. In addition, he did more than any other person in Canada to improve the quality of written advocacy and judgments. An extraordinary and committed teacher, he gave generously of his time to his clerks, to counsel and to his fellow judges.

Justice Laskin has an enormous heart and great compassion, which he manifested time and time again in his judgments. He cared deeply about the personal circumstances of the litigants before him. He used the law to protect individuals' right to fairness, and he wrote clearly and compellingly to do so. He expected the institutions of civil society to exemplify their best characteristics when affecting the rights and interests of people. He called on insurance companies, universities and professional bodies, among others, to live up to the trust their clients, students and members had reposed in them. In so doing, he made the province a better place to live. We owe him an enormous debt.

Justice Laskin's humanity is, in my view, the single most important feature of his jurisprudence. No one anecdote can adequately explain his warmth and generosity, but this one has always stood out for me.[3]

In December 2013, the Toronto Raptors traded away Rudy Gay and appeared to have given up on the season. Improbably, the team would catch fire and win 42 games after the trade, meet the Brooklyn Nets in the playoffs, and give us the electricity of Jurassic Park and Raptors' President Masai Ujiri's infamous *cri de coeur*.[4]

On January 19, 2014, however, that improvement was nowhere to be seen. The Raptors allowed Nick Young to score 29 points in a 112–106 loss to the terrible Los Angeles Lakers. I was at that game with my then six-year-old son, who appeared to be paying no attention to the play on the court. With 9:23 left to play, Young hit (another) three-pointer, which put the Lakers up 87–86. Shockingly, my son threw his hands up in the air and (correctly) exclaimed, "Swaggy P is killing us!"

Justice Laskin was sitting on the other side of my son. John turned to him and said, "I know. Why don't they cover him on those plays?" Although they had never met before that day, the two of them embarked on a wide-ranging conversation about the Raptors' defence, the mascot and the relative merits of pizza and popcorn as snacks until the final buzzer. The conversation was warm and easy, and the two of them laughed like old

friends. It was remarkable, but not surprising, given John's decency, curiosity and warmth.

Justice Laskin brought these characteristics to all his judicial duties, including his leadership of the court's clerking program. From recruitment and interviewing, to ensuring the clerks met all Law Society requirements, to putting on a bench-and-bar-and-clerks education program, he was deeply involved in all aspects of the clerkship program. He was extremely generous to his clerks, and it was a joy to dig in and try (and most often fail) to help him improve his work. He showed a great interest in the professional and personal lives of his clerks long after they left the court. Many of his former clerks are proud to call him a mentor and friend.

Perhaps most importantly, Justice Laskin's decency and generous nature permeated his decision-making and his writing. I selected only two examples from among his extensive body of work to elaborate on this point.

**Concern with a level playing field: *Howe v. ICAO***

Justice Laskin joined the Court of Appeal for Ontario in March 1994. Only three months later, he found himself on a panel with Justice John Brooke and Justice George Finlayson. Justice Laskin was very much the junior member of this panel. Justice Brooke was appointed to the High Court of Justice in 1963 and to the Court of Appeal in early 1969, which was the year John Laskin graduated from the Faculty of Law at the University of Toronto. Justice Finlayson, appointed in 1984, had "developed a reputation for being aggressive, independent, blunt and honest."[5]

On June 28 and 29, 1994, the panel heard an appeal from a decision of the Divisional Court that concerned disclosure in a discipline proceeding before the Institute of Chartered Accounts of Ontario ("ICAO"). The case was presented by eminent counsel including Edgar Sexton, Q.C., for the appellant Mr. Howe, and Ian Binnie, Q.C., for the ICAO. The case emerged from the aftermath of the high-profile allegations that the financial statements of Standard Trust contained significant errors.

The Professional Conduct Committee of the ICAO began an investigation into its member Mr. Howe, who was a partner at a major accounting firm and was responsible for the audited financial statements of Standard Trust. The committee retained a chartered accountant to investigate and to report his findings. The investigator met with Mr. Howe, reviewed his audit work papers, and prepared a 61-page report that outlined his main findings about the deficiencies in Mr. Howe's work. The Professional Conduct Committee received the report and issued charges alleging that Mr. Howe had violated the ICAO's rules of professional conduct.

The Professional Conduct Committee refused to provide Mr. Howe with a copy of the investigator's report. It produced a will-say and other related documents, but would not produce the report itself. The Discipline Committee of the ICAO then dismissed Mr. Howe's application for disclosure of the report. Mr. Howe then sought judicial review of the Discipline Committee's decision to the Divisional Court. That application was also dismissed.[6] Mr. Howe's first glimmer of success on this issue came on May 17, 1994, when the Court of Appeal granted leave to appeal and ordered that the appeal be expedited.

Justices Finlayson and Brooke dismissed Mr. Howe's appeal. Justice Finlayson held that the application was premature because the decision on disclosure, even if incorrect, would not amount to a fatal jurisdictional defect warranting court intervention. Justice Finlayson also held that the Discipline Committee's decision that the report was protected by a common law, *Wigmore* privilege was reasonable.[7] Justice Finlayson closed his reasons by stating, "I do not think that we should encourage applications such as these, which have the effect of fragmenting and protracting the proceedings, except in the clearest of cases."[8] Justices Finlayson and Brooke were on safe doctrinal ground.

**Justice Laskin, with cool understatement, had already seized the high ground. The stakes for the appellant? Very high.**

Justice Laskin, however, dissented. He held that the failure to produce the investigator's report breached the duty of procedural fairness and that the court should set aside the decision of the Discipline Committee, even though the hearing had not been completed. In two quick paragraphs at the outset of his reasons, he outlined what was at stake for Mr. Howe and the position taken by the ICAO:

> The appellant is facing a wide-ranging complaint of professional misconduct. His discipline hearing is scheduled to begin in late September 1994. If found guilty, he could lose his licence to practise as a chartered accountant.
>
> The complaint against the appellant is based on an investigation report prepared for the Professional Conduct Committee. That committee is responsible for prosecuting the complaint. It intends to call the investigator as an expert witness to prove the case against the appellant. Although the prosecution has a copy of the investigator's report, it has provided the appellant with only a summary of the investigator's proposed testimony, and refuses to give the appellant the report itself.[9]

Justice Laskin, with cool understatement, had already seized the high ground. The stakes for the appellant? Very high. The relief requested? The simple fairness of a level playing field. Justice Laskin was rolling.

He then observed that the Discipline Committee was under a duty to act fairly, which included the obligation to provide adequate disclosure and which, in this case, given the serious consequences at play (he pointed out that "for some professionals, a finding of professional misconduct is more serious than a criminal conviction"), required production of the report unless it was protected by privilege.[10] He pointed out that, in a post-*Stinchcombe* era, administrative tribunals should provide more robust disclosure to their members facing disciplinary charges. Justice Laskin then turned to the question of privilege. He thoroughly and systematically demolished the reasoning of the Discipline Committee. Justice Laskin's reasons regarding the fourth branch of the *Wigmore* test are particularly strong and reveal his concern for the rights of the individual facing prosecution:

> Wigmore's fourth criterion requires the court to weigh the injury and the benefit resulting from disclosure. I think the case for disclosure of Mr. Johnston's report is overwhelming and far outweighs any possible resulting injury. Mr. Johnston's report forms the basis of the charges against the appellant. Mr. Johnston is a key witness, if not the key witness for the prosecution. The report is based, at least in part, on information provided by the appellant, who was obliged to co-operate in Mr. Johnston's investigation. The prosecutor has the report and the appellant does not, which means (to use the well-known phrase) there is not a level playing field.
>
> The appellant should not be left to speculate whether the summary he was given is sufficient, nor should he be required to accept the prosecutor's assertion that "the will-say statement [i. e., the summary] contains more information than what's in the report." The summary provided to the appellant is not even said to be a summary of the full report; instead, it is a summary of Mr. Johnston's proposed testimony. The report may contain additional statements, observations, and opinions which mitigate, qualify, or even contradict those set out in the summary. The report may suggest lines of cross-examination or other inquiries which the appellant could pursue, and, of course, the report can be used for the purpose of impeachment. Cross-examination is fundamental to our adversarial system and the appellant has the right to meet the case against him by cross-examination. Without the report it is probable that this right will be impaired.
>
> The purpose of ICAO discipline proceedings is to protect the public and to preserve the public's confidence in the accounting profession by maintaining high professional standards. The public, therefore, also has an interest in disclosure in order to ensure that justice is done.[11]

Justice Laskin, alone among the six judges who heard this case at the two levels, took seriously Mr. Howe's interest in seeing the report. He explained what Mr. Howe could do with the report and why fairness required Mr. Howe to have it. Justice Laskin concluded the passage above with a clever pivot explaining why the public interest, which the ICAO was to serve, also supported the disclosure of the report.

Justice Laskin's reasons articulate eloquently his concern that those entrusted with protecting the public interest treat fairly individuals facing potentially serious consequences. He wrestled with the real-world implications of the decision of the Discipline Committee and the decision to deny Mr. Howe access to the report. This case is a very early expression of Justice Laskin's empathy and concern for respecting the rights of individuals.

I think it is also important to note that Justice Laskin felt these concerns so strongly that he took the step of writing a dissent. I don't think it would have been easy for him to dissent from Justices Brooke and Finlayson so early in his time on the court. Over the course of his career, Justice Laskin infrequently dissented from his colleagues. This decision must have been a difficult but principled one for him to make.[12] It seems to me that he dissents only when he feels it really matters. Over his career, at least five of his dissents resulted in the Supreme Court of Canada reversing the majority decision.[13]

I confess to being somewhat less convinced by his reasons for concluding that the application for judicial review was not premature, but that is not the point. The current generation of administrative law lawyers whom I respect have all embraced his dissent as their standard operating procedure. That may be the greatest legacy of Justice Laskin's dissent in this case.

**Procedural fairness: *Khan v. University of Ottawa***

In 1997, Justice Laskin wrote another decision that reflected both his big heart and his compassion for a person facing serious consequences.[14]

Nalini Khan was a law student who failed her evidence examination in December of her second year at the University of Ottawa. If she had passed that exam, she would have passed her year. Given her overall grade point average, however, if she failed the evidence course, she would have to complete an additional semester of school before graduation. After she failed the course, Ms. Khan reviewed her examination booklets and discovered that her fourth examination booklet was missing. The instructor was adamant that Ms. Khan had handed in only three booklets. Ms. Khan appealed her grades to two university committees. Neither committee gave her an oral hearing, and both committees dismissed her appeal. Her application for judicial review was dismissed, but she obtained leave to appeal to the Court of Appeal.

Her appeal came before the very same panel that heard Mr. Howe's appeal: Justices Brooke, Finlayson and Laskin. This time, Justice Brooke joined Justice Laskin's opinion and the student's appeal was allowed. Justice Finlayson would have dismissed the appeal. His reasons bristled with indignation. He had a very different view

of the merits of the case:

> In my view, this court must ensure that its judgment is not premised on a state of facts that accepts in full and without caveat every claim made by the appellant and her supporters at every stage of the proceedings in appeal, while reacting negatively to every explanation by both the Faculty and Senate Committees as to why they were not prepared to grant her appeal of a failing grade.
>
> As a supplement to this observation, it is not up to the appellant to define the issue in appeal to her own liking. Despite the protestations of those in authority to the contrary, the appellant has consistently maintained that there is and was but one issue in these proceedings. Did the appellant lie when she said there was a fourth booklet? By insisting that this was the only matter that required a response, the appellant has co-opted the agenda of the Faculty Committee and demanded that she is entitled to a standard of justice reserved to students who face sanction because of personal misconduct. She does not acknowledge that the only issue before the Faculty Committee and later the Senate Committee was whether the grading of an examination had been subject to an error or injustice. The appellant insists upon the right to attend and assert in person that there was a fourth booklet as if establishing that fact would be conclusive, but the Committee members were aware of the quality of the work in the three booklets she did turn in, and the examining professor's assessment of the poor calibre of that work. Comments attributed to the professor regarding the examination and possibility of a fourth booklet are illuminating: "More of the same wouldn't have been beneficial."
>
> …
>
> It seems to me, with great respect to those who feel otherwise, that the appellant has succeeded in making a mountain out of a molehill. The notion that a student can dictate the level of review of her examination paper by making an allegation such as was made by the appellant here can lead only to mischief. The Committees in the case in appeal are criticized for not taking seriously an allegation that they did not consider to be determinative of what was before them. Instead of showing deference to these persons of experience that have the responsibility for maintaining academic standards within their faculty and university, they are criticized for not turning themselves inside out to affirmatively establish that the appellant was not telling the truth.[15]

Justice Laskin took seriously the student's version of events and the importance of the decision to her academic career. He seized on a crucial admission by the university: The student would be entitled to rewrite the examination if the fourth booklet existed and had not been graded. He framed his reasons around this admission.

Justice Laskin held that the examination committee should have given Ms. Khan the opportunity to appear in person before each committee that considered her appeal and an opportunity to make oral representations. Justice Laskin acknowledged that, while most academic appeals would not require an oral hearing, this one did because the appeal turned on her credibility and because of the serious consequences to her of an adverse finding. If the committee believed Ms. Khan, she must win her appeal.

Justice Laskin also took seriously the obligation of the university to give the student an opportunity to know and respond to the factors relied on by the committee in dismissing her appeal. The right to know and respond to information and arguments prejudicial to one's position is a bedrock principle of administrative law. Justice Laskin meticulously explained how and why the committee breached Ms. Khan's right to procedural fairness by failing to provide her with a meaningful right to know and respond to the allegations against her.

It is often the case that a subsequent appeal hearing can cure procedural defects at a prior stage.[16] Justice Laskin, however, found the appeal to the senate wanting and held that it did not cure the earlier errors made by the Examinations Committee. His reasons explained why the appeal hearing was far from a *trial de novo* and why it was infected by the same sort of procedural errors as the hearing before the Examinations Committee. He ordered a new hearing before that committee.

This decision caused significant waves among counsel who act for universities in Ontario and throughout Canada. It was all the more surprising because, before his elevation to the bench, Justice Laskin was one of those counsel. He acted for many years as discipline counsel for the University of Toronto. Academic discipline at that university is taken very seriously. Indeed, the leading case at U of T on the principles to be applied when imposing a sanction was argued by John Laskin and decided by John Sopinka, Q.C, in 1976.[17] When John Laskin went to the bench, the role of senior discipline counsel was filled first by Justice Kathryn Feldman, and then by my partner Linda Rothstein.

Universities might well have been forgiven for thinking Justice Laskin would be a good draw on this type of case. Surely, he would understand universities and their procedures – and the institutional challenges faced when dealing with tens of thousands of students and many more examination booklets.

In fact, Justice Laskin knew too much about universities. He knew how important they are as institutions in a free and democratic society. He knew they embody principles of liberalism, freedom of inquiry and expression, and personal dignity. He knew what a university could be at its best and, it turned out, was prepared to hold a university to that standard. He could not countenance a university acting unfairly toward a student.[18] That was not his vision of the university, of society or of the place of the individual within it.

The *Khan* decision was another example of Justice Laskin's generosity of spirit driving his decision-making. His reasons for decision are a pleasure to read. They are well-written, clear, and compelling. By 1997, he was well on his way to becoming one of the best writers on the Court of Appeal.

**A superb writer**

Justice Laskin cares deeply about his own writing. Of course, he spent hours and hours reading and analyzing the law, but he also spent countless more hours writing and rewriting his judgments. He strove to drive out ambiguity; to eliminate the passive voice; to reduce the use of Latin maxims; to make sentences as clear as they could be; and to make paragraphs beautiful structures framing clearly expressed ideas.

Justice Laskin wrote brilliant overviews to his judgments. For example, consider the introduction to his reasons for decision in *Whiten v. Pilot Insurance Co.*:

> Pilot Insurance Company appeals a punitive damages award of $1,000,000, the largest award in Canada against an insurer for dealing in bad faith with a claim by one of its insureds.
>
> Daphne Whiten owned a home on Old Donald Road in Haliburton County, where she lived with her husband, Keith Whiten. The home and its contents were insured under a homeowner's policy issued by Pilot. In the early morning hours of January 18, 1994, a fire destroyed the Whitens' home and all of their belongings. Daphne Whiten claimed for the fire loss under her insurance policy, but Pilot refused to pay. Pilot alleged arson, even though it had opinions from its adjuster, its expert engineer, an investigative agency retained by it and the fire chief that the fire was accidental. Pilot maintained its defence of arson throughout a four week trial before Matlow J. and a jury, although it now concedes that the evidence unequivocally shows the fire was accidental.
>
> The jury assessed damages at $1,287,300 – $287,300 for the fire loss and $1,000,000 for punitive damages. The trial judge ordered Pilot to pay the costs of the action on a solicitor and his own client scale. Pilot restricts its appeal to whether punitive damages should have been awarded and, if so, the amount of the award. It submits that punitive damages should not have been awarded either because it did not commit "an independent actionable wrong", or because its conduct was not reprehensible enough to justify an award. Alternatively Pilot submits that the jury's assessment was excessive and was influenced by errors in the trial judge's charge. Pilot asks this court to set aside the punitive damages award or reduce it to an amount within the range of $15,000–$25,000.
>
> I would not give effect to Pilot's submissions. In my opinion, Pilot's breach of its obligation of good faith was an independent actionable wrong for which punitive damages could be awarded. Pilot's conduct was so reprehensible that a punitive award was justified; and the amount of the award is supportable in the light of the deference to be accorded to the jury's assessment, the extent of Pilot's reprehensible conduct, the need to deter this kind of conduct and the need to impose a fine that is more than a licence fee. Therefore, I would dismiss the appeal.[19]

I think this introduction is just about perfect. It is functional: Justice Laskin told the reader the key facts of the case, the issues under appeal and how he proposed to determine them. It is persuasive: He marshalled the key facts, seized the moral and rhetorical high ground, and left the reader convinced of the correctness of his judgment. It is clear: His language is accessible, plain and devoid of ambiguity or ornamentation. It is respectful: He treated the parties as people facing serious real-life issues, not as characters in a film-noir potboiler. This introduction is an example of the very best judicial writing, and it is typical of Justice Laskin's work.[20]

If Justice Laskin had left us only with his body of decisions, we would have an excellent set of examples of how to write effectively. We could, as legal scholars, study the texts and distill what made them great. We could then try to incorporate those principles into our own writing. But he went much further than that.

**A dedicated teacher**

Justice Laskin dedicated an enormous amount of time and energy to teaching judges and lawyers how to improve their writing. I believe he did more to advance written advocacy than anyone else in Canadian history.

Justice Laskin taught decision writing at innumerable seminars for judges and members of administrative tribunals in Canada. He was frequently an instructor at both the National Judicial Institute and the Ontario Centre for Advocacy Training. Courts around the world look to him for advice on how to write better decisions. He has spoken to judges in Hong Kong, Albania, The Hague, New Mexico, Barbados, Tanzania and China.

He has also written a series of articles for counsel on how to write persuasively.[21]

One of the most popular was "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums," which appeared in this journal in 1999. He explained how important factums are to the judges of the Court of Appeal and urged counsel to put more time and care into their factums. He suggested that counsel focus on their audience and put themselves in the position of their reader, the judge. Justice Laskin's most famous advice from that article was to adopt point-first writing: State your point before you develop or discuss it.

He explained that a well-written overview statement was important because it provided necessary context for the appeal that would allow the judge to better absorb and understand the details to follow. Interestingly, Justice Laskin also invited counsel to use their overview statements to tell their story in human terms and to appeal to the human being in the judge:

> In the overview statement, you must begin persuading the court of the rightness of your client's cause. Tell your story in human terms – appeal to the human being in the judge. Forget the legal jargon. Pretend the judge is just your well-informed next-door neighbour. Engage the judge, capture the essence of what the case is all about, and communicate the justness of your position. In other words, solicit the judge's affection for your cause.

With this advice, Justice Laskin was also telling us a lot about himself as a judge. Although his advice had broad application, he was also showing his cards: Tell your story to me in human terms; appeal to me as a human being; and solicit my affection for your cause.

Justice Laskin believed that the facts mattered far more than the law in most appeals[22] and urged counsel to think about cases as clashes of competing stories and underlying themes:

> In emphasizing the decisiveness of the facts, I do not suggest that judges ignore the law. Appellate judges feel a duty to the law as well as a duty to justice. And we will do our utmost to satisfy both wherever possible. But the truth is, few cases demand that we reach a legal result that seems unjust. Karl Llewellyn – one of the great legal realists – explained this in a path-breaking book about how appellate courts really decide cases. The book, called *Deciding Appeals*, was written in 1960, but Llewellyn's insights remain true today.
>
> In his book Llewellyn stressed that precedent is malleable; many standards are framed in general terms; and many cases fall between precedents. The law guides, suggests, even pressures, but it does not control the result. The law allows judges a lot of scope to emphasize the facts because of what Llewellyn called the leeways of precedent. Appellate judges have a great deal of leeway to do what they perceive is the right thing. In other words, there is a lot of play in the joints.[23]

Justice Laskin mastered the leeways of precedent to permit him to do the right thing. He did so with great compassion and sensitivity. We should all be grateful for his service.



Notes

1. In 1994, Minister of Justice Allan Rock appointed Justice Laskin to the Court of Appeal directly from the bar, where he had distinguished himself as one of Ontario's leading advocates. His practice spanned all aspects of public and private law. Starting after his graduation from the Faculty of Law at the University of Toronto in 1969, he practised at Fasken & Calvin; Laskin, Jack & Harris; and Davies, Ward & Beck. He was counsel to several Commissions of Inquiry and served as legal counsel for Canadian Jewish Congress, Ontario Region. Not surprisingly, he was elected a fellow of the American College of Trial Lawyers.
2. To paraphrase Drake, it's top two and it's not two. When I clerked for the Court of Appeal for Ontario in 1999–2000 the court comprised Chief Justice Roy McMurtry, Associate Chief Justice Coulter Osbourne and Justices John Brooke, John Morden, George Finlayson, Horace Krever, Hilda McKinlay, James Carthy, Marvin Catzman, Louise Arbour, Jean-Marc Labrosse, David Doherty, Karen Weiler, Mac Austin, Rosalie Abella, John Laskin, Louise Charron, Marc Rosenberg, Michael Moldaver, Stephen Goudge, Stephen Borins, Dennis O'Connor, Kathryn Feldman, James MacPherson and Robert Sharpe. This is the judicial equivalent of the 1955–58 Miles Davis Quintet, the 1961 New York Yankees or Formation-era Beyoncé. You choose.
3. I am uneasy about starting this article with an anecdote. After all, Justice Laskin wrote an article called "Forget the Windup and Make the Pitch," and I fear I am doing exactly the opposite.
4. "Fuck Brooklyn!" (if you are curious). It earned him a $25,000 fine from the NBA and an everlasting place in the heart of every fan of the Raptors.
5. Online: <https://www.osgoodesociety.ca/book-author/george-finlayson/>.
6. *Howe v Institute of Chartered Accountants (Ontario)* (1994), 21 OR (3d) 315 (Div Ct).
7. *Howe v Institute of Chartered Accountants (Ontario)* (1994), 118 DLR (4th) 129 (Ont CA).
8. *Ibid* at 137.
9. *Ibid*.
10. *Ibid* at 142.
11. *Ibid* at 147.
12. Justice Laskin was no pushover. One year later, Mr. Howe was back before the Court of Appeal seeking a stay of proceedings before the Discipline Committee pending the resolution of a civil action against him. Justice Laskin was a member of the panel that dismissed his appeal in a two-paragraph endorsement: *Howe v Institute of Chartered Accountants of Ontario* (1995), 25 OR (3d) 96 (CA).
13. *R v Sanichar*, 2013 SCC 4, rev'g 2012 ONCA 117; *Dickie v Dickie*, 2007 SCC 8, rev'g 78 OR (3d) 1, (Ont CA); *R v Ferguson*, 2001 SCC 6, rev'g 35 CR (5th) 290 (Ont CA); *Whiten v Pilot Insurance Co*, 2002 SCC 18, rev'g 58 OR (3d) 480 (Ont CA); *R v Spence*, 2005 SCC 71, rev'g 73 OR (3d) 81.
14. *Khan v University of Ottawa* (1997), 148 DLR (4th) 577 (Ont CA).
15. *Ibid* at 596–597, 607.
16. See eg *Re: Polten and Governing Council of the University of Toronto* (1975), 8 OR (2d)749 at 768 (Div Ct).
17. Interestingly (and I use that word advisedly), John Sopinka was in dissent on that case. Nevertheless, Justice Laskin's wisdom shone through and that decision has been the leading case for over 30 years.
18. Happily, his comments questioning the continued appropriateness of the "manifest unfairness" standard were, in my opinion, *obiter*.
19. (1999), 170 DLR (4th) 280 at 284–285 (Ont CA).
20. It is also, of course, the introduction to his dissent from the reasons of the majority written by Justice Finlayson (Catzman JA concurring). I realize now that I selected three cases in which Justice Laskin disagreed with Justice Finlayson. This is entirely coincidental. I mean no disrespect to Justice Finlayson.
21. "A View from the Other Side: What I Would Have Done Differently If I Knew Then What I Know Now" (May 1998) 17:2 *The Advocates' Society Journal*; "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums" (August 1999) 18:2 *The Advocates' Society Journal*; "What Persuades (or, What's Going on Inside the Judge's Mind)" (June 2004) 23:1 *The Advocates' Society Journal*; "How to Write a Persuasive Factum: A Judge's View" in David W Chodikoff & James L Horvath (eds), *Advocacy & Taxation in Canada* (Toronto: Irwin Law, 2004), ch 1.
22. Hon John I Laskin, "What Persuades (or, What's Going on Inside the Judge's Mind)" (June 2004) 23:1 *The Advocates' Society Journal* 4–9 at para 38.
23. *Ibid* at paras 40–41.

# The Journal conversation: Ronald Slaght

**Stephen Grant, LSM, ASM**

**STEPHEN GRANT:** Did you always want to be a lawyer?

**RONALD SLAGHT:** It's easy to say yes, but the answer is no. Partly because of my personal circumstances. I am a fourth-generation lawyer, which is pretty rare in this country. My great-grandfather was the Crown attorney in Simcoe, my grandfather was a very famous counsel in Ontario and my father was a lawyer. But my parents separated when I was young, and I had no exposure to lawyers over all those years, despite the history.

So, I didn't really gravitate toward it or think much about it until I finished political science and economics and took a year off to decide what to do.

**SG:** What did you do for the year off?

**RS:** Mostly travelled. As you know, in the late sixties it was a volatile time. The Democratic convention in '68; the Vietnam war. So, when I came back from a radical and liberating few months, I supply taught in the Toronto system for a couple of months to see what that would be like. That drove me to law school.

**SG:** Did you find it came naturally to you?

**RS:** Well, the parts of it that I thought I had a penchant for involved the expression of something orally. I didn't have any particular idea that I could do the analytical part. I didn't even know what that was. I remember walking into McCarthys on the first day of articling and realizing there was something called a client. I had no idea about that – even through law school.

**SG:** Did you enjoy law school?

**RS:** I did enjoy it.

**SG:** How did you end up at McCarthys?

**RS:** In September of my third year, I phoned three law firms and said I would like an articling job. I had heard of this guy named Doug Laidlaw. His fame had even filtered into the law school, and so McCarthys was where I wanted to go.

What is also startling is that they knew who I was because they phoned the law schools in those days and asked, you know, "Are there any good prospects in your ranks?"

So, I got an interview at the three places I phoned, and I got an offer and I accepted it.

**SG:** I had a similar experience with Ian Scott and Cameron, Brewin and Scott. That's where I wanted to go because I had heard and met Ian Scott. Funny how those events shape our lives.

**RS:** It is.

**SG:** He was quite a formidable guy, Doug Laidlaw.

**RS:** He was. Even though people don't think of him this way, he was quite formal, and it was "Mr. Laidlaw" for the first few years. At the same time, he was welcoming and a teacher, and awe-inspiring, too. You wanted to work hard to do his bidding, which is what we did.

**SG:** A formidable advocate, though?

**RS:** And he was probably better in the Court of Appeal and the Supreme Court of Canada than he was in the trial courts, although he's known for the latter. I've never seen anybody make as powerful, concise an argument as he could, and mostly because he prepared for those appeals, unlike the trials where it was one after the other from September to June.

**SG:** You've had a pretty fulfilling career, no?

**RS:** I have.

**SG:** I was looking at your firm's website, and it's talking about "known for the stare that can stop you in your tracks." Was that natural or developed?

**RS:** It was natural and, to a certain extent, unconscious. But it also became a bit of a tool when I realized that this thing had an effect on people.

**"You have to give it a shot, and you can lose – and you can learn a lot from losing."**

**SG:** I had no idea it was a trademark.

**RS:** It's mostly a blank stare. I'm actually thinking while I'm staring, but people think I know the answer and that's why I'm staring.

**SG:** Nice trick.

**RS:** It was a powerful weapon over the years.

**SG:** Apart from the stare, what do you think accounts for that successful career?

**RS:** Well, if I had to say something, of all the things, opportunity is certainly one of them. A natural proclivity must have had some effect. And hard work, obviously.

But what I learned, and all the great advocates I've seen have this trait, is that it's the ability to make the case your own – to identify the one or maybe two issues that are the significant issues and make those issues what the case is about.

Leaving extraordinary talent aside, you have that penchant or that ability, or you can be taught it. And it was easy when the files were half an inch thick. It's not so easy anymore – but the skill is the same.

While you now have to learn more, there are only a couple of things that are important in any case, and I think I had that point drilled into me and watched it, observed it and tried to practise it.

**SG:** Distilling the case to its essence?

**RS:** Well, I think it's a little different from that. It's identifying something that you think is a winning strategy or focusing on an issue and then making the case.

**SG:** Finding the winning line of play?

**RS:** Yes. And it's something that can be learned, and it's difficult.

**SG:** And it can be taught?

**RS:** And it can be taught. It can be taught on the way through, and I was taught it and I observed it and I tried to do it. I can think of examples in my own cases where it's a stunning thing to be able to do. And you need a certain force of personality, usually at the beginning; but to me it's the real key to being successful. It's not being bogged down, to put it in colloquial terms.

**SG:** It's obviously something more than being intuitive. How did you acquire that skill?

**RS:** I saw it being practised, and I watched it. As a younger lawyer, I watched it happen in cases where I didn't even agree that that was the issue, or where I didn't see it as being the issue. And I just came to understand that you must have something. Rather than just A to Z, you know? K, somewhere in there, K is the answer.

It gives you focus. It gives you purpose. It gives you something the rest don't have. And you can build on it. And then, obviously, you have to do the work and convince somebody that you've got the right issue. But you can learn to do it, and that's been the successful feature of my practice.

**SG:** Did you ever feel that you had the winning line of argument and the ruling was against you?

**RS:** That happens. This is not a script that we write. This is a human drama, and one of the players is the judge.

You don't win all your cases. You and I weren't always successful at everything we did.

I've noticed, though, that young lawyers now are so used to success academically, in their extracurricular life, that they feel they must win. I never really felt that. You have to give it a shot, and you can lose – and you can learn a lot from losing.

**SG:** I'm surprised to hear you say that because I always thought you were passionate about winning without being overbearing about it, full of the certitude of your position.

**RS:** I do believe that, and that's part of what I've been describing. You convince yourself first and, without being blinkered about it, you obviously have to take into account whatever else is going on in the case. But disappointment comes with what we do.

**SG:** Don't you find that it is so hard to absorb personally unless, maybe, you're more dispassionate about it?

**RS:** It's devastating because you also have to remember that one of the joys of what we do is that you're representing somebody. So, to lose means your client loses, and that's very difficult.

**SG:** I think the older I get, the harder I find it when I know that the wrong result happens.

**RS:** And there are more than enough of those.

**SG:** You had quite an amazing group of advocates around you when you started at McCarthys until you left to form Lenczner Slaght.

**RS:** You know, it really was, and I was lucky. And this is something people, again, would probably be astounded to know. I was the ninth lawyer in the litigation department at McCarthys.

**SG:** When I was there, there were around 90.

**RS:** Alan Lenczner and Michael Royce and I came into that litigation milieu just at the time the big firms were exploding in growth, and we had an incredible core group. And there was no shortage of things to do. So, we were always litigating. It was a great opportunity to learn.

**SG:** You've had huge successes. Did you ever have any failures?

**RS:** I absolutely did. I can think of a couple of cases that never got righted, and I believe in my core were wrongly decided and wrongly decided on appeal. But there are only a small number of those. The other side of it: I have many more where I have a lot of satisfaction from succeeding.

**SG:** Did you ever succeed in cases that surprised you? It's usually a binary system, win or lose. The draws are very, very slim.

**RS:** Yes, but I think, by and large, courts get it right.

**SG:** I do, too.

**RS:** Still, I'm an advocate, doing the best I can for a particular client. On the other side, when you succeed, it may not be for exactly the reason that you thought. But usually it's probably equally defensible.

**SG:** What I remember about your and to some extent my old days is how hard you guys would seem to work. You would work hard, then play squash and then work some more. Wasn't that what your days were like?





**RS:** It truly was.

**SG:** I'm describing it accurately?

**RS:** You are describing it. We never really thought about it much. We just worked. It wasn't as if it was easy, but that's what we did. And, as a result, we became pretty good lawyers.

**SG:** So, what did you do about work/life balance in those days?

**RS:** First of all, I never heard the term at the time. And I actually didn't think I didn't have work/life balance. Maybe the proportions were not as somebody might think them to be today. But for me it was a pretty good work/life balance. I look back on that and it's hard to be regretful.

**SG:** It is hard to be regretful. But going back a moment, what's the key change in our professional lives that you have seen?

**RS:** To me, it's the growth of the regulatory society that has made a huge difference in our lives.

I was startled when I was reading the new policing legislation, which brings in all kinds of new potential causes of action. It is 400 pages long. Think of the field of battle that this gives rise to.

So, I think regulatory litigation is rapidly overtaking what we would think of in broad terms as commercial litigation as the backbone of the litigator.

**SG:** Do you think it's a less rigorous form of litigation?

**RS:** No, I don't think that. First of all, you have to have a specialized knowledge. You can't just drop in on a particular tribunal anymore, something that has changed the nature of law firms that do litigation. The specialty practice is now much more necessary than it ever was in the previous, what, 25 years.

While we hold ourselves out at Lenczner Slaght as generalists, and, by and large, we still do everything, there's a big learning curve and you'd better be good at what you do to compete with the people who do that work everyday. Then there's the whole administrative law construct.

**SG:** I look at the standard of review jurisprudence and can't actually figure out how they decide whether the standard of review is reasonableness, correctness or some *ex post facto* reasoning.

**RS:** I think the real trouble with it is that, at the end of the day, it's a bit of a movable feast. It's a blocker if the court wants to have a blocker. And that's the frustrating part. Then, when you look at deference, it's just not predictable.

**SG:** It seems to me to be calibrated to aid the court to find the just result.

**RS:** Yes. And because we're in a regulatory society and there are so many cases coming out of administrative law, that's a really important feature of our practice, which is new compared to when we used to go to the Court of Appeal and have at it again.

But that is the new reality, a regulatory litigation practice. And it's an opportunity. I say to our young people, you know, identify an interest. It's going to be hard to be a generalist, so find something and then be the best at that.

**SG:** There are a lot of terrific young lawyers out there. Your firm and elsewhere?

**RS:** Oh, for sure. They need the experience. They need, you know, a bit less work/life balance sometimes, maybe, but they have a lot of talent. And they have something we did not have: They are restless, and change comes from that.

We were fortunate when we started Lenczner Slaght because we were experienced barristers, so we got our work because we had won cases – we had reputations. That's how the work came to us. It's a lot harder to do that now because of the specialty practice and because there just isn't the volume of cases and, of course, everybody is out there chasing the same clients.

**SG:** But it's proved to be another fulfilling chapter, right?

**RS:** Yes, and it didn't take that long before we realized we were getting enough work that we needed people to help us do the work, and they needed people to help them do their work. That's how the firm grew quickly.

**SG:** Looking back over it all, do you have any regrets?

**RS:** Well, leaving aside work/life balance, at one point I thought I might try politics. It's not really a regret, but it could have been a different path. But I quickly decided I'm better at what I'm now doing than I think I'd ever be at that.

Anyway, this is a common story. I think as I'm sort of at some point going to come to the end of this, then what next? I am taking more time off. I always intended never to die with my boots on. I'm going to quit at some point, and I've been directing myself over the last two or three years so I'll be able to do that.

**SG:** I think it's a bad strategy to retire and then die.

**RS:** Yes, it is.

**SG:** Am I right that you have segued a bit into ADR stuff?

**RS:** Yes, I do arbitrations and mediations.

**SG:** As I also do ADR in family law, what's interesting is that you see from an adjudicative point of view what resonates and what doesn't when counsel are asserting propositions.

**RS:** And would it have made you a better counsel then if you'd had the insights?

**SG:** Must be, right?

**RS:** Yes. But coming back to the original point, sitting there as an arbitrator particularly, but also you see it in mediations, is, principle number one, what's the issue? Do these lawyers have their finger on the issue? Am I being persuaded by one or the other of them that they have the kernel of this case? That's what I look for.

**SG:** The right path, the right path to the right solution?

**RS:** To persuade the person up there is to give that person a way to find for you and get rid of all the other issues.

**SG:** So, do you actually ever intend to call it a day? Do you have a plan?

**RS:** Yes, I absolutely do. I'm going to be out of this job in, you know, a reasonable time from today.

**SG:** It's a nice stage of life, don't you think?

**RS:** It's lovely. Whether you've earned it or not, that's where I am and I'm enjoying it.

**SG:** What do you think about the state of the world today?

**RS:** Well, I guess that's the other thing. I would like in the next life, the life after the one now – not in the hereafter – to make some contribution to the shoring up of our democratic institutions and in a public policy sense.

**SG:** Are you worried about your own particular carbon footprint?

**RS:** Well, my wife is an environmentalist, so I'm making very small contributions to that world.

**SG:** Don't we have to?

**RS:** It's dropped down a little bit in importance because of what's going on otherwise in the world.

**SG:** The Doomsday clock has moved up a couple of minutes to two minutes to twelve. This hasn't been that worrisome since you and I were young in the Cold War/nuclear age, I don't think.

**RS:** It's so true. So maybe it's over to them?

**SG:** I'm not sure we've done them any favours.

So, final question: What do young lawyers do to become the next you?

**RS:** Well, they have to be them – that's the first answer to that question. With that as a given, they have to find cases and try them. And then, I think, they have to take to heart what I took to heart from watching the great lawyers I watched, including your partner Ian Scott, with whom, as a young lawyer, I had an appeal on a great case. I knew a hell of a lot more about it than he knew about his side of it.

**SG:** No doubt.

**RS:** And he came into the Court of Appeal and persuaded them that his side of the case was right, and my side of the case was wrong – even though my side of the case was right and his was wrong. And he did it by convincing them that he had this one issue that was the answer, and they bought it.

An unforgettable lesson for me. And that's what I tried to do. And that's what people should try to do. Because if you do that, it means you know everything else, too.

Because we deal with such a volume of material now, you'll be unhappy if you don't prioritize and find something that you can be persuasive with. And judges and courts look for that. They want help. They want somebody to say, "Okay, I'm going to tell you what this case is about," and then you only say one thing.

**SG:** And how to get there?

**RS:** And "I'll tell you how to get there." It's the key.

**SG:** Thank you for doing this. It's very gracious of you.

**RS:** Very happy to be here.







## Diversity and inclusion in the courtroom:

# A necessity, not a luxury

**Erin C. Cowling**

Many will agree that we have more work to do in promoting and improving equality, diversity and inclusion in the legal profession. The glacial pace of progress is not only disheartening, it is also perplexing.

It is widely recognized that there is a strong business case for diversity. In January, McKinsey & Company released a report that looked at the relationship between the level of diversity (defined as a "greater share of women and a more mixed ethnic and cultural composition in the leadership of large companies") and company financial performance.[1] The analysis found a statistically significant relationship between a more diverse leadership team and better financial performance. Companies in the top quartile for gender diversity were 21 percent more likely to experience above-average profitability than companies in the fourth quartile. For ethnic and cultural diversity, there was a 33 percent likelihood of financial outperformance. Law firms are businesses, too. Why wouldn't we want to embrace better financial performance?

If diversity is directly related to *financial* success, logically diversity should be directly related to *courtroom* success as well. Diverse litigation teams bring unique talents, skills, experiences and perspectives to the legal issues at hand and are more likely to think outside the box to respond to the needs of our increasingly diverse clients.

Just as there is no longer a time or place for an all-white male panel speaking at a legal conference, there should no longer be a time or place for an all-white male litigation team. Judges should not be looking down from the bench and seeing a uniform set of faces staring back at them.

### White male lawyers (still) monopolize US courts

In August 2017, the *New York Times* published an opinion piece from a retired New York Federal District Court judge, Justice Shira Scheindlin, called "Female Lawyers Can Talk, Too."[2] In it, Justice Scheindlin observed that, during her time on the bench, the "talking was almost always done by white men. Women often sat at counsel table but were usually junior and silent. It was a rare day when a woman had a lead role – even though women have made up half of law school graduates since the early 1990s." Justice Scheindlin also noted that, after the male lead counsel repeatedly conferred with the sitting female lawyer (especially after Justice Scheindlin asked a tough question), she would ask herself, "Why wasn't [the female lawyer] doing the arguing, since she knew the case cold?"

In 2017, the Commercial and Federal Litigation section of the New York State Bar Association commissioned an observational study involving women lawyers speaking in court. The results of the study were published in November in a report titled "If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR."[3] The report found that women were the lead lawyers for private parties barely 20 percent of the time while they were twice as likely to appear on behalf of public sector clients. The most striking disparity in women's participation appeared in "complex commercial cases." Women's representation as lead counsel shrank from 31.6 percent in one-party cases, to 26.4 percent in two-party cases, to 24.8 percent in three- to four-party cases and to 19.5 percent in cases involving five or more parties. The report concluded that the more complex the case, the less likely a woman appeared as lead counsel.

The gender equality numbers were worse for lawyers who appeared before the Supreme Court of the United States. According to a November 2017 article in the Supreme Court Brief of the

*National Law Journal*,[4] fewer than 18 percent of the advocates before the high court were women.

These reports focused only on gender. However, one can only assume that these numbers are worse for some lawyers; for example, women of colour who face the double hurdle of race and gender.

**But Canada is better, right?**

In 2008, in my early years of practice, I was fortunate to be an associate on a case that went to the Supreme Court of Canada.[5] Of the 23 lawyers in court that day, two of us were women. Neither of us spoke. Admittedly, this was a decade ago. Appearances by female lawyers at our Supreme Court must have improved since then. Or have they?

To answer this question, I conducted an informal survey. I reviewed all 64 reported Supreme Court of Canada decisions from 2017 and divided counsel of record according to gender.[6] Of the 635 lawyers listed as counsel (some appearing more than once), 205 were women. *That is approximately 32 percent.*

*In only seven decisions, female counsel were equal to or outnumbered male counsel.* In one case, a party had a legal team of eight lawyers with not a single woman among them.

These numbers, of course, account only for the counsel of record and do not reflect the gender of lawyers who actually speak before the Supreme Court justices. When we look at those numbers, it is worse. Usually the lawyer listed first as counsel is the lawyer who made the oral argument. Of the 304 lead counsel, 75 were women. *That is just under 25 percent.*

According to the latest statistics available from the Federation of Law Societies of Canada, women represented 43 percent of the practising lawyers in Canada in 2015.[7] Assuming the gender breakdown for litigators in Canada is similar to the overall gender breakdown of lawyers in general, we surely have room for improvement if fewer than 25 percent of the lawyers speaking before the highest court are women.

Some may argue that seniority plays a role in these numbers, because it is likely senior counsel who argue before the Supreme Court. I'm not sure I agree that this is always true, but for argument's sake let's say it is. The problem is, women have been graduating from law school in the same (or greater) numbers as men for several years now. If women are not making it into senior level positions, then this is an entirely different issue that needs to be addressed.

**Increasing diversity in the courtroom**

Whatever steps we are taking to improve equality in the legal profession, they are not working fast enough. Most firms have diversity and inclusion policies and commitments on their websites to promote equality and equal opportunities. These are great first steps, but actions speak louder than words.

In her opinion piece, Justice Scheindlin suggested that judges, law firms and clients all have a chance to improve this "bleak picture" of underrepresentation of women and racialized lawyers in the courtroom.

In the United States, several judges have imposed rules in their courts encouraging a more visible and substantial role for female lawyers. For example, Justice Jack B. Weinstein, a senior federal court judge in Brooklyn, imposed a rule sheet that states "junior members of legal teams" are "invited to argue motions they have helped prepare and to question witnesses with whom they have worked."[8]

Also, clients, particularly corporate clients and in-house counsel, should be, and have been, demanding that their legal teams be more diverse. For example, Facebook requires that one-third of a law firm's team working for the social network "be composed of women and ethnic minorities."[9] Hewlett Packard and MetLife have also implemented similar initiatives.[10]

Law firms can also keep data on the number of court appearances provided to women lawyers or lawyers belonging to other equality-seeking groups. The people who have the power in firms – equity partners and client relationship managers – can take steps to increase diversity and inclusion at the very beginning of a file when deciding how to staff the litigation team.

Compensation committees should also take note. If a partner consistently chooses all-white male lawyers when assembling a team, compensation points can be deducted. If a diverse team is assembled, points can be gained. If a woman or a racialized lawyer speaks in court, extra points can be added. Money can be a great motivator.

And, of course, there is nothing stopping women or other underrepresented lawyers from seeking out these roles, too. When I was a newer lawyer it never crossed my mind to *ask* if I could speak in court until I saw a female lawyer ask a senior partner if she could cross-examine a witness. He said, "Of course." Sometimes that's all it takes. Lead counsel may simply be stuck doing things the old way, are too busy or may assume you are not interested. Speak up and put yourself out there.

**Advocates for change**

Maintaining the status quo is always easier than embracing change. As often noted in diversity and inclusion literature: When you are accustomed to privilege, equality feels like oppression.

If we truly want a better legal profession, we need to be advocates for real change. It is our responsibility. Let's stop simply paying lip service to our diversity and inclusion policies and initiatives by our law societies and legal associations. We must actively take steps to improve diversity and inclusion in our courtroom and in our profession as a whole.





**Notes**

1. Vivian Hunt, Lareina Yee, Sara Prince, Sundiatu Dixon-Fyle, "Delivering Through Diversity" McKinsey & Company, January 2018; online: <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity>
2. Shira A Scheindlin, "Female Lawyers Can Talk, Too," *New York Times*, August 8, 2017; online: <https://www.nytimes.com/2017/08/08/opinion/female-lawyers-women-judges.html>.
3. Hon Shira A Scheindlin (ret), et al, "If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR," New York State Bar Association, November 2017; online: <http://www.nysba.org/comfedreport/>.
4. Tony Mauro, "Why Are There So Few Women SCOTUS Advocates?" *The National Law Journal, Supreme Court Brief*, November 1, 2017; online: <http://s3.amazonaws.com/cdn.orrick.com/files/NLJ-WhyAreThereSoFewFemaleScotusAdvocates.pdf>.
5. *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69.
6. I focused on gender diversity (rather than race, sexual orientation or physical abilities) because gender is more easily identifiable. I determined gender based on identifying the gender that is traditionally associated with the first name of counsel and researched the individual lawyers when this was not clear. Obviously, this informal review cannot accurately reflect which gender the individual themselves may identify with.
7. Federation of Law Societies of Canada, "2015 Statistical Report of the Federation of Law Societies of Canada"; online: <http://flsc.ca/wp-content/uploads/2014/10/2015-Stats-Report-FIN.pdf>.
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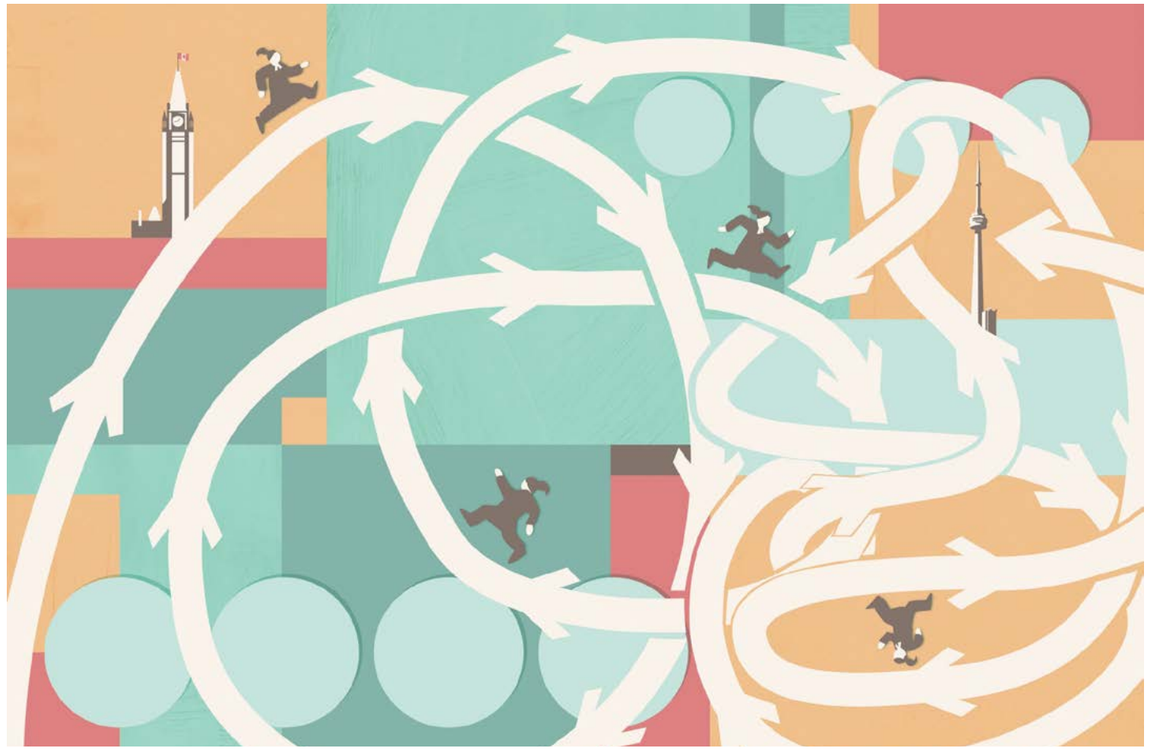
# The "Path":

## A case of pursuing dreams, conquering goals and cultivating resilience

**Marie T. Clemens**



It may not have been the path of least resistance when I decided to leave my well-established law practice in Ottawa to pursue my dreams in "The Big Smoke"[1] (which, as a side note, I had to Google. The term describes Toronto as a city with a "big reputation, but little to show for it." Yikes! Although it may not be very flattering, perhaps it's better than the nickname Ottawa has been given: "Coma City.") No matter what city I may reside in, however, my vision for living life remains the same. I see life as a journey and "an adventure of passion, risk, danger, laughter, beauty, love, a burning curiosity to go with the action to see what it is all about, to search for a pattern of meaning […] and to live to the end."[2]

Perhaps some of you can relate to your career in law being similar to Toronto's infamous "PATH"[3]: This underground pedestrian walkway has many different routes that no one can ever truly navigate with ease; it may require direction, assistance and guidance; and, despite having a well-established plan, one may at times be filled with doubt, or encounter challenges and setbacks along the way. What may have initially seemed simple and straightforward can lead people in circles before they finally reach their destination. Once there, however, they quickly realize it's time to move on again. I'm sure that many who have experienced this downtown underground maze have, at one point or another, asked themselves, "How does one navigate this labyrinth with ease and grace?" Sorry to disappoint, but I cannot offer a clear answer here. What I *can* offer in this article, though, is a lighthearted account of my journey to Toronto, which I hope will provide some tips on achieving your goals and cultivating resilience.

**The backstory: Why make the change?** There are many reasons why I decided to leave the comforts of Ottawa. But believe me when I say it was *not* an easy decision to make. I knew I would be leaving behind many things I find meaningful in life: the presence, comfort and joy of my family who lived nearby; the close friendships I developed over the years; the established relationships with my colleagues; and the relatively secure path of career advancement within the Ottawa bar. "So, why move?" you may ask. After all, it would be a hassle to pack up my life, say my farewells, start over again and prove myself at a new firm. The answer for me was simple: personal growth and career progression. Since my call to the bar in 2011, I have practised in the area of insurance defence, which involved many early mornings, Porter Airlines lounges and long commutes from the airport to my final destination in Toronto. These trips always left me feeling challenged, alive and curious about the Toronto market. I was intrigued about the opportunities a career in Toronto could offer, the benefits that come with living and working in a big city, and the social aspect of it all.

I believe it's important to step back from our everyday demands to reflect on life, to consider our career goals and objectives, and to evaluate the projection and the desired destination we want for ourselves. By doing so, we can take charge of our personal advancement, whether it be as an individual, in our careers or in our relationships. We often get stuck on auto-pilot, going through our daily routines without asking, "Is this truly what I desire?" The answer may very well be yes – which is wonderful – or it may be that one aspect of your life requires change. Perhaps you require a work/life balance, a new challenge or a renewed sense of passion that only change can bring.

My thought process was that a new market could provide exposure to preferred substantive work, allow for diversity in clientele and offer further entrepreneurial opportunities. Sometimes it's also about taking a chance. "Always go with the choice that scares you the most," the expression tells us, "because that's the one that is going to require the most from you."[4] I was ready for a change in lifestyle. I was seeking growth and welcomed this new opportunity with open arms.

**The change: Cultivating resilience** Change is essential. In fact, I believe it is a key ingredient to success, happiness, individual growth and career development. However, along with change, we may also experience difficulties, barriers and adversity. While change can be exhilarating, it may also come with setbacks that can leave us feeling depleted, discouraged and wanting to retreat to our comfort zone.

I anticipated that the move to Toronto would have its challenges, but there were (and are) things I did not foresee. From condo renovations (which included two floods) and walking for over an hour in the wrong direction ("Always remember the lake is south," they said. But how do you know where the lake is when you're standing in the middle of the city surrounded by tall buildings?), to "interesting" experiences with public transportation and the partial closing of Bay Street thanks to exploding hydro panels and a subsequent fire, my first few months were chock full of surprises. In full disclosure, there may have been a few tears shed along the way and an underlying desire to retreat to my comfort zone. Despite the moments of doubt, I quickly learned that the key to dealing with change is to embrace it and endure the setbacks while focusing on the positive. In short, the most important thing is to carry on – to practise resilience.

But what *is* resilience, and how does one develop, maintain and practise it? "Building Your Resilience," a great article released by Homewood Health, resonated deeply.[5] It outlines why resilience is an important quality in our fast-paced, stressful and ever-changing lives. According to the article, resilience is defined as the ability to face life's challenges and cope with disruptive change; it is the ability to rebound from setbacks without responding in dysfunctional ways. Being resilient doesn't mean we can't or shouldn't feel sad, angry or upset in response to difficult events; rather, it means we must find a way to manage through the adversity. Resilience allows us to endure difficult and challenging situations – whether it is moving to a new city, overcoming a difficult task or dealing with a challenging client – and enables us to grow. The good news is that resilience is an adaptive strategy and, as such, can be learned or built through changes to our lifestyle and outlook on life.[6]

I have included some recommendations and tips for accepting change and cultivating resilience in our lives as we continue to work toward achieving our goals. These can be easily remembered as the acronym *CHANGE*:

**C**reate a support network
**H**elp yourself
**A**ccept change
**N**ever accept defeat
**G**ive yourself credit
**E**xercise and work/life balance

*Create a support network*. This goal has been the most challenging one since my arrival in Toronto, most likely a reflection of the great support system in Ottawa: a wonderful and loving family, caring and supportive friends, and a team of amazing colleagues. Having a great support system with whom you can share your thoughts and fears, discuss challenges, turn to for advice or simply lean on when you need a shoulder is an essential part of overcoming life's obstacles. Our burdens can be too heavy to carry alone; we all need the emotional and psychosocial support of others to help us work through our challenges.

> ***Tips:*** *Join an organization such as the Ontario Bar Association, volunteer in your community (e.g., Lawyers Feed the Hungry) or organize a dinner among the associates at your firm. Take steps to make sure you are part of a network and work on strengthening your connections.*

*Help yourself*. When faced with a challenge or setback, stay calm, examine the situation and think rationally for solutions that will assist in advancing and moving you toward your goals. We are often great at solving other people's problems and recommending well-thought-out solutions but struggle when it comes to our own challenges. This likely occurs because we are more emotionally invested in our own lives, and, at times of duress, our ability to think critically and rationally is clouded by our emotional state. Thus, staying calm and emotionally grounded should be the primary focus. It will allow you to do what you, as a lawyer, do best: problem-solve.

> ***Tips:*** *Try meditation or develop a mantra: "I am strong; I am focused; I will get through this." You can revise the mantra to any words or phrases that inspire you most.*

*Accept change*. Change is a part of life, and a career in law is vibrant and dynamic – evolving and progressing. We can't stop change from happening. Trying to do so will only wear us down. If we embrace change rather than resist it, we will feel happier, less stressed and, ironically, more in control.

> ***Tips:*** *Journal about the changes in your life. Document the peaks and*

*the valleys and how you are feeling in those moments. Focus on the positives and the opportunities you wish to welcome into your life.*

*Never accept defeat.* Instead, use a difficult situation as a learning opportunity, not only to develop better coping and problem-solving skills, but also to strategize and implement solutions. This is also a great opportunity to practise asking for help, which at the same time can strengthen your interpersonal relationships. Learning to take action will help restore balance by allowing you to regain control over your circumstances.

***Tips:*** *In the middle of your day, during a stressful situation or at a moment of uncertainty, stop, take a deep breath, go for a walk, change your mindset. If you are still overwhelmed, perhaps ask a friend or mentor for support.*

*Give yourself credit***.** Often, we forget just how far we have come and all the obstacles we have surpassed to get to this spot. Positive reinforcement is crucial as it will give you that extra boost of energy necessary to keep going. Take a moment of recognition for yourself; be proud of everything you have accomplished and keep pushing to be the best you can be.

***Tips:*** *Truly take time to celebrate your success by going to dinner, calling a friend to share the joys in your life or enjoying a glass of champagne. Make the moment special and focus on that feeling of accomplishment.*

*Exercise and work/life balance.* It is so important to take care of yourself. If our bodies and minds are not maintained, our ability to manage and work through challenging situations effectively will be impaired. This is one area where we have complete control: taking the time to rest, following a healthy diet, exercising regularly (even as little as 15 minutes a day can have outstanding benefits),[7] and making time to enjoy the simple pleasures that life has to offer. Toronto, for example, has so many wonderful activities when it comes to enjoying life: outstanding restaurants, fine arts, a beach close by, cycling trails – the list goes on. It's important to develop healthy ways to manage stress, to relax and to take a deep breath.

***Tips:*** *Develop a routine that works for you. Enjoy an early morning workout, going for a walk at lunch hour or reading for pleasure during your commute. Take 20 minutes each day to take care of yourself. Scheduling this time on your calendar will help you stay committed.*

**The journey: Keep moving forward**

In my personal journey, a change in city, surroundings and bar may have been a step backward in many respects, albeit temporarily. Each day, however, sees improvements: I am developing new daily and weekly routines, discovering new places and meeting wonderful people. Overall, I feel challenged and I feel alive. On the subject of personal accomplishments, long-distance swimmer Diana Nyad said, "When you achieve your dreams, it's not so much what you get, it's who you become."[8] I agree with her. While I did get many wonderful things by moving to Toronto, they are simply the cherry on top. The most significant part of this journey is who I have become as a result. In the last few months, I have had more personal growth than I have experienced in years, and that is the accomplishment of which I am most proud.

This path, somewhat like the PATH that lies beneath the downtown core of Toronto, has always been about the journey and the growth which comes along the way. It's about continuing to move forward and embracing change; enjoying the peaks and working through the valleys. I am excited to continue my journey and am hopeful that my career in law will continue to develop and flourish no matter where this path may lead. Let us continue to cultivate resilience so we may persevere in overcoming obstacles and succeed in conquering our goals.

**Notes**

1. J Semley, "Ask Torontoist: Who You Calling 'The Big Smoke'?" *Torontoist*, May 13, 2010;online:<http://torontoist.com/2010/05/ask_torontoist_who_you_calling_the_big_smoke/>.

   In his book *Naming Canada: Stories About Canadian Place Names*, Alan Rayburn suggests that the term may have its roots in an Australian Aboriginal comment regarding industrial Australian cities, which was then applied to Toronto by Allan Fotheringham, in his long-running column for *Maclean's*. Famously controversial, Fotheringham was never at a loss for cutesy nicknames, or "Fotheringhamisms." He was known to refer to Ottawa as "Coma City" and to former PM Joe Clark as "Jurassic Clark." As far as "The Big Smoke," Fotheringham used the term as a means of describing Toronto as a city with "big reputation, little to show for it." To him, any status the city might have as "Toronto the Good" or "the Athens of the Dominions" was all smoke and mirrors. While some other Canadian cities are also referred to as "The Big Smoke," such as Sudbury for its towering INCO smokestacks and Vancouver for its heavy fogs, once again Toronto suffers another snarky potshot from outsiders. Maybe now we'll think twice before cheerily self-applying the moniker. Still, it is better than "Cowtown" or "Pile O' Bones" or "Coma City." It's also way catchier than Montreal's "*la ville aux cent clochers*" (the city of a hundred belltowers).
2. SD Alinsky, quoted in E Saperston, *Live in Wonder: Quests, Quotes & Questions to Jumpstart Your Journey* (2d ed) (Venice, CA: Live in Wonder Press, 2012).
3. PATH, downtown Toronto's (mostly) underground walkway, links 30 km of shopping, services and entertainment and provides an important contribution to the economic viability of the city's downtown core. The system facilitates pedestrian linkages to public transit, accommodating more than 200,000 business-day commuters and thousands of additional residents and tourists on their way to sports and cultural events.
4. Caroline Myss, an American author of books on spirituality.
5. Homewood Health, "Building Your Resilience." *Life Lines*, 5:8 (2015); online: <http://www.lians.ca/sites/default/files/documents/00083506.pdf>.

   Homewood Health provides the Member Assistance Program (MAP) for Ontario lawyers, paralegals, judges, students at Ontario law schools and accredited paralegal colleges, and licensing-process candidates, as well as their families. MAP is a confidential service funded by and fully independent of the Law Society of Upper Canada and LawPro. To learn more about the MAP, visit myassistplan.com or call 1-855-403-8922.
6. Homewood Health, "Building Your Resilience." *Ibid*.
7. A Sifferlin, "15 Minutes of Exercise a Day May Be Just Enough: Study." *Time* Health, June 14, 2016; online: <http://time.com/4367344/15-minutes-of-exercise-benefits/>.
8. Diana Nyad, quoted in Lisa Iannucci, "Just Keep Swimming: Diana Nyad Shares Lessons Learned on Treks Across Dangerous Waters." CTW Features, September 26, 2015; online:<http://elkodaily.com/just-keep-swimming-diana-nyad-shares-lessons-learned-on-treks/article_89022130-950f-5a00-bdb2-7dd91a404bc2.html>.

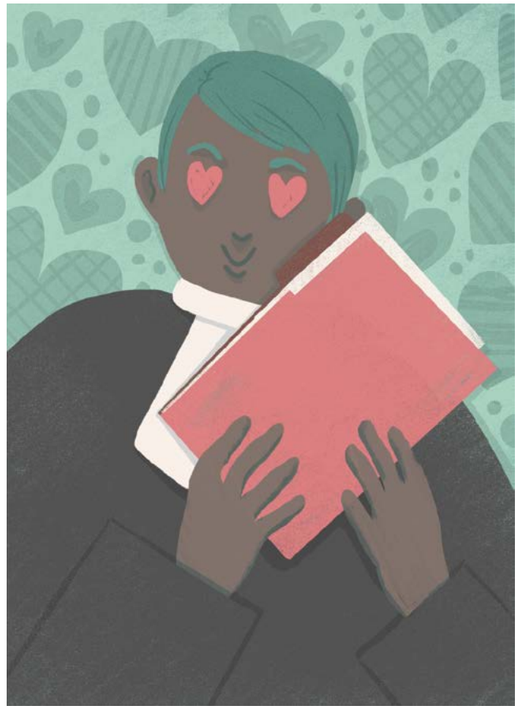




# Why we fall in love with our cases

## – and how that love blinds us

**Paul Fruitman**



In 1995, *U.S. News and World Report* conducted a revealing poll on the loser-pay costs regime. Rather than ask whether the United States should adopt an English- or Canadian-style costs system, the magazine divided its readers into two groups and asked each one separate but complementary questions.

The first group was asked, "If someone sues you and you win the case, should he pay your legal costs?" Eighty-five percent answered yes. The question for the second group was, "If you sue someone and lose, should you pay his costs?" Only 44 percent in the second group answered in the affirmative. The poll shows how "fairness" is a subjective concept. Readers thought a loser-pay regime was quite fair – so long as they were not the loser.

Advocates are not immune from this phenomenon, which psychologists call "fairness bias." Once we become engaged on one side of a dispute, we unconsciously emphasize the good parts of our side and downplay its bad facts. In short, we fall in love with our cases. This infatuation brings benefits as well as challenges. We are better barristers when we believe in our cases. Conviction is a huge part of persuasion. However, confidence in our cases can blind us to their weaknesses. In addition, because Canadian litigators deal directly with clients, we must remain able to give them objective advice.

Provided we recognize fairness bias, we can mitigate its risks and exploit its benefits. We can force ourselves to view the case through our adversaries' eyes, revealing the flaws in our own arguments. Confronting these flaws can keep us objective when advising clients. It also offers us the chance to account for those flaws in our impassioned advocacy. To be our best, we must fall in love with our cases, see their flaws and then fall in love again.

**Emotions drive our decisions**

To appreciate how and why we fall in love with our cases, we first need to consider how we make decisions and, in particular, moral judgments. There are, according to New York University psychology professor Jonathan Haidt, three schools of thought that have guided Western philosophy and psychology on human decision-making.

The Platonic school argues that our decisions are guided by reason. In contrast, former United States President Thomas Jefferson claimed that reason and emotion are engaged in a constant game of tug of war over control of our decision-making. Finally, Scottish philosopher David Hume deemed reason a "slave of the passions," arguing that we make decisions based on our emotions and then use reason to justify those judgments to ourselves, and others.[1]

The current consensus is that Hume was right. Haidt recounts studies he conducted questioning the rational basis for cultural taboos. Participants were told stories designed to cause visceral disgust but in which none of the characters caused or experienced harm. These included eating rather than burying a dead family dog and privately desecrating a flag. Rather than admit that the disgust-inducing conduct was harmless, participants invented victims. They speculated the family could get sick by eating their dead pet or that flag pieces might clog a toilet and cause a flood. Moral reasoning is, in Haidt's words, "mostly just a post hoc search for reasons to justify the judgments people had already made."[2]

Haidt's research will not surprise those who believe the learned judges deciding our cases determine their preferred outcomes before conjuring reasons to support them. The format of judicial decisions – "here are my facts and here is my law, now watch as the learned judge applies the latter to the former to divine the 'right' decision" – is quasi-scientific. However, law is not about science, but morality. Judicial reasons purport to be a disinterested application of law to

facts but are really a post hoc assessment of right and wrong, good and bad, and above all, "fairness."

**How we fall in love with our cases**

Of course, what is "fair" depends on one's viewpoint and interests. The findings of the *U.S. News* poll on loser-pay costs are echoed in several studies of employee compensation, including one aptly titled: "Performance-based Pay is Fair, Particularly When I Perform Better."[3]

Fairness bias is also endemic to sports fans, who naturally think referees and commentators are biased against their favoured team. During one game of the 1986 World Series between the Boston Red Sox and the New York Mets, the switchboard at NBC, which was broadcasting the game, received 1,800 complaint calls. Approximately 1,000 callers complained that announcers Vin Scully and Joe Garagiola were biased against the Mets. The other 800 or so complained that Scully and Garagiola were biased against the Red Sox. The slightly increased number of complaints from New York was attributed to that city's larger population and the fact that NBC was a local call for New Yorkers but a toll call for Bostonians.[4]

Closer to the courtroom are litigation studies by economists Linda Babcock and George Loewenstein. Participants were divided into pairs, with each pair having a "plaintiff" and a "defendant." The participants were asked to guess the award from a real personal injury trial and each pair was then tasked with trying to negotiate a settlement. Guesses by the plaintiffs were, on average, twice as high as the defendant guesses, and the pairs with the more disparate guesses were less likely to reach resolution.[5] This is fairness bias at work.

As advocates, we allege bias among judges (rarely), witnesses (occasionally) and experts (often). There are dozens, if not hundreds of cases discussing the importance and tenuousness of expert impartiality. The Supreme Court of Canada spent 12 pages of a 2015 decision summarizing and pronouncing on this jurisprudence.[6] More recently, a finding of expert bias risked sinking the prosecution of former Ontario Liberal Party staffers alleged to have destroyed government documents. The court in the "gas plants trial" disqualified the Crown's key expert witness because he had worked too closely with police investigators to remain impartial.[7]

I have on numerous occasions witnessed experts morph into partisans for the party paying their fees. Sometimes it happens consciously. Most of the time, however, it is the natural result of being on one side of a case. Fairness bias is highly infectious, and there is nothing so special about advocates that would make us immune to it.

When we take on a matter, we naturally become partial to it. We quiet the counter-arguments like we do the cognitive dissonance that accompanies our own decisions. We begin to equate our side of the dispute with what is "fair." This may be an unwelcome reality for the advocates who pride themselves on the ability to remain detached while engaged in litigation's cut and thrust, but love is blindness.[8] Think of the last time you received a decision that rejected the "obvious truth" of your argument. Consider the possibility that "truth" may not have been obvious and your own bias clouded the objective reality that drove the judge's decision.

**Conviction makes our arguments more compelling**

Falling in love with our cases is not necessarily a bad thing. In fact, overall it makes us better advocates. U.S. president Lyndon B. Johnson is famous for having said, "What convinces is conviction. Believe in the argument you're advancing. If you don't you're as good as dead. The other person will sense that something isn't there, and no chain of reasoning, no matter how logical or elegant or brilliant, will win your case for you."

Studies of persuasive speaking back up Johnson's assessment. Based on research he conducted in the late 1960s, University of California Los Angeles professor Albert Mehrabian concluded that perception of speakers depends mainly on their presentation: 55 percent body language and 38 percent tone of voice; and only 7 percent based on choice of words.[9]

Though Mehrabian's methods and results have been subject to criticism, those critics still acknowledge the importance of non-verbal communication. Subsequent studies show that in the case of an important presentation – such as in-court submissions – the importance of the words chosen rises to 53 percent. Nevertheless, non-verbal communication in that context still accounts for 47 percent of persuasion (32 percent body language and 15 percent tone of voice).[10]

Non-verbal communication is difficult if not impossible to fake. An enduring belief in our cause is essential to convincing others.

**Why we need to remain objective, and how we can do that**

For advocates, that enduring belief must be reconciled with the need to respond to the arguments of our adversaries. The counterweight to Lyndon Johnson in this regard is English philosopher John Stuart Mill, who in 1859 wrote in *On Liberty*, "He who knows only his own side of the case knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion."

In our fused bar, where the advocate directly advises clients, she or he must also be able to advise them properly of both the strengths and weaknesses of their claims. Clients are too invested, financially and emotionally, to see their cases clearly. Counsel's advice and direction must be tempered by objectivity.

How do we revisit objectivity when we are naturally biased toward our side of the dispute? I believe we need to imagine regularly the case through the eyes of our adversaries. This goes beyond setting out the facts our adversaries need to prove and the evidence that can prove those facts. To truly counter our fairness bias, we need to assume the role of our adversaries and "argue" the case from their standpoint.

Indeed, the studies conducted by Babcock and Loewenstein show that simply telling people about fairness bias does little to help them counter it. While study participants thereafter generated more accurate predictions about what the *other party* to their mock negotiation would guess was the trial judge's award, their own predictions did not change. Participants accepted that fairness bias would affect their counter-parties but believed that they themselves were immune to it. However, when participants were asked to "think carefully" about the weakness of their own cases, the discrepancy between their award predictions significantly narrowed and their rate of resolution significantly increased.[11]

Harvard psychology professor Joshua Greene suggests that we can challenge our biases by switching from our "automatic" mental mode to our "manual" one. Greene draws an analogy between our brains and modern cameras whose automatic settings work well for typical portrait and landscape shots but need to be turned off under certain lighting and backgrounds.[12] This idea of a dual-process brain echoes the System 1 and System 2 theory popularized by psychologist-economist Daniel Kahneman and explained in his 2011 bestseller, *Thinking Fast and Slow*.[13] System 1, our automatic mode, is driven by our emotions. System 2 is our manual mode. It allows us to think rationally and make calculated decisions.

Of course, we rely heavily on System 2 in crafting arguments supporting our own side of the case. However, we need to consider that our carefully crafted arguments are influenced by our emotions and that we need to go full manual to see the case from the other side – and from the standpoint of an objective third party. This is a difficult, but highly revealing exercise. By "tricking" our brains to assume the other side of a dispute, we can better understand the flaws in our arguments and develop ways to respond to them. I have had the most success with cases that afforded the time, and budget, to engage in full mock cross-examinations of my own witnesses.

**Controlling our bias for maximum benefit**

Being predisposed to our side of the dispute is, on the whole, very helpful. We must believe in our cause to convince others it is right. Sy Sperling made a fortune with his Hair Club for Men based on the company's famous, if kitschy, tag line, "I'm not only the Hair Club president. I'm also a client."

However, we are better advocates, and we serve our clients better, when we are able to occasionally put bias aside and see cases from the standpoint of our adversaries. By truly adopting the other side, we will better understand the flaws in our own arguments. The key is to be able to turn our bias on and off. The last thing we want is self-doubt when making submissions. If we do not love our cases, judges will not care for them at all.



**Notes**

1. Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Region* (Toronto: Random House, 2012), 31–41.
2. *Ibid*, 27–30, 41–48.
3. NW van Yperen, K van den Bos & DC de Graaff, "Performance-based Pay Is Fair, Particularly When I Perform Better: Differential Fairness Perceptions of Allocators and Recipients" (2005) 35(6) European Journal of Social Psychology 741. See also DM Messick & KP Sentis, "Fairness and Preference" (1979) 15(4) Journal of Experimental Social Psychology 418.
4. As recounted by longtime NBC announcer Bob Costas on the October 13, 2017, episode of the *Bill Simmons Podcast*. For further evidence of the "home team" bias, see AH Hastorf & H Cantril, "They Saw a Game: A Case Study" (1954) 49(1) Journal of Abnormal and Social Psychology 129. In the study, Princeton students viewing a film of a football game between their school and Dartmouth "saw" Dartmouth commit twice as many penalties as Princeton. Dartmouth students recorded an equal number of penalties by both teams.
5. L Babcock & G Loewenstein, "Explaining Bargaining Impasse: The Role of Self-Serving Biases" (1997) 11(1) Journal of Economic Perspectives 109; L Babcock, G Loewenstein & S Issacharoff, "Creating Convergence: Debiasing Biased Litigants" (1997) 22 Law & Social Inquiry 913.
6. *White Burgess Langille Inman v Abbott and Halliburton Co.*, [2015] 2 SCR 182 at 198–210.
7. *R v Livingston*, 2017 ONCJ 645.
8. Bono, pop psychologist.
9. Harry Mills, *Artful Persuasion: How to Command Attention, Change Minds and Influence People* (New York: AMACOM, 2000), 40–43.
10. *Ibid.* See also Jeff Thompson, "Is Nonverbal Communication a Numbers Game?" *Psychology Today* (September 30, 2011); online: <https://www.psychologytoday.com/blog/beyond-words/201109/is-nonverbal-communication-numbers-game>.
11. L Babcock & G Loewenstein, "Explaining Bargaining Impasse" *supra* note 5 at 115–116; L Babcock, G Loewenstein & S Issacharoff, *supra* note 5 at 917–918, 921.
12. Joshua Greene, *Moral Tribes: Emotion, Reason and the Gap Between Us and Them* (New York: Penguin Books, 2013) at chs 5, 6, 11.
13. Daniel Kahneman, *Thinking Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).

# The good old days

**Earl A. Cherniak, Q.C., LSM, ASM**

I was called to the bar of Ontario in 1960, in what is sometimes euphemistically called "the good old days."

Some of it was good and some was not so good, but the practice of law was certainly different in the 1960s and the 1970s than it is today. There were five thousand lawyers in Ontario in 1960, just about evenly divided between Toronto and the rest of the province. About two hundred lawyers were called to the bar with me in 1960, and five were women. No LSAT was required for entry to law school – only a recognized university degree and about $500 for tuition to enrol in Osgoode Hall Law School, on the grounds of Osgoode Hall. Students could and did fail.

In 1960, typewriters were mostly manual. There was no fax machine and no voice mail; "cc" meant carbon copy on carbon paper, and "bcc" did not exist. Printed casebooks were unknown for argument in court, as was highlighting text and redlining drafts. Authorities were trundled into the courtroom on trolleys. Only lawyers in the few large (25-lawyer) Toronto firms docketed their time. The words "email," "Google" and "internet" had not been coined. Mail took one to three days to be delivered, so an exchange of correspondence took about a week.

Lawyers gowned at their lockers in the courthouse, where the day's gossip (and much more) was exchanged and learned.

No one talked about "civility," but the litigation bar was small, even in Toronto, and word got around if you were a jerk.

In magistrate's (now provincial) court and weekly motion courts, cases and motions were heard in the order of the seniority of counsel, which meant that the continuing legal education for young lawyers consisted of watching their seniors in action, where we learned what not to do as much as how to do it. Crown attorneys and judges ate lunch together, while members of the criminal bar sat at other tables and looked on. Disclosure depended on the whim of the Crown attorney.

What passed for diversity in those days was whether lawyers were Protestant, Catholic or Jewish, and many firms had no diversity in that sense at all.

There were few organizations for lawyers. In Toronto, the Toronto Lawyers' Club did not accept Jews, so they joined the Reading Club. But the Advocates' Society, founded in 1963, and the county and district law associations accepted all qualified comers.

Long vacation (all of July and August) actually meant vacation, since there were no trials, time did not run for the purpose of calculating deadlines, discoveries could be held only on consent (rarely given) and only urgent motions could be heard. In 1970, I took a five-week trip to Europe with my family with no

contact at all with the office – international telephone calls were very expensive – and I dealt with the mountain of correspondence only on my return.

Matrimonial law, which was part of my practice for ten years, was very different from today. A deserted wife could sue for interim alimony, but the test was a sum to allow her to live "quietly and in retirement," which meant a pittance and was not available to a wife guilty of adultery, irrespective of the conduct of the husband. Divorces were granted only on proof of adultery or cruelty, and warnings had to be given to each spouse in a trial about collusion and connivance in the proof of adultery, which if present would prevent any relief being granted. Uncontested divorce trials before some judges took five minutes or less. Some lasted more than an hour.

Some judges would not grant custody of children to a woman who had committed adultery, irrespective of the conduct of the

husband. For some judges the answer to the question "What about the children's religious education?" had better be, "Oh, my Lord, I take them to church and Sunday school every week." Otherwise, a custody award was problematic.

The first Ontario Jewish Supreme (now Superior) Court judge (Abe Lieff) was appointed in 1963. Until Mabel Van Camp was appointed in 1971 (coincidentally, at the same time as Mayer Lerner, the second Jewish judge) all Supreme Court and most lower court judges (county and magistrate) were old, male and, with few exceptions, difficult and crusty. Lawyers and parties whose names ended in a vowel or with a "k" were looked on by some judges with suspicion. Supreme Court judges went on circuit, and some judges preferred certain county towns, not always to the pleasure of the local practising bar. The Ontario Court of Appeal in the 1960s was composed of some very good, but very miserable, judges who made life exceedingly difficult for young lawyers who appeared before them, with the result that many never returned after one unhappy experience in that court. A few of us, such as John Sopinka, Claude Thompson, Stan Fisher, John Brunner, Lorne Morphy, Doug Laidlaw and me were gluttons for punishment and kept coming back. ("Mr. Cherniak, have you anything else to say?" Answer: "Yes, indeed I do, my Lord.") There were exceptions even then. Ken Morden, John Morden's father, was one, as was Chief Justice Dana Porter, Julian Porter's father. Things began to change in the early 1970s, with the appointment of the likes of John Brooke, Syd Robins and Charlie Dubin.

Trials in that period were short – two or three days at most. Even *Arnold v. Teno*, one of the trilogy, tried in June 1974, was completed in nine days on liability and damages, including argument. (A similar case would take five to six weeks today.)

Many of us in the litigation bar in the 1960s practised in the civil, criminal and family courts and were constantly in all of them, often more than one on the same day, or conducting discoveries, getting the experience on our feet that is unknown to today's litigation bar, at least in any major centre. Specialization, except in the insurance defence bar, was almost unknown and many eminent counsel, especially in the county towns, did solicitors' work as well. Discovery and especially production were nothing like today. "Trial by ambush" was not uncommon.

The number of female lawyers was vanishingly small, and those that there were, with very few exceptions (Judy LaMarsh was one), did not practise at the litigation bar.

I was fortunate to have the opportunity to learn my craft in those days, because the kind of experience I and my contemporaries had is not possible today, for countless reasons, not least of which is economic. But when I reflect on the changes that have taken place in the profession since those days – for instance, the strides that female lawyers have made generally and in litigation and on the bench – I cannot help but think back on the waste of talent in my generation and that of my mother. The women I grew up with – my sisters, my mother and their friends – were no less talented and capable than the women I interact with today, but it didn't occur to many of them that law (and some other professions) was an option. So, while I look back with nostalgia on some of the "good old days," for all its flaws the world we live in now, and the practice of law in particular, is infinitely better.







# Witty judgments

**Orestes Pasparakis**

The author extends special thanks to Stephen Taylor and James Foy.

Judicial decisions typically range from the dry to the mind-numbingly dull. There is a good reason we don't stay up at night eagerly turning pages to find out how the latest edition of the *Ontario Reports* ends. Reading judgments, in most cases, is like taking medication – something done only as needed. While this is not a uniquely Canadian phenomenon, our decisions seem to be particularly unexciting. As one United States Court of Appeal judge remarked, "I like my Canadian colleagues, but, boy, when it comes to reading their opinions, it's like wading through molasses."[1]

When a witty decision is written, it is quickly forwarded from firm to firm and lawyer to lawyer. These judgments bring a little colour to an otherwise grey landscape. Particularly amusing decisions may even garner media attention. It seems to me that, slowly but surely, more and more judges are writing with literary style, with humour and with wit. Canadian judges are increasingly trying to breathe life into their judgments and inject their personalities into their craft.

Please don't. Grey is good and molasses is just fine.

It's not that judges can't be funny. I've read a few decisions that were laugh-out-loud funny. Really. There's a line from a recent Ontario Superior Court of Justice decision that still makes me smile when I think of it weeks later. The problem isn't judges' lack of wit; it's that levity and high style are contrary to the very purpose of judicial writing.

A few obvious observations upfront: As Lord Denning noted, a reasoned decision is "the whole difference between a judicial decision and an arbitrary one."[2] And, as the old adage goes, justice must not just be done – the litigants must see it being done.[3]

I have come to realize how important reasons are, especially to the unsuccessful party. The winning party is usually just pleased with the prize. Winners don't fuss over the judge's analysis or why they got their way. Decisions are written for the loser. On reading a draft of this article, one of my colleagues pointed out that a similar sentiment was expressed by the Court of Appeal for Ontario, quoting the Honourable Sir Robert Megarry, vice-chancellor of the Chancery Division of the High Court of Justice, albeit dealing with judicial fairness generally rather than humour specifically:

> Sometimes I ask students to say whom they consider to be the most important person in a court room. Many pick the judge; others give a variety of answers. Once one even opted for the usher, without being able to explain why. My answer, given unhesitatingly, is that it is the litigant who is going to lose. Naturally he will usually not know this until the case is at an end. But when the end comes, will he go away feeling that he has had a fair run and a full hearing? Some litigants, of course, are so unreasonable that nothing will satisfy them, even if they win. But take the reasonable defeated litigant (you will all have known many of these), and see whether he feels that he has had a fair crack of the whip. One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process.[4]

Several years ago, Jonathan Lisus wrote about losing as an advocate. His thesis was that losing is part of the job. Lisus explained that losing teaches us humility, it gives us courage and it makes us better advocates.[5] And that may be. All I know is that I hate losing. Even more than I hate losing, I hate having to explain to my client why we lost. A well-reasoned judgment can make this awful experience a little more palatable. Losing clients benefit from knowing that the court understood the issues and carefully considered the arguments. Losers need to know that the judge (even if we may disagree with the ultimate determination) did his or her job.

The thought of having to present an unsuccessful client with a flippant decision makes my stomach drop. How do you convince a general counsel (even worse, a general counsel sitting in London or New York) that the wisecracking judge took his or her legal problem seriously? Clients will feel that we have wasted their time and money only to receive a glib decision that makes light of their concerns.

The moral force of a judgment can be easily lost. In a recent appeal decision, the court went through a detailed legal analysis and came to a fair and reasoned conclusion. However, the decision ended with a gratuitous quip. As I read it, it was clear as day that any client would overlook the analytic strength of the decision, fixate on the ending and question the legitimacy of the entire process. No losing litigant would feel justice was done even where the earlier analysis of the court was cogent. George Rose Smith, a former Arkansas Supreme Court judge observed that "the loser is inevitably certain to be embittered by the court's decision, no matter how right it may be as a matter of law. When an intense fire is sure to be kindled, the wise judge does nothing to add fuel to the flames."[6]

There are also judgments that poke fun at the parties. Oftentimes, these are the litigants who bring their petty grievances and twisted perspectives into the courtroom. While there are cases that should never see the inside of a courtroom, it should be clear to everyone that mockery isn't the right approach. If a proceeding is abusive, condemnation should be doled out through costs and not ridicule.

Few people go to court for sport. Rightly or wrongly they are seeking a hearing – to be heard. Jest, probably the clearest indication that the litigants are not being taken seriously, gives rise to the impression that they have not truly been heard.

It is also possible that, from time to time, it's the court and not the litigants that has lost perspective. One memory stands out for me, and I acknowledge it is not directly on point. As a summer student years ago, I was invited to watch the hearing of Olympia & York's filing for protection under the *Companies' Creditors Arrangement Act*. It was a massive case, with billions in debt and a courtroom filled with gowned lawyers. During the course of the hearing, one lawyer stood up in the back of the room to raise concerns about his client, a family-run company, that supplied some $76,000 of glass panels. In response, one of the phalanx of lawyers representing Olympia & York stood up and made a jibe about the trivial nature of the claim and suggested that the court's time was being wasted. The courtroom erupted into appreciative laughter. When I was growing up, my parents ran a family business and $76,000 was a huge amount of money to them. In that moment, my views were aligned with those of Professor William Prosser, who wrote that "[t]he litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig."[7]

We also need to remember the critical role judgments play in weaving the fabric of the common law. Our judges' decisions influence common law around the world and will shape the law into the future. Although we all may know that Justice so-and-so is a wise guy, his decision, once released, will reach an indeterminate audience who will read it without that awareness. That broader audience probably won't appreciate the fun-loving nature of our berobed comedian. Put meanly, a decision that is good for a laugh is seldom useful for anything else.

Some may say that this issue isn't black and white: that a decision can be both funny and well-reasoned; colourful yet analytical. A decision can emulate literature and still make good law. Maybe this argument is true. But such a decision would still relegate the purposes of dispute resolution and lawmaking to a position secondary to the judge's expression of his or her personality. Even when deftly done, the "clever" decision fails to fulfill the court's function. A judge is supposed to be an impartial and largely fungible member of an institution that applies the law justly and blindly. The judge as celebrity undercuts the fabric of that institution.

From time to time, proponents of more colourful judgments will point to "accessibility" as a benefit of unconventional writing.[8] There's no question that clear judgments written in plain language are desirable. However, we must not confuse a decision that "can be read" with one that just "must be read." A decision that can be read and understood is an essential feature of judicial writing. A decision that must be read for its humour is undoubtedly a hindrance to clarity for the people to whom the decision matters most.

Others I suspect will see this as an issue on the margins. And, happily, it still is. Nonetheless, each new witty decision chips away at the institution. A note from one of the students who helped me pull together materials for this piece reads: "The effective communication of judicial reasons is essential to ensure that faith in the justice system, and the rule of law, remains strong." While this sounds like a sentence from a law school seminar, it remains important and it remains true. Having dealt with local courts in a number of jurisdictions, I have come to realize that what we have in Canada is rare: a judicial system that is unquestionably fair and impartial. We need to protect that system, even if it means reading and writing dry – and, maybe, even dull – judgments.

**Notes**

1. Nathan Koppel, "Court Jesting: These Sentences Don't Get Judged Too Harshly," *Wall Street Journal*, June 29, 2011; online: < https://blogs.wsj.com/law/2011/06/29/court-jesting-the-art-of-pop-judging/>. The author notes the allegations of misconduct and resignation of Judge Kozinski following the drafting of this article. His comments nevertheless provide a useful window into the attitudes of some people including, most importantly, some judges, toward judicial humour.
2. Sir Alfred Denning, *Freedom under the Law* (Toronto: Carswell, 1949) 91.
3. Lord MacMillan, "The Writing of Judgments" (1948) 26 Can Bar Rev 491.
4. The Honourable Sir Robert Megarry, cited in *JMW Recycling Inc v Canada (Attorney General)* (1982), 35 OR (2d) 355, 1982 CarswellOnt 762 (CA) at para 31.
5. Jonathan Lisus, "The Advocate as Loser" 30 (summer 2011) *The Advocates' Journal* 17–20.
6. George Rose Smith, "A Critique of Judicial Humour" (1990) 43 Ark L Rev 1 at 26.
7. William L Prosser, cited in George Rose Smith, "A Critique of Judicial Humour" (1990) 43 Ark L Rev 1 at 2.
8. See eg Tracey Tyler, "Clarity in the Courts: Justices Go to Writing School," *Toronto Star*, August 5, 2011; online: <https://www.thestar.com/news/crime/2011/08/05/clarity_in_the_courts_justices_go_to_writing_school.html> and Kirk Makin, "The Judge Who Writes Like a Paperback Novelist," *Globe & Mail*, March 10, 2011, updated March 26, 2017; online: <https://www.theglobeandmail.com/news/national/the-judge-who-writes-like-a-paperback-novelist/article570811/. >