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The Civil Litigator's Survival Guide to Evidence

November 6, 2020

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The Civil Litigator's Survival Guide to Evidence

November 6, 2020

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AGENDA

9:00 a.m.	**Chairs' Welcome and Introductory Remarks**
9:05 a.m.	**Hearsay, Prior Inconsistent Statements and the Rule in *Browne v. Dunn*** **Rebecca Durcan,** Steinecke Maciura LeBlanc **Geoff R. Hall,** McCarthy Tétrault LLP
9:45 a.m.	**Evidentiary Issues On Motions and Applications: Overcoming Problems and Presenting Properly** **Ian P. Katchin,** Fogler, Rubinoff LLP
10:20 a.m.	**Break**
10:35 a.m.	**Relevance, Materiality, Probity, Persuasion** **David Milosevic, LL.M., CFE,** Milosevic Fiske LLP **Cameron Fiske, C.S.,** Milosevic Fiske LLP
11:10 a.m.	**Admissibility of Evidence – And Is "Weight" a Thing?** **Lisa Munro,** Lerners LLP
11:45 a.m.	**Evidence on Mediations and Arbitrations** **William G. Horton,** William G. Horton Commercial Arbitration **Kathryn Podrebarac,** Podrebarac Mediation
12:15 p.m.	**Lunch**
1:00 p.m.	**Commonly-Encountered Evidentiary Conundrums and Their Solution** **The Hon. Justice David Brown,** Court of Appeal For Ontario **The Hon. Justice Michelle Fuerst,** Regional Senior Judge (Central East Region), Superior Court of Justice (Ontario)
1:50 p.m.	**Expert Evidence: How It Can Make or Break Your Case** **Robert B. Bell,** Lerners LLP
2:25 p.m.	**Break**

2:40 p.m. **Ethical and Professional Issues Relating To Evidence**
Akua Carmichael, Dale & Lessmann LLP
Ranjan Das, BYLD Barristers
Tanya C. Walker, Walker Law

3:40 p.m. **Evidence and the Trial**
The Hon. Justice Todd L. Archibald, Superior Court of Justice (Ontario)
Jacqueline L. King, C.S., Shibley Righton LLP
Robert Taylor, Levitt LLP

4:30 p.m. **Program Ends**

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FACULTY LIST

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BIOGRAPHIES

Chair

Jacqueline L. King is a Partner in the Civil and Commercial Litigation Group at Shibley Righton. Her experience includes multimillion Fraud Recovery in Securities Investments, Shareholder Disputes and Oppression Remedies, as well as Contract, Estate, Trust, Insurance and Employment Litigation. Jacquie has appeared before the Supreme Court of Canada, the Federal Court of Appeal, the Courts of Appeal in New Brunswick, Ontario, Manitoba, and Saskatchewan. Having litigated cases in almost every province in Canada, Jacquie possesses a unique and broad range of experience. Jacquie is a frequent commentator on legal matters, and chairs and conducts seminars on subjects ranging from fraud investigation to evidence, pleadings and litigation strategy. Jacquie acts as both a Mediator and Arbitrator, including Commercial Cross Border Arbitration and Estate mediations and is called upon for second opinions and to act as co-counsel.
Jacquie is a former Executive Council Member of the Ontario Bar Association and has served as Chair of the Advocacy and Government Relations Committee; the Continuing Legal Education Committee and the Supreme Court of Canada Liaison Committee. She has a Bachelor of Commerce degree from Dalhousie University and an LLB from Queen's University. Jacquie is ranked 5/5 AV Preeminent. Jacquie is also the author of "25 Rules for Success and 10 Tips to Enjoy the Practice of Law" - https://store.thomsonreuters.ca/en-ca/pdp/25-rules-for-success-and-10-tips-to-help-you-enjoy-the-practice-of-law/42760396 - A book on best practices - avoiding common pitfalls and minimizing stress in your practice.

Faculty

The Hon. Justice Todd Archibald, Appointed Justice of the Superior Court of Justice-1999; Partner: Borden, Ladner, Gervais from 1992 to 1999; Practiced in fields of civil, criminal and environmental litigation; Litigation Lawyer, Gardiner, Roberts – 1990-1992; Certified by the Law Society of Upper Canada as an Environmental Law Specialist in 1997; Received LL.M. from Osgoode Hall Law School in 1986. Fellow: Chartered Institute of Arbitrators – 2019 (FCIArb); Received Chartered Mediator designation (C. Med.) – ADRIC – 2019. Adjunct Professor: Advanced Trial Advocacy, and Corporate Crimes and Regulatory Offences at Osgoode Hall Law School (2000 – to present). Appointed Co-Director of Osgoode Civil LL.M. in 2009. Received Osgoode's Part-time LL.M. Teaching Award in 2008. Received AG's 2015 Mundell Medal for Legal Scholarship. Received Canada 150 Community Award for legal teaching and scholarship – 2017. Received Osgoode's Alumni Gold Key Award for Public Sector Achievement – 2019. Ontario Tennis Association Distinguished Service Award – 2019. OBA Foundation Award for exceptional contributions to the advancement of justice - 2020. Editor – Carswell's Annual Review of Civil Litigation (2001 – to

present); Co-Author - 2020 Ontario Superior Court Practice (an annual publication); Co-Author – 2019 Profiting from Risk Management and Compliance Text (updated annually); Co-Author – 2017 Discovery in Canadian Common Law: Practice, Techniques and Strategies Text. Formerly Senior Solicitor for the Legal Department of the Municipality of Metropolitan Toronto 1989-1990; Formerly Senior Assistant Crown Attorney in Toronto 1985-1989.

Robert B. Bell is a senior partner with Lerners LLP. Mr. Bell has appeared in trial and appellate courts in different provinces and before the Supreme Court of Canada. Specialty areas include class proceedings; complex multiparty litigation including cross-border product liability involving design and manufacturing issues in automotive, aerospace and consumer products industries; and major commercial and insurance issues. He has been involved over the years as defence counsel on many of the consumer, automotive and aviation class actions in Canada, and has been counsel on leading reported decisions as the law on certification, trial, bar order in class action settlements has developed in Canada. Mr. Bell has consistently received a Martindale-Hubbell AV pre-eminent 5 out of 5 peer review rating and is repeatedly selected by peers for inclusion in The Best Lawyers in Canada where he is recognized for his expertise in insurance law and product liability (including being ranked as "Product Liability Lawyer of the Year" in 2020). He is also listed in Chambers Canada; The Lexpert/American Lawyer Guide to the Leading 500 Lawyers; Lexpert Special Edition on Litigation Lawyers; The Canadian Legal Lexpert Directory; Lexpert Guide to the Leading US/Canada Cross-Border Litigators; Who's Who Legal : Canada; and as a Litigation Star 2020 in Benchmark Canada - The Definitive Guide to Canada's Leading Litigation Firms & Attorneys. Rob Bell is published widely and is frequently invited to participate at conferences as keynote speaker, panellist and moderator by many legal organizations. He has created and participated in numerous advocacy training programs for The Advocates' Society (including programs in Kiev, Ukraine; St. Kitts, Caribbean and United Nations, NY); The Law Society of Upper Canada and Osgoode Professional Development. He is the recipient of the 2014 Advocates' Society Excellence in Teaching Award for his outstanding contribution to the profession. He is an Accredited Mediator (CEDR), a leading UK provider of dispute resolution services; past Executive Board Member of The Advocates' Society; Member of the Law Society of Ontario; and Member of the Canadian, American, and International Bar Associations.

The Honourable Justice David M. Brown was appointed to the Court of Appeal for Ontario in December, 2014, after sitting as a judge of the Superior Court of Justice of Ontario in the Toronto Region since September, 2006, including several years on the Toronto Region Commercial List. Immediately prior to his appointment to the Court of Appeal, Justice Brown was serving as the President of the Ontario Superior Court Judges' Association. Before his appointment to the Bench, he was a partner with Stikeman Elliott LLP (Toronto) in its Litigation and Energy Groups. He served as an Adjunct Professor of Law at Osgoode Hall Law School teaching Energy Law from 2004 until 2006, and a Sessional Lecturer at Queen's University Law School from 1990 to 2002 teaching Trial Advocacy. Justice Brown writes on a number of legal topics, including civil procedure reform and Newfoundland legal history. Justice Brown earned his B.A. (Hons.), University of Toronto, 1976; Certificate, Beijing Languages Institute, 1977; Diploma, Nanjing University, 1978; J.D., 1981, University of Toronto; L.L.M., Osgoode Hall Law School, 2005; called to the Ontario Bar, 1983.

Akua Carmichael is a senior associate at the Toronto law firm, Dale & Lessmann LLP, where she practices estate planning, administration and litigation. She advises and represents a range of

clients including estate trustees, attorneys, guardians, and beneficiaries, on non-contentious and contentious estate matters. Prior to joining Dale & Lessmann, Akua was an Investigation Counsel with the Law Society of Ontario. She has also taught legal ethics courses at the Faculty of Business at Humber College. Akua is a frequent speaker on estate and trust issues and has written published articles as an estate law contributor to Advisors Edge Report as well as other publications. She is the author of an estate planning manual and workbook entitled My Lifeprint, and she is an estate law tutor with the Law Society of Ontario.

Ranjan Das, a 1995 call to the Bar, is a partner of the Toronto litigation boutique Berkow Youd Lev-Farrell Das LLP, Barristers practising commercial and civil litigation. He is a member of the Civil Rules Committee, an elected member of the Civil Litigation Executive of the CBAO, and a board member of the Toronto Lawyers Association where he also sits on the Roundtable of Diversity Organizations ("RODA") (that promotes the inclusion of diverse lawyers). He formerly sat on the Board of Granite Club, and the Forest Hill Hockey Association (Referee-in-Chief, and Select Coach). Ranjan is a "virtual" firm mentor in the Ryerson University's Law Practice Program (an LSO alternative to traditional articling). Ranjan holds an LL.M. from Osgoode Hall Law School (Banking Law/Financial Services), an LL.B. from the University of Ottawa, a Bachelor of Commerce (Honours) from Queen's University, and a Not for Profit Governance Essentials Program Certificate from the Rotman School of Management and the Institute of Corporate Directors.

Rebecca Durcan is a partner at Steinecke Maciura LeBlanc. Rebecca acts as general counsel, prosecution counsel and independent legal counsel to several Ontario regulators. Rebecca graduated from Queen's University in 1997 with an Honours Degree in History. She then attended the University of Windsor and graduated with her Bachelor of Laws in 2000. In 2006, Rebecca obtained her Masters in Laws (Health) from Osgoode Hall. In 2016, Rebecca obtained her Certificate in Risk Management from the University of Toronto. Rebecca co-authored the *Annotated Statutory Powers Procedure Act, Second Edition* (Thomson Reuters) and *Prosecuting and Defending Professional Regulation Cases* (Emond Publishing). Rebecca regularly speaks about regulatory issues at the Canadian Network of Agencies for Regulation (CNAR), Council on Licensure, Enforcement and Regulation (CLEAR), Ontario Bar Association, Advocates Society, and Continuing Legal Education of British Columbia. Rebecca was elected as Bencher to the Law Society of Ontario from 2018-2019. In this capacity, she assisted with the regulation of lawyers and paralegals in Ontario in the interest of the public. Ranjan Das, a 1995 call to the Bar, is a partner of the Toronto litigation boutique Berkow Youd Lev-Farrell Das LLP, Barristers practising commercial and civil litigation. He is a member of the Civil Rules Committee, an elected member of the Civil Litigation Executive of the CBAO, and a board member of the Toronto Lawyers Association where he also sits on the Roundtable of Diversity Organizations ("RODA") (that promotes the inclusion of diverse lawyers). He formerly sat on the Board of Granite Club, and the Forest Hill Hockey Association (Referee-in-Chief, and Select Coach). Ranjan is a "virtual" firm mentor in the Ryerson University's Law Practice Program (an LSO alternative to traditional articling). Ranjan holds an LL.M. from Osgoode Hall Law School (Banking Law/Financial Services), an LL.B. from the University of Ottawa, a Bachelor of Commerce (Honours) from Queen's University, and a Not for Profit Governance Essentials Program Certificate from the Rotman School of Management and the Institute of Corporate Directors.

Cameron Fiske, C.S. is a partner at Milosevic Fiske LLP's downtown Toronto litigation boutique. His practice is focused on complex commercial litigation, fraud, and class actions. Cameron has successfully prosecuted civil fraud claims at trial and has won several appeals before the Divisional Court and the Court of Appeal for Ontario. In 2018, Cameron presented the oral argument for the appellant before a nine-judge panel of the Supreme Court of Canada in a seminal language rights case. He regularly publishes on the subject of class actions and co-wrote an article that was published by the Advocates' Journal on the subject of anti-SLAPP legislation. Cameron has acted on several large public interest claims on subjects ranging from French language rights in Ontario to Aboriginal rights. He is a graduate of McGill's Law School's Transsystemic Program and is recognized by the Law Society of Ontario as a Specialist in Civil Litigation.

The Hon. Justice Michelle Fuerst was appointed to the Superior Court of Justice for Ontario in 2002 and assigned to the Central East Region, where she presides primarily over criminal law cases. On October 1, 2013, she became Regional Senior Judge of that Region, serving as a member of the Superior Court's Executive, and having specific responsibility for the scheduling and assignment of approximately 50 judges in the Region. She is a 1979 graduate of Osgoode Hall Law School. At the time of her appointment to the Bench, she was a partner in the Toronto law firm of Gold & Fuerst, where her practice was restricted to criminal and quasi-criminal trials and appeals. She is a past President of both the Canadian Bar Association-Ontario, and the Criminal Lawyers' Association (Ontario). She was a member of the Adjunct Faculty of Osgoode Hall Law School for over a dozen years, where she taught Advanced Evidence, and Criminal Law II. For six years she was an Instructor in Trial Advocacy at the University of Toronto Law School. She was the 1998 Milvain Chair of Advocacy at the Faculty of Law, University of Calgary. She was co-Chair of the Federation of Law Societies' annual National Criminal Law Program for over a decade, until 2017. She is a co-author of *The Annotated Tremeear's Criminal Code,* a co-author of the third, fourth and fifth editions of *The Law of Evidence in Canada*, a co-author of *The Trial of Sexual Offence Cases,* a co-editor of the third and fourth editions of *Ontario Courtroom Procedure,* and a co-author of the *Police Powers Newsletter.* She currently chairs the Criminal Law Program of the CIAJ/NJI Seminar for New Federally Appointed Judges. She is a member of the Judicial Education Committee of the Canadian Judicial Council, and a member of the Education Committee for the Superior Court of Justice. She chairs the Superior Court's Modernization Committee, and is a member of the Court's Criminal Law Working Group. She was a Director of the Ontario Superior Court Judges' Association from 2008 to 2013. She has chaired the Canadian Bar Association's International Development Committee, and the Canadian Bar Association's Judges' Forum. She is a Fellow of both the American College of Trial Lawyers, and the International Society of Barristers.

Geoff R. Hall is a partner in the litigation group at McCarthy Tétrault LLP. His practice covers a broad range of corporate/commercial litigation, including contracts, banking, shareholder disputes, tax, bankruptcy/restructuring, administrative law, and Aboriginal law. In 2018 he was named one of *Canadian Lawyer*'s Top 25 Most Influential Lawyers in Canada. He is also listed in Chambers Canada as a Leading Lawyer: Litigation: General Commercial – Ontario, in the current edition of the *Lexpert/ALM 500 Directory*, in a guide to the 500 leading lawyers in Canada, and in the current edition of *Canadian Legal Lexpert Directory* as a leading lawyer in the area of corporate commercial litigation. Mr. Hall's recent major engagements include *1169822 Ontario Limited v. The Toronto-Dominion Bank*, 2018 ONSC 1631 (in which the trial judge commented that the opposing expert's opinion was "utterly shattered" by Mr. Hall's cross-examination), *Slate*

Management Corporation v. Canada (Attorney General), 2017 ONCA 763 (in which he advanced an innovative mootness argument on appeal), and *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 (appeal to the Supreme Court of Canada involving the test for rectification in a tax context), and defending TD Bank in an action for $5.5 billion arising from the collapse of Stanford International Bank. Mr. Hall is also is a broadly published author, his most notable work being *Canadian Contractual Interpretation Law*. It is widely considered to be the leading treatise on contractual interpretation in Canada. It has been cited multiple times by the courts, including 15 times by the Supreme Court of Canada. Mr. Hall clerked for the Supreme Court of Canada in 1991–92, and was admitted to the Ontario Bar in 1993. He holds an LL.B from the University of Toronto and an LL.M. from Harvard Law School.

William G. Horton practices as an arbitrator of Canadian and international business disputes. He has been appointed tribunal chair, sole arbitrator and party nominee in well over one hundred substantial cases, involving, among other subjects, nuclear facilities, telecom, satellite and wireless industry disputes, government privatization contracts, aircraft engines, national advertising campaigns, cross border distribution agreements, energy sector rate renewals, oil and gas royalty disputes, alternative energy projects, software licensing and other intellectual property, sale of a business, professional associations and shareholder agreements. He has served in both ad hoc and institutional arbitrations. Prior to establishing his current practice, Bill appeared as lead counsel before all levels of courts up to and including the Supreme Court of Canada. He successfully represented clients in significant cases involving business and corporate disputes, fraud, lender liability, international banking disputes, litigation arising from major insolvencies and reorganizations, fiduciary duty and good faith obligations, directors and officers liability, professional liability, insurance and reinsurance disputes, competition offences, defamation, shareholder disputes, class actions and injunctive remedies. Bill serves as the Course Director and Principal Instructor of the Toronto Commercial Arbitration Society Gold Standard Course on Commercial Arbitration and chairs the TCAS Arbitration Act Reform Committee. Until recently he served as Editor of the Canadian Arbitration and Mediation Journal.

Ian P. Katchin is a Partner in the Litigation and Dispute Resolution Group at Fogler, Rubinoff LLP and was admitted to the Ontario Bar in 2007. He practises commercial litigation (with an emphasis on shareholder and partnership disputes, and injunctions); insurance litigation (including coverage disputes); and construction litigation (including highway construction and lien matters). Ian has a passion for education. During his undergraduate and law school studies, he was a part-time elementary school substitute teacher where he taught Junior Kindergarten to Grade 8. More recently, he was a Sessional Instructor at the University of Windsor - Faculty of Law where he taught Commercial Law - Secured Transactions during the Winter 2017 term. He was also an Adjunct Professor at Osgoode Hall Law School where he taught Commercial Law during the Winter 2019 term.

David Milosevic is principal at Milosevic Fiske LLP's downtown Toronto litigation boutique. His practice is focused on complex commercial litigation, fraud, and securities litigation. He has acted on some of the largest civil fraud claims in Ontario and has extensive experience managing complex multi-party litigation. David has extensive trial experience and appears regularly before the Superior Court and Court of Appeal for Ontario and has appeared before the Supreme Court of Canada. David articled at a national Bay Street law firm. David graduated with a First Class Honours

B.A. in History and Political Science from McGill University, and obtained Civil and Common Law degrees with Distinction, also from McGill University. He placed second overall in Canada in the country's largest advocacy competition, the Phillip. C. Jessup International Law Moot Court Competition. David holds a Master of Laws from Osgoode Hall Law School in Civil Litigation and Dispute Resolution and has lectured on class actions at the McGill University Faculty of Law. David is a Certified Fraud Examiner with the Association of Certified Fraud Examiners. David is a member of the Ontario Bar Association Civil Litigation Executive and the Civil Litigation newsletter editor for 2021 and is a member of the Advocates' Society 10+ Standing Committee for 2021.

Lisa Munro is a partner of Lerners LLP. She practises both domestic and international commercial arbitration and commercial litigation involving business and contractual disputes, shareholder disputes and oppression remedy claims, class actions, and matters involving directors' and officers' liability, transnational and cross-border law (including enforcement of foreign judgments), and accountants' and auditors' liability. She has the Qualified Arbitrator (Q. Arb.) designation from the ADR Institute of Canada and is a Member of the Chartered Institute of Arbitrators (MCIArb). She is also a fellow of the Litigation Counsel of America. She was a member of the Lerners LLP Executive Committee from 2007 to 2019 Managing Partner of Toronto Office from 2018 to 2019. She is the founding Chair of the Lerners LLP Diversity and Inclusion Committee. She is a member of the board of directors, Greater Toronto Scout Foundation, and a recipient of the Scouts Canada Medal for Good Service. She is also a member of the board of directors of the Chartered Institute of Arbitrators (Canada Branch). Lisa was selected by Women's Executive Network as one of Canada's Most Powerful Women: Top 100 (2017). She is a Benchmark Canada Litigation Star (2018 to 2020) and was selected for inclusion by her peers in *Best Lawyers in Canada* for corporate commercial litigation, alternative dispute resolution, class action litigation, and professional malpractice law (2015 to 2021). Lisa is recognized and recommended by Lexpert as a leading lawyer in corporate commercial litigation. She received the Lexpert Zenith Award for Diversity and Inclusion in 2016 and *Diversity Journal's* Women Worth Watching Award in 2015.

Kathryn Podrebarac is a lawyer and mediator who was called to the Ontario bar in 1994. She began her career on Bay Street at Blakes, where she practiced civil litigation and class actions for several years. She later founded two leading litigation boutiques, Tough & Podrebarac LLP and Podrebarac Barristers Professional Corporation, which were peer recognized in LEXPERT as "repeatedly recommended" for corporate commercial litigation in Toronto. In April 2017, Kathryn established Podrebarac Mediation. She now devotes her practice to mediating a wide range of complex disputes and litigating class actions. www.PodrebaracMediation.com

Robert C. Taylor is a senior partner at Levitt LLP and practises civil litigation focused on employment law and professional discipline matters. He has acted for clients across Canada. Robert specializes in complex disputes and has acted on several injunction/unfair competition/theft of trade secrets cases. Robert has handled a wide variety of trials and hearings including an 88 day trial and has appeared in all levels of Court in Ontario, the Supreme Court of British Columbia and the New Brunswick Court of Queen's Bench, Federal Court Trial Division and Federal Court of Appeal and the Supreme Court of Canada. Robert has also lectured on employment and litigation-related topics. Robert has a B.Sc. (Honours) from the University of Toronto and graduated from Osgoode Hall Law School.

Tanya C. Walker of Walker Law obtained her law degree from Osgoode Hall at York University in 2005 and her Honours Bachelor of Commerce with a minor in Economics from McMaster University in 2002. She was called to the Ontario Bar in 2006. Tanya is currently serving a term as Bencher of the Law Society of Ontario; elected by her peers as not only the first Black elected female Bencher from Toronto, in the 223 year history of the Law Society, but also as one of the youngest sitting Benchers. Tanya is a frequent speaker on legal issues to the Toronto Community and regularly appears on the CTV Show, Your Morning as a legal expert. She has received numerous awards including the 2019 Alumni Gold Key Award from Osgoode Hall.

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November 6, 2020

Hearsay, Prior Inconsistent Statements and the Rule in *Browne v. Dunn*

Hearsay, Prior Inconsistent Statements and the Rule in Browne v. Dunn

Presentation to Osgoode Hall Professional Development Program: The Civil Litigator's Survival Guide to Evidence

November 6, 2020

Rebecca Durcan – Steinecke Maciura LeBlanc
Geoff R. Hall – McCarthy Tetrault LLP

Hearsay

Rebecca Durcan

Steinecke Maciura LeBlanc

What is hearsay?

HEARSAY IS:

1. An out of court statement.

- The declarant of the statement is not a witness.
- The recipient of the statement is a witness.

HEARSAY IS:

2. Offered for the truth of its contents

What is the “truth of its contents”?

In order to determine whether hearsay is being offered for the “truth of its contents” you must look to the **PURPOSE** for which the hearsay evidence is tendered.

The Hearsay Dangers

1. The trier of fact is unable to assess the declarant's:

- Perception
- Memory
- Communication
- Sincerity

2. The declarant is not under oath.

3. The declarant is not subject to cross examination.

"I'll ask you once more, and I remind you that you are *under oath*! Why did you *cross the road*?!"

Procedure

1. Is it hearsay?
    1. If no? Then it is admissible.
    2. If yes?
        1. Is it admissible under a traditional hearsay exception?
        2. Is it admissible on the principled basis of necessity and reliability?

Traditional Exceptions

1. Admission by an accused
2. Statement made against the declarator's interest
3. Statement is part of a public or government document
4. Dying declaration
5. Res Gestae
6. Statement describing physical or psychological condition

Traditional Exceptions

7. Sworn testimony from a previous hearing
8. Past recollection recorded
9. State of mind
10. Present intentions
11. Statutory exceptions
12. Part of the narrative

Principled Approach

- Admissible when
  - Necessary to a hearing
  - Reliable
- Recognize that certain type of hearsay statements present "minimal dangers and its exclusion would impede accurate fact finding." (*Bradshaw*)
- Still need to consider if prejudice outweighs probative value

Scenario

- Raj is suing Jane for repayment of $500 loan
  - Raj testifies and tenders certified copy of cashed cheque from Raj to Jane
    - NOT HEARSAY
  - Raj testifies that Jane promised to pay him back and tenders a letter from Jane saying she would pay him back
    - HEARSAY – BUT ADMISSION BY JANE
  - Raj testifies that Jane has not paid him back
    - NOT HEARSAY

Scenario

- Raj testifies that Jane told his friend Tzen that she would not pay Raj back
  - HEARSAY
  - CANNOT BE TENDERED FOR PROOF OF STATEMENT
  - TZEN COULD TESTIFY THAT JANE TOLD HIM THAT SHE WOULD NOT PAY RAJ BACK. THIS WOULD BE ADMISSION

How Not To Drive A Trial Judge Around The Bend: Proper Use of the Rule in *Browne v. Dunn* and Prior Inconsistent Statements

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Geoff R. Hall, McCarthy Tétrault LLP

The Rule in *Browne v. Dunn* (according to *R. v. Quansah*, 2015 ONCA 237)

- If a party intends to impeach a witness called by an opposite party, the party who seeks to impeach must give the witness an opportunity, while the witness is in the witness box, to provide any explanation the witness may have for the contradictory evidence.

The rule is rooted in considerations of fairness

- Fairness to the witness whose credibility is attacked.
- Fairness to the party whose witness is impeached.
- Fairness to the trier of fact.

The rule assists with an orderly trial

- Ensures an orderly presentation of evidence, avoiding scheduling problems associated with re-attendance.
- Lessens the risk that the trier of fact may assign greater emphasis than may be warranted to evidence adduced later in the trial.

The rule is flexible

- As a rule of fairness, the rule in *Browne v. Dunn* is not a fixed rule.
  - The extent of its application lies within the discretion of the trial judge and depends on the circumstances of each case.

Compliance with the rule

- Does not require that every scrap of evidence that is to be contradicted be put to a witness in cross-examination, only matters of substance.
- It is only the nature of the proposed contradictory evidence and its significant aspects that need to be put to the witness.

Confrontation may not be necessary

- In some cases, it may be apparent from the tenor of counsel's cross-examination that the cross-examining party does not accept the witness's version of events.
  - Where the confrontation is general, known to the witness and the witness's view on the contradictory matter is apparent, there is no need for confrontation and no unfairness to the witness in any failure to do so.

Prior Inconsistent Statements (according to *R. v. Abdulle*, 2020 ONCA 106)

- A prior inconsistent statement is not evidence of the truth of its contents, except where it has been adopted as true by the witness.
  - If not adopted, a prior inconsistent statement can only be used to assess the credibility of the witness.

- A witness adopts a prior inconsistent statement where they testify that they made the prior statement, and that, based on their present memory, the prior statement is true.
- Where a prior statement is adopted, it is incorporated into the witness' evidence at trial:
  - considered part of the witness' trial testimony
  - is proof of the truth of the statement's contents.

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Evidentiary Issues On Motions and Applications: Overcoming Problems and Presenting Properly

THE CIVIL LITIGATOR'S SURVIVAL GUIDE TO EVIDENCE 2020

Evidentiary Issues on Motions and Applications: Overcoming Problems and Presenting Properly

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Overview of Topics to be Discussed

1. Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need
2. How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action?
3. Effective Uses of Motions for Directions
4. Case Conferences as Evidence-Gathering Tools for Motions

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need

Overview

1. Applications
2. Motions
3. Evidence Used on Motions and Applications
    - A. Affidavit
    - B. Cross-Examination on an Affidavit
    - C. Examination of a Witness On a Pending Motion or Application
    - D. Examination of a Witness, with leave, Orally at the Hearing
    - E. Examination for Discovery Transcript at the Hearing
4. Expert Witness Evidence
5. Filing of Transcripts

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Applications

An "application" is defined in Rule 1.03 as "a proceeding commenced by notice of application."

An application is a form of court proceeding in which the parties' evidence is tendered by way of affidavits, followed by cross-examinations on those affidavits, and then, typically, an oral hearing based upon the written record.

This is contrasted with an "action", which is also defined in Rule 1.03 to mean:

a proceeding that is not an application and includes a proceeding commenced by,

- *a) statement of claim;*
- *b) notice of action;*
- *c) counterclaim;*
- *d) crossclaim; or*
- *e) third or subsequent party claim.*

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Applications (Cont.)

The circumstances in which proceedings may be taken by way of application are listed in Rule 14.05.

Pursuant to Rule 38.05, "*[a] notice of application shall be issued as provided by Rule 14.07 before it is served.*"

Unlike the case with a Statement of Claim in an action, there is no requirement under the Rules for the time *within which* a notice of application must be served but, rather, a deadline *by which* it must be served. Under Rule 38.06(3), a notice of application must be served at least 10 days before the date of the hearing of the Application.

The material to be used on an application is set out in Rule 38.09, which requires the delivery of an application record, including the notice of application, all affidavits and other material served by any party for use on the application, a list of all relevant transcripts of evidence in chronological order, and any other material in the Court file that is necessary for the hearing (Rule 38.09(2)).

A party responding to a Notice of Application *may* serve a responding application record consisting of a table of contents and any material to be used by the respondent on the application and not included in the application record (Rule 38.09(3.1)).

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Motions

A "motion" is defined to include "a motion in a proceeding or an intended proceeding" (Rule 1.03).

A Judge has jurisdiction to hear any motion in a proceeding (Rule 37.02(1)). A Master may hear any motion in a proceeding (subject to certain exceptions, including where jurisdiction is expressly conferred on a judge) (Rule 37.02(2)).

A motion can be made in both an action, as well as an application.

Rule 37.10(1) sets out the circumstances in which a Motion Record must be filed.

The contents of the Motion Record are similar to those found in an Application Record, and are detailed in Rule 37.10(2).

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Evidence Used on Motions and Applications

Rule 39 sets out how evidence may be given on motions and applications:

- by affidavit (Rule 39.01);
- by cross-examination on an affidavit (Rule 39.02);
- by the examination of a witness before the hearing of a pending motion or application (Rule 39.03(1));
- by the examination of a witness, with leave, orally at the hearing (Rule 39.03(4)); or
- by the use of an examination for discovery transcript at the hearing of a motion (Rule 39.04).

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Evidence Used on Motions and Applications (Cont.)

A. Affidavit

Evidence on both motions and applications is typically by way of affidavit – but it does not have to be. Rule 39.01(1) provides that "*[e]vidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise*."

Format and contents of Affidavits (Rules 4.06(1) and 4.06(2)).

"Information and Belief" – Rules 39.01(4) and 39.01(5)

Scope of Disclosure – Rule 39.01(6); *Natale v. Testa*, 2018 ONSC 4541

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Evidence Used on Motions and Applications (Cont.)

B. Evidence by Cross-Examination on an Affidavit

Cross-examination is not an absolute right (*Ridley v. Ridley* (1989), 37 C.P.C. (2d) 167 (Ont. H.C.)).

The right to cross-examination on a motion or application only arises once a party has served every affidavit on which they intend to rely and has completed all Rule 39.03 examinations.

Once a party cross-examines an adverse party on their affidavit, they cannot subsequently deliver an affidavit for use at the hearing or conduct a Rule 39.03 examination without leave or consent.

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Evidence Used on Motions and Applications (Cont.)

B. Evidence by Cross-Examination on an Affidavit (Cont.)

First Capital Realty v. Centrecorp Management Services Ltd., [2009] O.J. No. 4492

At paragraph 9 of *First Capital, supra*, the Divisional Court set out the four-part test to be satisfied to obtain leave under Rule 39.02(2):

- is the evidence relevant?
- does the evidence respond to a matter raised on the cross-examination – not necessarily raised for the first time?
- would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs/terms/an adjournment?
- did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Evidence Used on Motions and Applications (Cont.)

C. Examination of a Witness on a Pending Motion or Application

Rule 39.03 permits the examination of a person as a witness before the hearing of a pending motion or application and having a transcript of their evidence available at the hearing.

This rule states as follows:

> ***39.03(1)*** *Subject to subrule 39.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.*

Note that where the proceeding is an application, Rule 39.03(1) should not be used to conduct a general discovery (*Teranet Inc. v. Canarab Marketing Corp*. (2007), 44 C.P.C. (6th), 51 (Ont. S.C.J. [Commercial List]).

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Evidence Used on Motions and Applications (Cont.)

D. Examination of a Witness, with leave, Orally at the Hearing

Under certain circumstances, a witness may be examined orally at the hearing of a motion or application. Rule 39.03(4) states as follows:

> ***(4)*** *With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial.*

This situation can arise during a "mini-trial" on a motion for summary judgment under Rule 20.04(2.2) which provides as follows:

> ***(2.2)*** *A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.*

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Evidence Used on Motions and Applications (Cont.)

E. Examination for Discovery Transcript at the Hearing

On the hearing of a *motion*, a party may use in evidence an adverse party's examination for discovery, but not the party's own examination for discovery transcript (Rules 39.04(1) & (2)). These two Rules state as follows:

> ***Adverse Party's Examination***
>
> ***39.04 (1)*** *On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.*
>
> ***Party's Examination***
>
> ***(2)*** *On the hearing of a motion, a party may not use in evidence the party's own examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the party unless the other parties consent. O. Reg. 534/95, s. 1.*

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Expert Witness Evidence

Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03(2.1) (Rule 39.01(7)).

Rule 53.03(2.1) outlines the contents that a report from an expert must include.

When an expert is to be relied upon at a motion or application, the expert themselves has to swear an affidavit appending their own report to it as an exhibit. The affidavit should include, among other things, a statement that the report attached to the affidavit as an exhibit accurately sets out the expert's qualifications, work responsibilities, and a representative sample of their work experience.

Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need (Cont.)

Filing of Transcripts

Pursuant to Rule 34.18(1) "*[i]t is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the Court.*"

Where a party intends to refer to a transcript at the hearing of a motion or application, a copy of the transcript shall be filed at least four days before the hearing (Rule 34.18(2)).

Note that a portion of the transcript can only be filed on a motion or application if the other parties consent (Rule 34.18(3)).

How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action?

Overview

1. Key Differences Between Cross-Examinations and Examinations for Discovery
    A. Purpose
    B. Scope
2. *Evidence Act* Implications re Transcript Evidence
3. Use of Cross-Examination Transcripts on a Motion or Application
4. Use of Examination for Discovery Transcripts at a Trial
5. What if Answers from an Examination for Discovery are Incorrect?
6. Filing of Transcript Evidence: Motions and Applications
7. Filing of Transcript Evidence: Trial
8. Use of Examination for Discovery Evidence in a Subsequent Action

How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action? (Cont.)

Key Differences Between Cross-Examinations and Examinations for Discovery

A. Purpose

The purpose of cross-examination is to attack the credibility of the deponent's evidence and to test their evidence. It is surgical in nature. Questions should be close-ended and leading.

The purpose of an examination for the discovery is to gather relevant evidence and ensure that the parties' productions are complete. Questions are typically open-ended and elaborate on previous answers. Pursuant to Rule 31.02, an examination for discovery may be oral or by written questions and answers, but not both except with leave.

How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action? (Cont.)

Key Differences Between Cross-Examinations and Examinations for Discovery (Cont.)

B. Scope

Generally, the scope of cross-examination is determined by the issues on the motion or application and the issues raised in the affidavit.

Under Rule 31.06(1), on an examination for discovery,

> *[a] person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) and (4) and no question may be objected to on the ground that,*
>
> *(a) the information sought is evidence;*
>
> *(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or*
>
> *(c) the question constitutes cross-examination on the affidavit of documents of the party being examined.* (emphasis added)

How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action? (Cont.)

Evidence Act Implications re: Transcript Evidence

Regardless of whether a transcript is being used on a motion, application or at trial, section 48(2) of the *Evidence Act*, R.S.O. 1990, c. E.23, as amended, makes the following presumption:

> ***(2)*** *An examination or deposition received or read in evidence under subsection (1) shall be presumed to represent accurately the evidence of the party or witness, unless there is good reason to doubt its accuracy.*

How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action? (Cont.)

Use of Cross-Examination Transcripts on a Motion or Application

At a motion or application, any party may use anyone's transcript evidence. Rule 39.03(1) which provides that:

> ***39.03(1)*** *Subject to subrule 30.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.*

A party who intends to refer to a transcript of evidence at the hearing shall file a copy of the transcript as provided by Rule 34.18 (Rule 37.10(5)).

Rule 34.18 states that:

> ***34.18****(1) It is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the court. R.R.O. 1990, Reg. 194, r. 34.18 (1).*

There are permitted uses of an adverse party's examination for discovery evidence on a motion as follows:

> ***39.04****(1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.*

A party's own examination for discovery evidence cannot be relied upon by that party on the hearing of a motion, unless the other parties consent (Rule 39.04(2)).

How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action? (Cont.)

Use of Examination for Discovery Transcripts at a Trial

A party may not rely upon its own examination for discovery evidence at trial.

At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of (a) an adverse party; or (b) a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise, if the evidence is otherwise admissible, whether the party or other person has already given evidence or not (Rule 31.11(1)).

Sections 20 and 21 of the *Evidence Act*, R.S.O. 1990, c. E.23, as amended, require that a prior inconsistent statement be put to the witness before it is introduced as evidence.

Just as parties can examine a non-party as a witness on a pending motion or application under Rule 39.03(1), Rule 31.10(1) permits the examination for discovery of a non-party with leave.

How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action? (Cont.)

What if Answers from an Examination for Discovery are Incorrect?

Rule 31.09(1) states as follows:

> ***Duty to Correct Answers***
>
> ***31.09*** *(1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,*
>
> *(a) was incorrect or incomplete when made; or*
>
> *(b) is no longer correct and complete,*
>
> *the party shall forthwith provide the information in writing to every other party. R.R.O. 1990, Reg. 194, r. 31.09 (1).*

Parties should be cautious that when an answer is corrected. Both the original and corrected answers are admissible at the hearing and the original answer is not expunged (*Capital Distributing Co. v. Blakey* (1997), 33 O.R. (3d) 58, 10 C.P.C. (4th) 109).

How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action? (Cont.)

Filing of Transcript Evidence: Motions and Applications

Transcripts on motions and applications are generally filed in their entirety in advance of the hearing and the filing requirements are set out in Rule 34.18(2) which states as follows:

> ***34.18(2)*** *Where a party intends to refer to a transcript on the hearing of a motion or application, a copy of the transcript for the use of the court shall be filed in the court office where the motion or application is to be heard, at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 34.18 (2); O. Reg. 171/98, s. 11; O. Reg. 394/09, s. 14.*

How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action? (Cont.)

Filing of Transcript Evidence: Trial

Unlike the procedure for filing transcripts in advance of motions and applications, "*[a] copy of the transcript for the use of the court at trial shall not be filed until a party refers to it at trial, and the trial judge may read only the portions to which a party refers*." (Rule 34.18(4)).

Transcripts for use at trial are not filed in advance. When they are filed, the Judge *may* only read the portions to which a party refers.

How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action? (Cont.)

Use of Examination for Discovery Evidence in a Subsequent Action

Discovery transcripts can also be used in subsequent actions (in limited circumstances).

Where an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, the evidence given on an examination for discovery taken in the former action may be read into or used in evidence at the trial of the subsequent action as if it had been taken in the subsequent action (Rule 31.11(8)).

Effective Uses of Motions for Directions

Overview

1. Applicable Rules of Civil Procedure
2. Motions for Directions as a Tool to Promote Access to Justice
3. Factors to Consider on a Motion for Directions
4. A Tool for Responding Parties
5. Use in Complicated Proceedings or a Series of Proceedings
6. Commercial List Motions for Summary Judgment

Effective Uses of Motions for Directions (Cont.)

Applicable Rules of Civil Procedure

Rule 1.05 of the Rules grants the Court a general power to impose terms in the making of any order.

Rule 1.05 states as follows:

> ***Order on Terms***
>
> ***1.05*** *When making an order under these rules the Court may impose such terms and given such directions as are just.*

Rule 50.13 must be read in conjunction with Rule 1.05 (as per Justice Firestone's comments in *Griva v. Griva*, 2016 ONSC 1820 (CanLII)).

Rule 50.13(1) stipulates that: "*[a] judge may at any time, on his or her own initiative or at a party's request, direct that a case conference be held before a judge or case management master.*"

Effective Uses of Motions for Directions (Cont.)

Motions for Directions as a Tool to Promote Access to Justice

The importance of a Motion for Directions was underscored by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 where the Court was discussing the scope of a Summary Judgment Motion as follows:

> *[70] The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost…*
>
> *[72] I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.*

Effective Uses of Motions for Directions (Cont.)

Motions for Directions as a Tool to Promote Access to Justice (Cont.)

In *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, the Court of Appeal allowed an appeal concerning the interpretation of s. 7(1)(a) of the *Limitations Act, 2002*, and granted summary judgment dismissing the action.

The Court cited what Karakatsanis J. described in *Hryniak, supra*, as a "culture shift" in Courts deciding summary judgment motions to create an environment promoting timely and affordable access to the civil justice system:

> *"[131] At the same time, the Supreme Court of Canada's decision in Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 2, per Karakatsanis J., called for a "culture shift" in courts deciding summary judgment motions "in order to create an environment promoting timely and affordable access to the civil justice system". Moreover, as Brown J.A. has noted, because "the court's comments [at para. 2 of Hryniak] apply equally to civil appellate courts", this court's exercise of its powers under s. 134 must also strive to promote "timely and affordable access to the civil justice system": Cook, at para. 78."*

Effective Uses of Motions for Directions (Cont.)

Factors to Consider on a Motion for Directions

In *1318214 Ontario Limited v. Sobeys Capital Incorporated*, 2012 ONSC 2784 (CanLII), Justice Brown identified the issues that a Court should consider when weighing a request for a lengthy post-discovery motion against setting an action down for trial.

These issues are also instrumental to any Judge faced with a motion for directions concerning the scheduling of a motion for summary judgment and are summarized as follows:

- Length of motion versus length of trial
- What specific issues will the court be asked to determine on the motion?
- Who will the affiants be and what issues will they address? How long with their affidavits be?
- Which witnesses will be called at trial and the anticipated length of examinations?
- How many documents will be marked as exhibits and/or introduced at trial? Will there be any agreement on the admissibility of documents?
- Will there be expert reports? If so, how many and on what issues?
- What is the volume of transcripts to be filed with the court or put before the Judge?
- Do the parties anticipate any in-trial motions? If so, how many and on what issues?
- What legal issues will be addressed in the parties' facta, and how many authorities will be relied upon?

Effective Uses of Motions for Directions (Cont.)

Factors to Consider on a Motion for Directions (Cont.)

On a motion for directions, the Judge will weigh the costs and benefits of scheduling a motion for summary judgment, all with a view to respecting the principles of proportionality, timeliness and affordability.

As per the Supreme Court of Canada's comments in *Hryniak, supra*, not all summary judgment motions require a motion for directions. The failure to bring such a motion where it was evident that the record will be complex or voluminous will be considered when dealing with cost consequences under Rule 20.06(a) which provides as follows:

> ***Costs Sanctions for Improper Use of Rule***
>
> ***20.06*** *The Court may fix and order payment of the costs of a Motion for summary judgment by a party on a substantial indemnity basis if,*
>
> *(a) the party acted unreasonably by making or responding to the motion; or*
>
> *(b) the party acted in bad faith for the purpose of delay.*

Effective Uses of Motions for Directions (Cont.)

A Tool for Responding Parties

A motion for directions can provide the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment – thereby saving their client costs and arguably delaying the determination of the issues to be decided.

In *Griva, supra*, Justice Firestone refused to schedule the plaintiff's requested summary judgment motion and noted the following at paras. 15 & 17:

> *"[15] In this case the requested motion for partial summary judgment will not resolve the damages issues in their entirety. The plaintiff's other damages claims will still be proceeding to trial. Those additional damage claims are based on the same factual matrix and evidentiary record as the general damages claim for which the plaintiff now seeks partial summary judgment…*
>
> *[17] In Baywood Homes Partnership v. Haditaghi, 2014 ONCA 450, at para 33, the court confirmed that the motions judge must "assess the advisability of the summary judgment process in the context of the litigation as a whole." In Hryniak the Supreme Court at para. 60 specifically stated that "`the interest of justice' inquiry goes further and also considers the consequences of the motion in the context of litigation as a whole."*

Effective Uses of Motions for Directions (Cont.)

A Tool for Responding Parties (Cont.)

Discreet issues may not always warrant the scheduling of a motion for summary judgment. In the words of Justice Karakatsanis in *Hryniak, supra*, at para. 59:

> *"[W]hat is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure."*

The concerns expressed by Justice Firestone were re-visited a year later by the Ontario Court of Appeal in *Butera v. Chown, Carins LLP*, 2017 ONCA 783 (CanLII) where the Court stated at para. 34:

> *"[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."*

On April 5, 2019, Justice McEwen released his Honour's decision in *1511419 Ontario Inc. v. KPMG*, 2019 ONSC 228 (CanLII). At paragraph 48 of the decision, Justice McEwen cited Mew J., Debra Rolph & Daniel Zacks, *The Law of Limitations*, 3d ed. (Markham: LexisNexis Canada, 2016) at s. 5.36 and stated:

> *"A full trial will still be required where a summary record cannot fairly be used to decide legal issues that are unsettled, complex, or intertwined with the facts."*

Effective Uses of Motions for Directions (Cont.)

Use in Complicated Proceedings or Series of Proceedings

Motions for directions can also be used under Rule 37.15 – Motions in a Complicated Proceeding or Series of Proceedings:

> ***37.15(1)*** *Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (place of hearing of motions) does not apply to those motions. R.R.O. 1990, Reg. 194, r. 37.15 (1); O. Reg. 292/99, ss. 2 (3), 4.*

Effective Uses of Motions for Directions (Cont.)

Commercial List Motions for Summary Judgment

For those matters on the Commercial List, the Court will not schedule Motions for Summary Judgment at a 9:30 a.m. appointment.

Instead, parties should schedule a 30-minute case conference at 10:00 a.m. through the scheduling office and be prepared to address the issues set out above (Commercial List Users' Committee Newsletter Issue No. 11 – A Year in Review – January 2019).

Case Conferences as Evidence-Gathering Tools for Motions

Overview

1. Guidance Provided by Rule 50.13
2. Case Conferences as a Gate-Keeping Tool for the Court
3. Case Conferences as an Evidence-Gathering Tool

Case Conferences as Evidence-Gathering Tools for Motions (Cont.)

Guidance Provided by Rule 50.13

Pursuant to the *Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model*, effective February 1, 2019, parties can apply to participate in a pilot project where one Judge both manages the case and conducts the trial.

Rule 50.13(1) provides that a case conference may be initiated by the Judge alone or upon the request of a party:

> ***50.13(1)*** *A judge may at any time, on his or her own initiative or at a party's request, direct that a case conference be held before a judge or case management master. O. Reg. 170/14, s. 16.*

Case Conferences as Evidence-Gathering Tools for Motions (Cont.)

Guidance Provided by Rule 50.13 (Cont.)

The matters to be dealt with at the case conference are outlined in subrule (5) as follows:

Matters to be Dealt With

(5) *At the case conference, the judge or case management master may,*

(a) identify the issues and note those that are contested and those that are not;

(b) explore methods to resolve the contested issues;

(c) if possible, secure the parties' agreement on a specific schedule of events in the proceeding;

(d) establish a timetable for the proceeding; and

(e) review and, if necessary, amend an existing timetable. O. Reg. 170/14, s. 16.

Case Conferences as Evidence-Gathering Tools for Motions (Cont.)

Case Conferences as a Gate-Keeping Tool for the Court

At para. 9 of the decision in *Adam et al. v. Ledesma-Cadhit et al*., 2015 ONSC 3043 (CanLII), Justice Myers underscored the gatekeeping function of the Court at a case conference to regulate the amount and scope of evidence as follows:

> *"The court can exercise some control over the amount and scope of evidence and, especially, reign in cases of abuse, by using Case Conferences under Rule 50.13 and motions for directions under Rule 1.05 as expressly recognized in Hryniak at para. 70."*

Case Conferences as Evidence-Gathering Tools for Motions (Cont.)

Case Conferences as an Evidence-Gathering Tool

As was the case with a motion for directions, a Judge or case management master may also give directions at a case conference pursuant to Rule 50.13(6)(c):

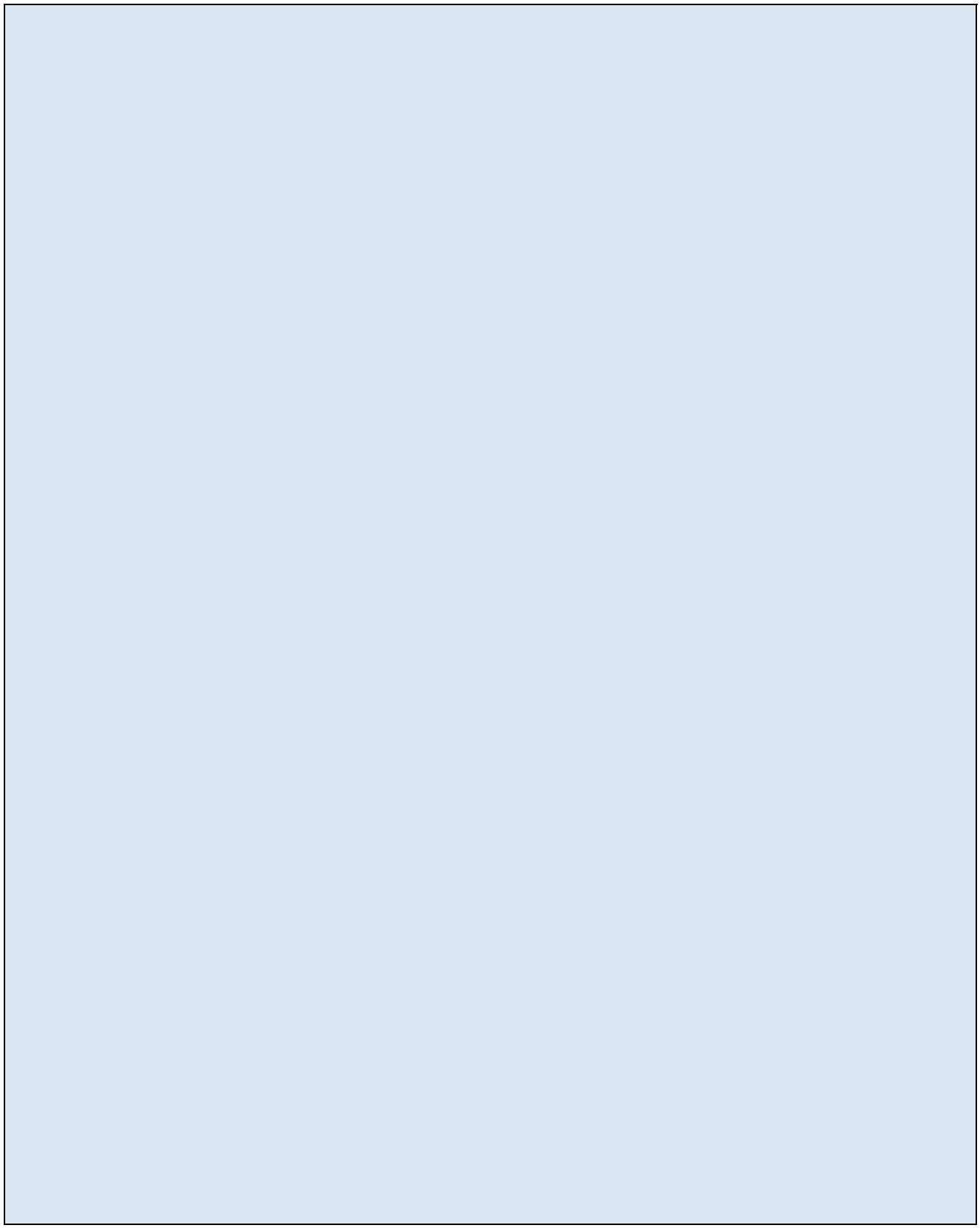
> ***Powers***
>
> ***(6)*** *At the case conference, the judge or case management master may, if notice has been given and it is appropriate to do so or on consent of the parties,*
>
> *(a) make a procedural order;*
>
> *(b) convene a pre-trial conference;*
>
> *(c) give directions; and*
>
> *(d) in the case of a judge,*
>
> *(i) make an order for interlocutory relief, or*
>
> *(ii) convene a hearing. O. Reg. 170/14, s. 16.* (emphasis added)

Unlike a pre-trial conference where statements made therein cannot be used or disclosed at any other step or stage of the proceeding (except as disclosed in an order under Rule 50.07 or in a pre-trial conference report under Rule 50.08) (Rule 50.09), a case conference held under Rule 50.13 does not afford the same protections.

THE CIVIL LITIGATOR'S SURVIVAL GUIDE TO EVIDENCE 2020

Evidentiary Issues on Motions and Applications:
Overcoming Problems and Presenting Properly

Questions?



THE CIVIL LITIGATOR'S SURVIVAL GUIDE TO EVIDENCE 2020

Evidentiary Issues on Motions and Applications: Overcoming Problems and Presenting Properly

November 6, 2020

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Index

This article will address frequently encountered evidentiary issues on motions and applications, how to overcome certain problems, and present properly. The following issues will be examined:

1. Motions vs. Applications: the key differences and their role in determining the evidence that you need;
2. How does the use of cross-examination transcripts on a motion differ from examinations for discovery in an action?
3. Effective use of motions for directions; and
4. Case conferences as evidence-gathering tools for motions.

1. Motions vs. Applications: The Key Differences and their Role in Determining the Evidence that you Need

There are two types of civil proceedings in Ontario: actions and applications. Generally, all civil proceedings are commenced by the issuing of an "originating process", which is defined in Rule 1.03 of the *Rules of the Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, to include a statement of claim (by way of an action) or a notice of application (by way of an application).

This section will focus on applications, as opposed to actions, and how they differ from motions. The discussion will conclude with an examinations of their role in determining the evidence needed for each.

Applications

An "application" is defined in Rule 1.03 as "a proceeding commenced by notice of application."

An application is a form of court proceeding in which the parties' evidence is tendered by way of affidavits, followed by cross-examinations on those affidavits, and then, typically, an oral hearing based upon the written record.

There is no traditional "trial" with *viva voce* evidence in an application – simply argument by counsel based upon the affidavit and transcript evidence from the cross-examinations of the parties or other examinations. A Judge may, under Rule 38.10(1)(b), order that the application or any issue proceed to trial and give such directions as are just.

This is contrasted with an "action", which is also defined in Rule 1.03 to mean:

> *a proceeding that is not an application and includes a proceeding commenced by,*
>
> *a) statement of claim;*
>
> *b) notice of action;*
>
> *c) counterclaim;*
>
> *d) crossclaim; or*

e) third or subsequent party claim.

Generally, every proceeding shall be commenced by action unless a statute or the Rules provide otherwise (Rule 14.02).

The circumstances in which proceedings may be taken by way of application are listed in Rule 14.05. Rule 14.05(3) permits a proceeding to be brought by way of application where the Rules authorize the commencement of a proceeding by application nor where the relief claimed is,

> *(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;*
>
> *(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;*
>
> *(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;*
>
> *(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;*
>
> *(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;*
>
> *(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;*
>
> *(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;*
>
> *(g.1) for a remedy under the Canadian Charter of Rights and Freedoms; or*
>
> *(h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3; O. Reg. 537/18, s. 2.*

Rule 38 regulates the jurisdiction and procedure on applications.

Pursuant to Rule 38.05, "*[a] notice of application shall be issued as provided by Rule 14.07 before it is served.*"

Unlike the case with a Statement of Claim in an action, there is no requirement under the Rules for the time *within which* a notice of application must be served but, rather, a deadline *by which* it must be served. Under Rule 38.06(3), a notice of application must be served at least 10 days before the date of the hearing of the Application.

Typically, a timetable is agreed-upon by the parties or set by the Court, and the Notice of Application is included in an Application Record and served well in advance of the hearing date, so as to permit the delivery of responding materials, cross-examinations to take place, and the delivery of facta and briefs of authority in advance of the hearing date.

The material to be used on an application is set out in Rule 38.09, which requires the delivery of an application record, including the notice of application, all affidavits and other material served by any party for use on the application, a list of all relevant transcripts of evidence in chronological order, and any other material in the Court file that is necessary for the hearing (Rule 38.09(2)).

A party responding to a Notice of Application *may* serve a responding application record consisting of a table of contents and any material to be used by the respondent on the application and not included in the application record (Rule 38.09(3.1)).

Although there is no requirement to serve a responding application record, respondents will typically serve responding application records, which will include affidavits that respond to the evidence of the applicant(s).

Unlike the permissive language in Rule 38.09(3.1), a party responding to an application *must* serve on every other party, at least four days before the hearing, a responding factum (Rule 38.09(3)). Facta are required for applications.

Motions

A "motion" is defined to include "a motion in a proceeding or an intended proceeding" (Rule 1.03). Therefore, leave to commence a proceeding, where leave is required, is obtained on a motion (Rule 14.01(3)) and in an urgent case (such as an interlocutory injunction) a motion may be made before the commencement of a proceeding (Rule 37.17). Rule 9.02(1) also provides for a pre-proceeding motion to appointment a litigation administrator.

With certain exceptions, such as a Motion for Summary Judgment, a "motion" is typically the vehicle by which a party seek certain interim or interlocutory relief from the Court. A Judge has jurisdiction to hear any motion in a proceeding (Rule 37.02(1)). A Master may hear any motion in a proceeding (subject to certain exceptions, including where jurisdiction is expressly conferred on a judge) (Rule 37.02(2)).

In a complicated proceeding, all motions may be assigned to be heard by a particular judge.

Motions on Commercial List matters are dealt with pursuant to the Commercial List practice direction and are generally scheduled at a 9:30 a.m. appointment, with certain exceptions, including Motions for Summary Judgment, which are dealt with during 30 minute case conferences at 10:00 a.m. at the Court.

A motion can be made in both an action, as well as an application.

Rule 37.10(1) sets out the circumstances in which a Motion Record must be filed and states as follows:

> ***37.10(1)*** *Where a motion is made on notice, the moving party shall, unless the court orders otherwise before or at the hearing of the motion, serve a motion record on every other party to the motion and file it, with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, and the court file shall not be placed before the judge or master hearing the motion unless he or she requests it or a party requisitions it. R.R.O. 1990, Reg. 194, r. 37.10 (1); O. Reg. 171/98, s. 14 (1); O. Reg. 438/08, s. 35 (1).*

The contents of the Motion Record are similar to those found in an Application Record, and are detailed in Rule 37.10(2) as follows:

> ***37.10(2)*** *The motion record shall contain, in consecutively numbered pages arranged in the following order,*
>
> > *(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;*
> >
> > *(b) a copy of the notice of motion;*
> >
> > *(c) a copy of all affidavits and other material served by any party for use on the motion;*
> >
> > *d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and*
> >
> > *(e) a copy of any other material in the court file that is necessary for the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.10 (2).*

Motions do not have to be heard orally. Pursuant to Rule 37.12.1(1), "*[w]here a motion is on consent, unopposed or without notice under subrule 37.07(2), the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise*."

For a motion on consent to the Court of Appeal, an affidavit or other document setting out the reasons why it is appropriate to make the order sought must be filed with the Court (Rule 37.12.1(2.1)).

As was the case with a responding application record, a party responding to a motion *may* serve a responding motion record, which if served must include a table of contents and any material to be used by the responding party on the motion and not included in the motion record.

Rule 37.10(3) sets out the contents of the Responding Party's Motion Record as follows:

> ***37.10(3)*** *Where a motion record is served a responding party who is of the opinion that it is incomplete may serve on every other party, and file, with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a responding party's motion record containing, in consecutively numbered pages arranged in the following order,*

> *(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and*
>
> *(b) a copy of any material to be used by the responding party on the motion and not included in the motion record. R.R.O. 1990, Reg. 194, r. 37.10 (3); O. Reg. 171/98, s. 14 (2); O. Reg. 438/08, s. 35 (2).*

Evidence Used on Motions and Applications

Rule 39 sets out how evidence may be given on motions and applications:

- by affidavit (Rule 39.01);
- by cross-examination on an affidavit (Rule 39.02);
- by the examination of a witness before the hearing of a pending motion or application (Rule 39.03(1));
- by the examination of a witness, with leave, orally at the hearing (Rule 39.03(4)); or
- by the use of an examination for discovery transcript at the hearing of a motion (Rule 39.04).

A. Affidavit

Evidence on both motions and applications is typically by way of affidavit – but it does not have to be. Rule 39.01(1) provides that "*[e]vidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise*."

The format for the affidavits are governed by Rule 4.06(1) which provides as follows:

> ***4.06** (1) An affidavit used in a proceeding shall,*
>
> *(a) be in Form 4D;*
>
> *(b) be expressed in the first person;*
>
> *(c) state the full name of the deponent and, if the deponent is a party or a lawyer, officer, director, member or employee of a party, shall state that fact;*
>
> *(d) be divided into paragraphs, numbered consecutively, with each paragraph being confined as far as possible to a particular statement of fact; and*
>
> *(e) be signed by the deponent and sworn or affirmed before a person authorized to administer oaths or affirmations. R.R.O. 1990, Reg. 194, r. 4.06 (1); O. Reg. 575/07, s. 1.*

The general rule as to the content of an affidavit is set out in Rule 4.06(2):

> ***4.06(2)** An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.*

But what if the deponent does not speak English? Pursuant to Rule 4.06(8):

> ***4.06(8)*** *Where it appears to a person taking an affidavit that the deponent does not understand the language used in the affidavit, the person shall certify in the jurat that the affidavit was interpreted to the deponent in the person's presence by a named interpreter who took an oath or made an affirmation before him or her to interpret the affidavit correctly.*

Although an affidavit for use on a motion may be sworn based upon "information and belief" (Rule 39.01(4)), affidavits for use on an application may only contain statements based upon "information and belief" in limited circumstances, such as where the matters are not contentious (Rule 39.01(5)).

In either case, the source of the information and the fact of belief must be specified (i.e. "I am advised by Mr. or Mrs. X and verily believe that …")

Given the more stringent requirements for affidavits used in an application, counsel must ensure that the individuals selected as deponents have the most first-hand knowledge of the matters to which they are swearing or affirming.

What about the scope of disclosure? Does it differ depending upon whether the motion or application is brought with or without notice?

For motions and applications brought without notice, the moving party or applicant must make full and fair disclosure of all material facts (good or bad). The failure to do so is a sufficient ground to set aside the order obtained. Rule 39.01(6) provides as follows:

> ***39.01(6)*** *Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.*

In *Natale v. Testa*, 2018 ONSC 4541, 2018 CarswellOnt 12184 (S.C.J.), although the defendant specifically requested notice of a motion to be brought by the plaintiff, the plaintiff brought an *ex parte* motion without disclosing the defendant's request. The Court not only set aside the *ex parte* order, but also a subsequent consent order.

The Court also set aside an *ex parte* Mareva injunction where the plaintiff failed to disclose a prior settlement agreement (*Elsley v. Bordynui*, 2013 ONSC 1210, 2013 CarswellOnt 2329).

For motions or applications brought without notice, the moving parties must ensure that full and fair disclosure is made, otherwise they will face serious consequences by the Court.

B. Evidence by Cross-Examination on an Affidavit

Cross-examination is not an absolute right and Courts have refused adjournment requests to permit cross-examinations on the eve of a hearing (*Ridley v. Ridley* (1989), 37 C.P.C. (2d) 167

(Ont. H.C.); *A.H. Al-Sagar & Bros. Engineering Project Co. v. Al-Jabouri* (1984), 47 C.P.C. 33 (Ont. H.C.)).

If you are going to cross-examine a deponent, serve all materials and then schedule the examinations at the earliest opportunity. A failure to promptly do so and then a request an adjournment to permit cross-examination may result in the Court refusing the adjournment request.

The right to cross-examination on a motion or application only arises once a party has served every affidavit on which they intend to rely and has completed all Rule 39.03 examinations. Rule 39.02(1) provides as follows:

> ***39.02(1)*** *A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application.*

A party preparing affidavit materials must know the case to be met at the outset and must include sufficient affidavit evidence to meet their case. Subject to limited exceptions, a party will not have a second-chance to file materials after they have conducted cross-examinations.

Once a party cross-examines an adverse party on their affidavit, they cannot subsequently deliver an affidavit for use at the hearing or conduct a Rule 39.03 examination without leave or consent. Rule 39.02(2) states as follows:

> ***39.02(2)*** *A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.*

The purpose behind this rule is to prevent a party from bolstering their case after cross-examinations without obtaining leave from the Court or the consent of the parties.

There may be instances where the evidence of the deponent in the affidavit is significantly contradicted by the very same deponent on cross-examination, therefore evidence from another witness is necessary to address the fact or issue in question.

In those types of cases, the Court will look to the test for leave under this Rule as set out by the Divisional Court in *First Capital Realty v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492. At paragraph 9 of *First Capital, supra*, the Divisional Court set out the four-part test to be satisfied to obtain leave under Rule 39.02(2):

1. is the evidence relevant?
2. does the evidence respond to a matter raised on the cross-examination – not necessarily raised for the first time?

3. would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs/terms/an adjournment?
4. did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

As set out above, the proposed new evidence has to be relevant and respond to a matter raised on cross-examination, and there must be a reasonable explanation for why the evidence was not included at the outset. This is, of course, in addition to the non-compensable prejudice prong of the test.

C. Examination of a Witness on a Pending Motion or Application

Rule 39.03 permits the examination of a person as a witness before the hearing of a pending motion or application and having a transcript of their evidence available at the hearing. This rule states as follows:

> ***39.03(1)*** *Subject to subrule 39.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.*

Rule 39.03 is often used where a party to an action requires the evidence of a third-party witness and, in particular, a witness who may not be prepared to swear an affidavit or may otherwise be adverse in interest to the party requiring the examination.

Note that where the proceeding is an application, Rule 39.03(1) should not be used to conduct a general discovery (*Teranet Inc. v. Canarab Marketing Corp*. (2007), 44 C.P.C. (6th), 51 (Ont. S.C.J. [Commercial List]).

D. Examination of a Witness, with Leave, Orally at the Hearing

Under certain circumstances, a witness may be examined orally at the hearing of a motion or application. Rule 39.03(4) states as follows:

> ***(4)*** *With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial.*

This situation can arise during a "mini-trial" on a motion for summary judgment under Rule 20.04(2.2) which provides as follows:

> ***(2.2)*** *A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.*

E. Examination for Discovery Transcript at the Hearing

On the hearing of a *motion*, a party may use in evidence an adverse party's examination for discovery, but not the party's own examination for discovery transcript (Rules 39.04(1) & (2)). These two Rules state as follows:

Adverse Party's Examination

39.04 (1) *On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.*

Party's Examination

(2) *On the hearing of a motion, a party may not use in evidence the party's own examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the party unless the other parties consent. O. Reg. 534/95, s. 1.*

Note that these Rules only apply to motions (as there are no examinations for discovery permitted in applications).

Expert Witness Evidence

Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03(2.1) (Rule 39.01(7)).

Rule 53.03(2.1) outlines the contents that a report from an expert must include as follows:

53.03(2.1) *A report provided for the purposes of subrule (1) or (2) shall contain the following information:*

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

When an expert is to be relied upon at a motion or application, the expert themselves has to swear an affidavit appending their own report to it as an exhibit. The affidavit should include, among other things, a statement that the report attached to the affidavit as an exhibit accurately sets out the expert's qualifications, work responsibilities, and a representative sample of their work experience.

The Acknowledgement of Expert's Duty form should also be a separate exhibit to the affidavit.

Filing of Transcripts

Pursuant to Rule 34.18(1) "*[i]t is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the Court*."

Where a party intends to refer to a transcript at the hearing of a motion or application, a copy of the transcript shall be filed at least four days before the hearing (Rule 34.18(2)). Note that a portion of the transcript can only be filed on a motion or application if the other parties consent (Rule 34.18(3)).

The entirety of the transcript is typically filed for a motion nor application in advance of the hearing. For a trial; however, the transcript is not filed until a party refers to it at trial, and the Judge may then read only the portion to which the party refers (Rule 34.18(4)).

2. How does the Use of Cross-Examination Transcripts on a Motion Differ from Examinations for Discovery in an Action?

To better understand the difference between how transcripts are used from cross-examinations as opposed to examinations for discovery, a brief overview of the key differences between the two examinations is warranted.

Key Differences Between Cross-Examinations and Examinations for Discovery

A. Purpose

The purpose of cross-examination is to attack the credibility of the deponent's evidence and to test their evidence. It is surgical in nature. Questions should be close-ended and leading.

The purpose of an examination for the discovery is to gather relevant evidence and ensure that the parties' productions are complete. Questions are typically open-ended and elaborate on previous answers. Pursuant to Rule 31.02, an examination for discovery may be oral or by written questions and answers, but not both except with leave.

B. Scope

Generally, the scope of cross-examination is determined by the issues on the motion or application and the issues raised in the affidavit.

Under Rule 31.06(1), on an examination for discovery,

> *[a] person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) and (4) and no question may be objected to on the ground that,*
>
> *(a) the information sought is evidence;*
>
> *(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or*
>
> *(c) the question constitutes cross-examination on the affidavit of documents of the party being examined.* (emphasis added)

For examinations for discovery, the findings, opinions and conclusions of experts retained by a party are expressly made discoverable, but this information, and the identity of the expert, need not be disclosed if the information was obtained in preparation for contemplated or pending litigation and if the party undertakes not to call the expert as a witness at trial (Rule 31.06(3)).

Evidence Act Implications re: Transcript Evidence

Regardless of whether a transcript is being used on a motion, application or at trial, section 48(2) of the *Evidence Act*, R.S.O. 1990, c. E.23, as amended, makes the following presumption:

> ***(2)** An examination or deposition received or read in evidence under subsection (1) shall be presumed to represent accurately the evidence of the party or witness, unless there is good reason to doubt its accuracy.*

Use of Cross-Examination Transcripts on a Motion or Application

At a motion or application, any party may use anyone's transcript evidence, whether obtained by cross-examination or an examination of a witness on a pending motion under Rule 39.03(1) which provides that:

> ***39.03(1)** Subject to subrule 30.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.*

A party who intends to refer to a transcript of evidence at the hearing of a motion shall file a copy of the transcript as provided by Rule 34.18 (Rule 37.10(5)).

Rule 34.18 states that:

> ***34.18****(1) It is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the court. R.R.O. 1990, Reg. 194, r. 34.18 (1).*

Additionally, there are permitted uses of an adverse party's examination for discovery evidence on a motion as follows:

> ***39.04****(1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.*

A party's own examination for discovery evidence cannot be relied upon by that party on the hearing of a motion, unless the other parties consent (Rule 39.04(2)).

Once cross-examination transcripts are filed with the Court, they are not subject to the deemed undertaking rule (Rule 30.1.01(5)(a)).

Use of Examination for Discovery Transcripts at a Trial

A party may not rely upon its own examination for discovery evidence at trial.

At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of (a) an adverse party; or (b) a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise, if the evidence is otherwise admissible, whether the party or other person has already given evidence or not (Rule 31.11(1)).

Additionally, Rule 31.11(2) provides that "*[t]he evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness*."

In the event of impeaching a witness, ss. 20 and 21 of the *Evidence Act*, R.S.O. 1990, c. E.23, as amended, require that a prior inconsistent statement be put to the witness before it is introduced as evidence.

Just as parties can examine a non-party as a witness on a pending motion or application under Rule 39.03(1), Rule 31.10(1) permits the examination for discovery of a non-party with leave as follows:

> ***31.10(1)*** *The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation. R.R.O. 1990, Reg. 194, r. 31.10 (1).*

The ability to examine a non-party under Rule 31.10 is not as of right (as it is under Rule 39.03). The test for granting leave is set out in Rule 31.10(2), which provides as follows:

> ***(2)*** *An order under subrule (1) shall not be made unless the court is satisfied that,*
>
> > *(a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;*
> >
> > *(b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and*
> >
> > *(c) the examination will not,*
> >
> > > *(i) unduly delay the commencement of the trial of the action,*
> > >
> > > *(ii) entail unreasonable expense for other parties, or*
> > >
> > > *(iii) result in unfairness to the person the moving party seeks to examine. R.R.O. 1990, Reg. 194, r. 31.10 (2).*

The use of the evidence obtained under Rule 31.10 is limited. Pursuant to Rule 31.10(5) "*[t]he evidence of a person examined under this rule may not be read into evidence at trial under subrule 31.11(1)*."

What if Answers from an Examination for Discovery are Incorrect?

A part who subsequently discovers that an answer given on an examination was incorrect or incomplete when made, or is no longer correct and complete, is under a duty to provide the information in writing to every other party.

Rule 31.09(1) states as follows:

> ***Duty to Correct Answers***
>
> ***31.09*** *(1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,*
>
> > *(a) was incorrect or incomplete when made; or*
> >
> > *(b) is no longer correct and complete,*
> >
> > *the party shall forthwith provide the information in writing to every other party. R.R.O. 1990, Reg. 194, r. 31.09 (1).*

This Rule applies to answers given on an examination for discovery and does not reference answers given on cross-examination.

Parties should be cautious that when an answer is corrected. Both the original and corrected answers are admissible at the hearing and the original answer is not expunged (*Capital Distributing Co. v. Blakey* (1997), 33 O.R. (3d) 58, 10 C.P.C. (4th) 109).

There are consequences to correcting an answer on discovery. Not only can the answer be treated at the hearing as forming part of the original examination (Rule 31.09(2)(a)), but any adverse party may require that the information be verified by affidavit or subject to further examination for discovery (Rule 31.09(2)(b)).

Filing of Transcript Evidence: Motions and Applications

Transcripts on motions and applications are generally filed in their entirety in advance of the hearing and the filing requirements are set out in Rule 34.18(2) which states as follows:

> ***34.18(2)*** *Where a party intends to refer to a transcript on the hearing of a motion or application, a copy of the transcript for the use of the court shall be filed in the court office where the motion or application is to be heard, at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 34.18 (2); O. Reg. 171/98, s. 11; O. Reg. 394/09, s. 14.*

Per Rule 34.18(3) a party may file a portion of the transcript if the other parties consent.

Filing of Transcript Evidence: Trial

Unlike the procedure for filing transcripts in advance of motions and applications, "*[a] copy of the transcript for the use of the court at trial shall not be filed until a party refers to it at trial, and the trial judge may read only the portions to which a party refers*." (Rule 34.18(4)).

Transcripts for use at trial are not filed in advance. When they are filed, the Judge *may* only read the portions to which a party refers.

Use of Examination for Discovery Evidence in a Subsequent Action

Discovery transcripts can also be used in subsequent actions (in limited circumstances). Where an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, the evidence given on an examination for discovery taken in the former action may be read into or used in evidence at the trial of the subsequent action as if it had been taken in the subsequent action (Rule 31.11(8)).

3. Effective Uses of Motions for Directions

Applicable Rules of Civil Procedure

Rule 1.05 of the Rules grants the Court a general power to impose terms in the making of any order. The prescribed forms are to be used where applicable and with such variations as the circumstances required (Rule 1.06).

Rule 1.05 states as follows:

> ***Order on Terms***
>
> ***1.05*** *When making an order under these rules the Court may impose such terms and given such directions as are just.*

Rule 1.05 provides for early judicial involvement in a matter, which allows for a Motion for Directions, to manage the time and cost of a Summary Judgment Motion.

Rule 50.13 must be read in conjunction with Rule 1.05. As per Justice Firestone's comments in *Griva v. Griva*, 2016 ONSC 1820 (CanLII) at para. 10:

> *"Rule 50.13 is to be read and applied in conjunction with Rule 1.05 which states: "[W]hen making an order under these rules the court may impose such terms and give such directions as are just."*

Rule 50.13(1) stipulates that: "*[a] judge may at any time, on his or her own initiative or at a party's request, direct that a case conference be held before a judge or case management master*."

With respect to the powers afforded to a Judge or case management master at a case conference, Rule 50.13(6) provides that:

> ***(6)*** *At the case conference, the judge or case management master may, if notice has been given and it is appropriate to do so or on consent of the parties,*
>
> *(a) make a procedural order;*
>
> *(b) convene a pre-trial conference;*
>
> *(c) give directions; and*
>
> *(d) in the case of a judge,*
>
> *(i) make an order for interlocutory relief, or*
>
> *(ii) convene a hearing. O. Reg. 170/14, s. 16. (emphasis added)*

Motions for Directions determine whether a proposed summary judgment motion should proceed.

They should be expedient and include a tight timetable for the completion of the necessary steps.

Motions for Directions as a Tool to Promote Access to Justice

The importance of a Motion for Directions was underscored by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 where the Court was discussing the scope of a Summary Judgment Motion as follows:

"***C. Tools to Maximize the Efficiency of a Summary Judgment Motion***

(1) Controlling the Scope of a Summary Judgment Motion

[69] The Ontario Rules and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.

[70] The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.

[71] Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.

[72] I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.

[73] A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case."

In *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, the Court of Appeal allowed an appeal concerning the interpretation of s. 7(1)(a) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, as amended, and granted summary judgment dismissing the action. In so doing, the Court cited what Karakatsanis J. described in *Hryniak, supra*, as a "culture shift" in Courts deciding

summary judgment motions to create an environment promoting timely and affordable access to the civil justice system. Para. 131 from the Court of Appeal's decision in *Carmichael, supra*, is as follows:

> *"[131] At the same time, the Supreme Court of Canada's decision in Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 2,* per *Karakatsanis J., called for a "culture shift" in courts deciding summary judgment motions "in order to create an environment promoting timely and affordable access to the civil justice system". Moreover, as Brown J.A. has noted, because "the court's comments [at para. 2 of Hryniak] apply equally to civil appellate courts", this court's exercise of its powers under s. 134 must also strive to promote "timely and affordable access to the civil justice system":* Cook*, at para. 78."*

Accessibility is achievable through justice that is proportionate, timely and affordable (*Hryniak, supra*). Motions for summary judgment are a vehicle for increased access to the civil justice system, as they promote a timely and affordable means to determine disputes. This, in turn, should increase the frequency of motions for directions before the Courts.

Factors to Consider on a Motion for Directions

In *1318214 Ontario Limited v. Sobeys Capital Incorporated*, 2012 ONSC 2784 (CanLII), Justice Brown identified at paragraphs 18 and 19 of the decision the issues that a Court should consider when weighing a request for a lengthy post-discovery motion against setting an action down for trial. These issues are also instrumental to any Judge faced with a motion for directions concerning the scheduling of a motion for summary judgment and are summarized as follows:

1. Length of motion versus length of trial
2. What specific issues will the court be asked to determine on the motion?
3. Who will the affiants be and what issues will they address? How long with their affidavits be?
4. Which witnesses will be called at trial and the anticipated length of examinations?
5. How many documents will be marked as exhibits and/or introduced at trial? Will there be any agreement on the admissibility of documents?
6. Will there be expert reports? If so, how many and on what issues?
7. What is the volume of transcripts to be filed with the court or put before the Judge?
8. Do the parties anticipate any in-trial motions? If so, how many and on what issues?
9. What legal issues will be addressed in the parties' facta, and how many authorities will be relied upon?

Parties are well-advised to be prepared to make submissions on the above at any motion for directions concerning the scheduling of a motion for summary judgment.

On a motion for directions, the Judge will weigh the costs and benefits of scheduling a motion for summary judgment, all with a view to respecting the principles of proportionality, timeliness and affordability.

The Judge may provide directions with respect to the timelines for filing affidavits, the length of cross-examinations, and the nature and extent of evidence that will be filed. At the same time,

the Judge needs to be cautious not to impose administrative measures that add unnecessary costs to the process.

It should be noted that as per the Supreme Court of Canada's comments in *Hryniak, supra*, not all summary judgment motions require a motion for directions. But, the failure to bring such a motion where it was evident that the record will be complex or voluminous will be considered when dealing with cost consequences under Rule 20.06(a) which provides as follows:

> ***Costs Sanctions for Improper Use of Rule***
>
> ***20.06*** *The Court may fix and order payment of the costs of a Motion for summary judgment by a party on a substantial indemnity basis if,*
>
> *(a) the party acted unreasonably by making or responding to the motion; or*
>
> *(b) the party acted in bad faith for the purpose of delay.*

<u>*A Tool for Responding Parties*</u>

As set out in para. 72 in *Hryniak, supra*, a motion for directions can provide the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment – thereby saving their client costs and arguably delaying the determination of the issues to be decided. I can be used as a tool by a responding party to challenge or even end the scheduling of a proposed motion for summary judgment.

When faced with a motion for directions, a responding party would be well-advised to consider the following decisions:

In the 2016 decision n *Griva, supra*, Justice Firestone commented on whether the Court can refuse, and if so under what circumstances, a party's request to schedule a motion for summary judgment. In refusing to schedule and allow the plaintiff's requested motion for summary judgment to proceed, Justice Firestone highlighted the Court's considerations and gatekeeping function as follows:

> *"[15] In this case the requested motion for partial summary judgment will not resolve the damages issues in their entirety. The plaintiff's other damages claims will still be proceeding to trial. Those additional damage claims are based on the same factual matrix and evidentiary record as the general damages claim for which the plaintiff now seeks partial summary judgment.*
>
> *[16] In this case to allow some of the damages claims to be determined by way of summary judgment and others to proceed to trial would risk inconsistent factual findings and a duplication of evidence from not only the plaintiff but also from the many other experts who will give evidence both on this summary judgment motion and at trial regarding the injuries sustained and the effect of those injuries. A complete evidentiary record is necessary in order to properly assess the plaintiff's claim for general non-pecuniary damages.*

> *[17] In Baywood Homes Partnership v. Haditaghi, 2014 ONCA 450, at para 33, the court confirmed that the motions judge must "assess the advisability of the summary judgment process in the context of the litigation as a whole." In Hryniak the Supreme Court at para. 60 specifically stated that "`the interest of justice' inquiry goes further and also considers the consequences of the motion in the context of litigation as a whole."*
>
> *[18] Given the Supreme Court's pronouncement at para. 72 in Hryniak, these considerations are equally applicable to all procedural orders and directions made by the court at a case conference in exercising its gate-keeping role."*

In *Griva, supra*, Justice Firestone also adopted Justice Myers' reasoning in *2287913 Ontario Inc. v. Blue Falls Manufacturing Ltd*., 2015 ONSC 7982 where at para. 17 Justice Myers stated in part:

> *"[W]here a party advances a small number of discrete issues that may resolve the entire case, it is much easier to conclude that a thorough investigation of those issues may be the most proportional process even though the issues may be complex or have some facts in dispute."*

As such, discreet issues may not always warrant the scheduling of a motion for summary judgment. In the words of Justice Karakatsanis in *Hryniak, supra*, at para. 59:

> *"[W]hat is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure."*

The concerns expressed by Justice Firestone were re-visited a year later by the Ontario Court of Appeal in *Butera v. Chown, Carins LLP*, 2017 ONCA 783 (CanLII), where the Court highlighted several concerns with motions seeking partial summary judgment as follows:

> *"[30] First, such motions cause the resolution of the main action to be delayed. Typically, an action does not progress in the face of a motion for partial summary judgment. A delay tactic, dressed as a request for partial summary judgment, may be used, albeit improperly, to cause an opposing party to expend time and legal fees on a motion that will not finally determine the action and, at best, will only resolve one element of the action. At worst, the result is only increased fees and delay. There is also always the possibility of an appeal.*
>
> *[31] Second, a motion for partial summary judgment may by very expensive. The provision for a presumptive cost award for an unsuccessful summary judgment motion that existed under the former summary judgment rule has been repealed, thereby removing a disincentive for bringing partial summary judgment motions.*
>
> *[32] Third, judges, who already face a significant responsibility addressing the increase in summary judgment motions that have flowed since Hryniak, are required to spend time hearing partial summary judgment motions and writing comprehensive reasons on an issue that does not dispose of the action.*

> *[33] Fourth, the record available at the hearing of a partial summary judgment motion will likely not be as expansive as the record at trial therefore increasing the danger of inconsistent findings.*
>
> *[34] When bringing a motion for partial summary judgment, the moving party should consider these factors in assessing whether the motion is advisable in the context of the litigation as a whole. 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. Such an approach is consistent with the objectives described by the Supreme Court in Hryniak and with the direction that the Rules be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.*
>
> *[35] Lastly, I would observe the obvious, namely, that a motion for partial summary judgment differs from a motion for summary judgment. If the latter is granted, subject to appeals, it results in the disposal of the entire action. In addition, to the extent the motion judge considers it advisable, if the motion for summary judgment is not granted but is successful in part, partial summary judgment may be ordered in that context."*

On April 5, 2019, Justice McEwen released his Honour's decision in *1511419 Ontario Inc. v. KPMG*, 2019 ONSC 228 (CanLII), in which motions for summary judgment brought by the defendants in three separate but related actions based upon the expiry of the two year limitation period were dismissed.

At paragraph 48 of the decision, Justice McEwen cited Mew J., Debra Rolph & Daniel Zacks, *The Law of Limitations*, 3d ed. (Markham: LexisNexis Canada, 2016) at s. 5.36 and stated:

> *"A full trial will still be required where a summary record cannot fairly be used to decide legal issues that are unsettled, complex, or intertwined with the facts."*

The decision in *1511419, supra*, is a good example of the Courts refusing to grant summary judgment where the legal issues were unsettled, complex or intertwined with the facts.

Accordingly, responding parties on a motion for directions that want to challenge the request to schedule a motion for summary judgment, would be well-advised to incorporate the concerns raised by the Courts, above, including:

- **Delay**: the underlying action generally does not proceed in the face of a motion for summary judgment, thereby causing the opposing party to incur time and costs on a motion that will not ultimately determine the action;
- **Cost**: the parties can incur significant costs on a motion that will not finally determine the issues in dispute in the action;

- **Judicial Considerations**: Judges, who already face a considerable volume of summary judgment motions, will be required to spend time hearing partial summary judgment motions and writing comprehensive reasons on issues that do no dispose of actions;
- **Inconsistent Findings**: There is a risk of inconsistent findings, given that the record available at the hearing on a partial summary judgment motion will likely not be as expansive as the record at trial;
- **Intertwined Facts**: When issues are complex and intertwined with the facts, a summary record may not be the most appropriate means in which to resolve disputes. In such cases, the scheduling of such motions (or the motions themselves) should be refused or otherwise dismissed;
- **Bifurcation**: Partial summary judgment motions should be a rare procedure, limited to those issues that can be readily bifurcated from those in the main action; and
- **Lack of Finality**: Subject to any appeals, the granting of a motion for summary judgment should dispose of the entire action. That is not the case with partial summary judgment motions and is contrary to the guidance from the Supreme Court of Canada in *Hryniak, supra*, that the Rules should be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.

More recently, on August 19, 2020, Justice Sweeny released a decision in *Sheldon v. Beaulieu*, 2020 ONSC 4908 (CanLII) whereby partial summary judgment was granted in a case involving a motor vehicle accident that occurred on January 28, 2016 in Thorold, Ontario.

At paras. 15 to 17 of *Sheldon, supra*, Justice Sweeny addressed the law surrounding the appropriateness of summary judgment motions as follows:

> *"[15] Although the Supreme Court of Canada in Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87 and the Court of Appeal in Butera v, Chown, Cairns LLP, 2017 ONCA 83, 137 O.R. (3d) 561 warned against the dangers of granting partial summary judgment, I am satisfied that the comments of the court in Butera do not preclude the granting of this partial summary judgment. The liability of this defendant can be readily bifurcated from those in the main action and may be dealt with expeditiously and in a cost-effective manner. This will not delay the main action and expend resources for a motion that does not determine all of the issues of the action. This is a discrete issue that has been brought to me for determination cost-effectively. The amount of judicial time expended is not out of proportion to the result obtained. There is unlikely to be any inconsistent findings. The fact that the bus driver may be an important witness at the trial does not mean that she needs to be a party or that there will be any inconsistent findings.*
>
> *[16] In Butera, at para. 34, the court noted that "[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."*
>
> *[17] That is the exact situation on this motion for summary judgment."*

In finding that the liability of the defendant could be easily bifurcated from those in the main action and would be dealt with expeditiously and in a cost-effective manner, summary judgment would not delay the main action. As the liability of the defendant was a discreet issue to be determined on a cost-effective basis and the likelihood of no inconsistent findings, Justice Sweeny granted summary judgment.

The above-noted cases canvass the considerations undertaken by the Courts when determining the appropriateness of summary judgment motions, and should be incorporated in the arguments of both sides during motions for directions concerning the scheduling of summary judgment motions.

Use in Complicated Proceedings or Series of Proceedings

Motions for directions can also be used under Rule 37.15 – Motions in a Complicated Proceeding or Series of Proceedings.

> ***37.15(1)*** *Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (place of hearing of motions) does not apply to those motions. R.R.O. 1990, Reg. 194, r. 37.15 (1); O. Reg. 292/99, ss. 2 (3), 4.*
>
> ***(1.1)*** *A judge who is directed to hear all motions under subrule (1) may refer to a master any motion within the jurisdiction of a master under subrule 37.02 (2) unless the judge who made the direction under subrule (1) directs otherwise. O. Reg. 348/97, s. 2.*
>
> ***(1.2)*** *A judge who is directed to hear all motions under subrule (1) and a master to whom a motion is referred under subrule (1.1) may give such directions and make such procedural orders as are necessary to promote the most expeditious and least expensive determination of the proceeding. O. Reg. 438/08, s. 37 (1); O. Reg. 394/09, s. 16.*
>
> ***(2)*** *A judge who hears motions pursuant to a direction under subrule (1) shall not preside at the trial of the actions or the hearing of the applications except with the written consent of all parties. R.R.O. 1990, Reg. 194, r. 37.15 (2); O. Reg. 438/08, s. 37 (2).*

In *Trade Capital Finance Corp. v. Cook*, 2017 ONSC 3606, 2017 CarswellOnt 11797 (S.C.J.), the Court held that a Judge appointed to hear Motions under Rule 37.15 should not hear a motion for summary judgment without the consent of the parties.

Commercial List Motions for Summary Judgment

For those matters on the Commercial List, the Court will not schedule Motions for Summary Judgment at a 9:30 a.m. appointment.

Instead, parties should schedule a 30-minute case conference at 10:00 a.m. through the scheduling office and be prepared to address the issues set out above (Commercial List Users' Committee Newsletter Issue No. 11 – A Year in Review – January 2019).

4. Case Conferences as Evidence-Gathering Tools for Motions

Pursuant to the *Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model*, effective February 1, 2019, parties can apply to participate in a pilot project where one Judge both manages the case and conducts the trial.

For those parties that do not want to participate in a fully case-managed process (as per the above-noted practice advisory), the benefits of the Commercial List are now available for all civil actions in Toronto under Rule 50.13 of the Rules, which permits case conferences in advance of, among other steps, motions.

As in the case of a pre-trial conference, a Judge may direct a case conference in either an action or application at any time, either on his or her initiative or at the request of a party.

The same rules regarding attendance and lawyer preparedness that apply to pre-trial conferences also apply to case conferences.

Guidance Provided by Rule 50.13

Rule 50.13(1) provides that a case conference may be initiated by the Judge alone or upon the request of a party:

> ***50.13(1)*** *A judge may at any time, on his or her own initiative or at a party's request, direct that a case conference be held before a judge or case management master. O. Reg. 170/14, s. 16.*

Unless the Judge or case management master directs otherwise, counsel and the parties shall participate in person or via telephone. This is addressed in Rule 50.13(2):

Attendance

(2) *The lawyers for the parties shall appear at the case conference and, unless the judge or case management master orders otherwise, the parties shall participate,*

(a) by personal attendance; or

(b) under rule 1.08 (telephone and video conferences), if personal attendance would require undue amounts of travel time or expense. O. Reg. 170/14, s. 16.

As a result of the COVID-19 pandemic, the majority of case conferences are proceeding via the Zoom videoconferencing platform.

In order for the case conference to be as productive and efficient as possible, Rule 50.13(4) requires that the lawyer attending has the authority to deal with the matters set out in subrule (5) below:

(4) *Every lawyer attending the case conference shall ensure that he or she has the authority to deal with the matters referred to in subrule (5) and that he or she is fully acquainted with the facts and legal issues in the proceeding. O. Reg. 170/14, s. 16.*

The matters to be dealt with at the case conference are outlined in subrule (5) as follows:

Matters to be Dealt With

(5) *At the case conference, the judge or case management master may,*

(a) identify the issues and note those that are contested and those that are not;

(b) explore methods to resolve the contested issues;

(c) if possible, secure the parties' agreement on a specific schedule of events in the proceeding;

(d) establish a timetable for the proceeding; and

(e) review and, if necessary, amend an existing timetable. O. Reg. 170/14, s. 16.

The list of matters to be dealt with under subrule (5) are not exhaustive. Accordingly, the Judge or case management master can, in accordance with Rule 1.05, make sure others or give such directions as are just in the circumstances.

<u>*Case Conferences as a Gate-Keeping Tool for the Court*</u>

In *Adam et al. v. Ledesma-Cadhit et al*., 2015 ONSC 3043 (CanLII), Justice Myers presided over a case conference to deal with the production of witnesses for cross-examination in relation to a

motion for summary judgment to dismiss a medical malpractice case against one of the defendants.

At para. 9 of the decision in *Adam, supra*, Justice Myers underscored the gatekeeping function of the Court at a case conference to regulate the amount and scope of evidence as follows:

> *"The court can exercise some control over the amount and scope of evidence and, especially, reign in cases of abuse, by using Case Conferences under Rule 50.13 and motions for directions under Rule 1.05 as expressly recognized in Hryniak at para. 70."*

Case Conferences as an Evidence-Gathering Tool

As was the case with a motion for directions, a Judge or case management master may also give directions at a case conference pursuant to Rule 50.13(6)(c):

> ***Powers***
>
> ***(6)*** *At the case conference, the judge or case management master may, if notice has been given and it is appropriate to do so or on consent of the parties,*
>
> *(a) make a procedural order;*
>
> *(b) convene a pre-trial conference;*
>
> *(c) give directions; and*
>
> *(d) in the case of a judge,*
>
> *(i) make an order for interlocutory relief, or*
>
> *(ii) convene a hearing. O. Reg. 170/14, s. 16.* (emphasis added)

Aside from the identification of issues, the resolution of contested issues, scheduling and addressing timetables, the case conference is also an opportunity for the parties to gather evidence for use on subsequent motions.

Unlike a pre-trial conference where statements made therein cannot be used or disclosed at any other step or stage of the proceeding (except as disclosed in an order under Rule 50.07 or in a pre-trial conference report under Rule 50.08) (Rule 50.09), a case conference held under Rule 50.13 does not afford the same protections.

All counsel must know their case and the evidence that they will rely upon in advance of attending any case conference, particularly when directions are sought or an order for interlocutory relief is sought.

On any contested issue at a case conference, counsel must be prepared to make submissions on their evidence and any applicable caselaw. But just as examinations for discovery or cross-examinations permit a party to test the evidence of the opposing party, so too does a case conference with the added benefit of judicial feedback.

At a case conference to sort out preliminary issues and scheduling for a contested motion, parties must be prepared to make submissions on their evidence. This will give all parties insight into the anticipated evidence of the other parties, thereby permitting them to better prepare their materials and strategy for cross-examinations and the eventual motion.

The Civil Litigator's Survival Guide to Evidence

November 6, 2020

Relevance, Materiality, Probity, Persuasion

Relevance, Materiality, Probity, and Persuasion of Civil Evidence

By: Cameron Fiske and David Milosevic, Milosevic Fiske LLP[1]

In his 2016 Advocates' Journal article "The unsettling truth about settling," the Honourable Justice Joseph W. Quinn speculated on how one becomes a talented lawyer. Invoking the analogy of how one excels at golf, His Honour indicated that one does not become a talented golfer by simply hitting the links once a year.[2] Nevertheless, with respect to contemporary civil litigation, conducting a trial once a year may well be the best many of us can hope for. Though the vast majority of civil cases settle, the ability to take a case to trial is essential. This leads us to the issue of civil evidence. Given the high rate of settlement, it is civil procedure that is probably the more potent weapon in the modern litigator's arsenal. However, civil evidence can be and is often overlooked.

The purpose of this paper is to provide a concise overview of one particular aspect of civil evidence that dominates the vast majority of civil trials: is the evidence admissible in court? Is the evidence relevant, material and does it have probative value? We will analyze this from the prospective of both jury and non-jury trials, with the caveat that civil jury trials are becoming rarer and rarer (outside of the domain of personal injury). Excluded from our analysis, in light of the constraints of time and word count, is a review of civil evidence on motions.

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[2] "The unsettling truth about settling," The Honourable Joseph W. Quinn, Winter 2019 edition, 35 Adv J No. 3, 23-25, The Advocates' Journal.

a.) The basic rule of evidence:

Evidence should be excluded if the prejudicial effect of it outweighs the probative value and/or if it is not relevant or material to the issues in dispute or to the credibility of a witness.[3]

b.) Determining Admissibility

In determining the admissibility of evidence, the judge will analyze the relevance and materiality of the information. Evidence must be both relevant and material to be admitted. In a jury trial, the presiding judge will determine the relevance and materiality, after a *voir dire*, and the jury will determine the weight if the evidence was ruled to be admissible. In a judge alone trial the judge will determine both the relevance and the materiality while ruling on admissibility. However, the ultimate weight of the evidence will be left to be considered in the trial decision.[4]

Commonly, civil evidence is categorized as:

Direct:	Evidence offered by a witness who can testify to personal knowledge of a fact or document at issue in the trial.[5]
Circumstantial:	Evidence based on inference. i.e. a witness can testify by direct evidence that they saw it was raining outside. Or, a witness can testify they saw people coming in wet and holding umbrellas, and testify by inference that it was raining outside.[6]
Character:	Evidence of a person's character or propensity to commit an act, is generally inadmissible. However, when a person put's their character in issue by testifying that they are a good person who would never do such a thing, for example, evidence to rebut that testimony of good character may be adduced.[7]

[3] Andrew W. Bryant et. al, *The Law of Evidence in Canada*, 3d ed (Toronto: LexisNexis, 2009) at 693 and *R v. Seaboyer*, [1991] 2 SCR 577.
[4] *Greenhalgh v. Douro-Dummer (Township)*, 2009 CanLII 57148 (ON SC) at para. 29-30.
[5] *R. v. Arcuri* (2001), 2001 SCC 54 (CanLII), 157 C.C.C. (3d) 21 (S.C.C.)
[6] *Ibid.*
[7] *R. v. McMillan* (1975), 1975 CanLII 43 (ON CA), 7 O.R. (2d) 750 (C.A.) at p. 757, aff'd 1977 CanLII 19 (SCC), [1977] 2 S.C.R. 824.

Expert:	Expert evidence may be adduced where ethe evidence is require to help the trier of fact to appreciate, understand, or come to the correct conclusions about non-opinion evidence. To be admissible, expert evidence must be relevant to a material issue in the case (2) not excluded by a policy rule (3) falls within the proper sphere of expert evidence (4) the witness is a properly qualified expert.[8]
Similar fact:	Similar facts are proven facts that a person acted one way in the past, from which an inference may be draw that he or she acted in a similar way on the occasion in dispute. Such evidence is presumptively inadmissible unless it can be shown that that its probative value outweighs any prejudicial effect.[9]
Hearsay evidence:	Hearsay is an out of court statement offered in court for the truth of its contents. Hearsay is generally inadmissible, but subject to eight common exceptions (prior inconsistent statement, prior identifications, prior testimony, prior convictions, admissions or a party, statement against interest by non-parties, declarations in the course of duty and spontaneous utterances). In addition, hearsay is admissible if the party tendering it can establish that the evidence is reliable and necessary.[10]

Although the admissibility of each of these types of evidence will face its own specific criteria for admissibility, it will need to meet the general criteria of relevance, materiality, probative value, and not be subject to any exclusionary rules.

1. **Relevance:** This is not a high standard. The question to be asked is whether or not the evidence increases or deceases the likelihood that a fact is true.[11] In *R v. Corbett*,[12] Justice La Forest (in dissent) described the significance of relevance as "all relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy."

[8] *R. v. Mohan* 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9
[9] *R. v. Arp* 1998 CanLII 769 (SCC), [1998] 3 S.C.R. 339
[10] *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358
[11] R v. Watson (1996), 30 OR (3d) 161, 108 CCC (3d) 310 (ONCA).
[12] [1988] 1 SC.R. 670 at 714.

2. **Materiality:** The evidence must address a fact that is being considered in the case. As such, it must arise out of the pleadings or be related to the credibility of a witness.[13] A failure to plead material facts can ultimately prove fatal to the admissibility of evidence.[14]

3. **Exclusionary Rule:** Is there a specific basis to exclude the evidence, such as in the case of hearsay (assuming that the evidence is not an exception to the hearsay rule)?[15] If so, the evidence will be excluded.

4. **Probative Value versus Prejudicial Effect:** Even if the evidence meets the initial gatekeeping requirements set out above the court still retains a residual power to exclude evidence where the evidence's prejudicial effect outweighs its probative value.[16]

To be clear, probative value is evaluated based on the court's determination of how important said evidence is at trial. Prejudicial effect is often a bigger problem in jury trials. The issue being whether a properly instructed jury will still use the evidence for an improper purpose (such as an appeal to emotion) or if the evidence will take up too much court time or cause unfair surprise.[17] The general rule of thumb is that if the prejudicial effect of the evidence exceeds the probative value then the evidence will be excluded.

As an aside, in judge alone trials, particularly in civil cases, one potential source of prejudice is late tendered evidence, such as documentation that is produced at trial that did not form part of an affidavit of documents. In those instances counsel may argue that late tendered evidence is

[13] Andrew W. Bryant et. al, *The Law of Evidence in Canada*, 3d ed (Toronto: LexisNexis, 2009) at 693.
[14] *Power v. Carroll*, 2007 ONCA 232 at para. 2.
[15] *R v. Khan*, [1990] 2 S.C.R. 531.
[16] *R v. Seaboyer*, [1991] 2 SCR 577.
[17] Ibid and *R v. Clarke* (1998), 129 CCC (3d) 1, 18 CR (5th) 219 at 34.

prejudicial and ought not to be admitted if the failure to disclose it at an earlier date renders it next to or completely impossible to lead contradictory evidence as a result of the passage of time. In effect, late tendered evidence is a form of undue surprise.[18]

c.) Similar fact evidence: a case study in judicial balancing of relevance and materiality

In *Greenhalgh v. Douro-Dummer (Township)*,[19] the plaintiffs were driving along a country road. They turned on to a laneway and eventually became stuck on a rock.[20] After attempting to restart their vehicle with no success, the plaintiffs tried to walk to safety through the bush. They became lost and wandered for hours in the bitter cold. Fortunately, they were eventually rescued by a passerby, but tragically, severe frostbite led to one plaintiff losing both her legs and eight fingers and the other plaintiff lost several fingers and toes.[21] At issue at trial was whether or not the defendant Township was liable for failing to put up a "No Exit" sign at the intersection of the county road and the laneway that the plaintiffs drove on.[22] While the Trial Judge ultimately went on to rule that no such signage was required, and that the Township was not liable, several evidentiary rulings were made at trial that provide an excellent case study in determining the admissibility of evidence.[23]

During the trial, the issue arose as to whether the plaintiffs had ever driven on the laneway before and if they had a destination in mind. Destination was critical to the issue of causation as the plaintiffs were asserting that had they seen a "No Exit" sign, or something of the sort, they would

[18] *R v. Seaboyer*, [1991] 2 SCR 577 and *R v. Clarke* (1998), 129 CCC (3d) 1, 18 CR (5th) 219 at 34.
[19] 2009 CanLII 71014 (ON SC).
[20] Ibid at para. 85-90.
[21] Ibid at para. 7-8, 327.
[22] Ibid at para. 9.
[23] Ibid at para. 2.

not have entered the laneway which they were merely using to get to another road.[24] To that end the defence sought to admit into evidence the testimony of Jessica Arthur ("Ms. Arthur") who stated that, as a foursome, both she and the plaintiffs would often "drive in one of their cars to a remote location, turn the car off, listen to music, take drugs, drink, and talk and laugh."[25] The women, she alleged, would call their excursions "back road tours."[26]

The plaintiffs' counsel objected to the admissibility of the evidence of Ms. Arthur. He argued that past evidence of drinking and taking drugs would be unfairly prejudicial and would suggest that the plaintiffs were of bad character.[27] On the contrary, defence counsel argued that the evidence was "tendered to address the reason why the girls were on Rusaw Lane that night. He [defence counsel] argued that the practice of back road tours was material and probative to explain the true intent of Jessica Greenhalgh and Robyn LaDuke [the plaintiffs] in their drive down Rusaw Lane on the night in question. The evidence was not tendered, he asserted, to show that Jessica Greenhalgh and Robyn LaDuke had a propensity for consuming alcohol or drugs which might cause them to be seen as persons of bad character."[28]

In ultimately admitting Ms. Arthur's testimony into evidence, and leaving its ultimate weight to be considered in his final decision, as it was a judge alone trial, the Honourable Justice Lauwers applied the Supreme Court of Canada's framework in *Handy*.[29] In *Handy*, Justice Binnie set out a three-part test to determine the admissibility of similar fact evidence. The first step is to identify the "issue in question," which is described as "an important control." The "issue in question" is

[24] *Greenhalgh v. Douro-Dummer (Township)*, 2009 CanLII 57148 (ON SC) at para. 27.
[25] Ibid at para. 4.
[26] Ibid at para. 4.
[27] Ibid at para. 15.
[28] Ibid at para. 24-26.
[29] 2002 SCC 56 (CanLII), [2002] 2 SCR 908 [Handy].

not the "general disposition of the accused" but must be "relevant to some other issue beyond disposition or character."[30] Next, there must be a nexus between the similar fact and the offences [circumstance] alleged. Factors connecting the similar facts to the circumstances set out include:

(1) proximity in time of the similar acts;

(2) extent to which the other acts are similar in detail to the charged conduct;

(3) number of occurrences of the similar acts;

(4) circumstances surrounding or relating to the similar acts;

(5) any distinctive feature(s) unifying the incidents;

(6) intervening events; and

(7) any other factor which would tend to support or rebut the underlying unity of the similar acts.[31]

The final step in the analysis is to determine whether the "situation-specific behaviour" is sufficiently compelling to "safely draw" the inference to be drawn. As an example, vague similarities between previous conduct and that which is being alleged as a continued pattern of conduct are not sufficient.[32]

In completing the *Handy* analysis, which was done by hearing Ms. Arthur's evidence before determining its admissibility, as there was no jury (had it been a jury trial the admissibility of the evidence would have been done by way of a *voir dire*),[33] Justice Lauwers admitted it for the most

[30] *Handy* para. 70.
[31] *Handy* at para. 82.
[32] *Handy* para. 89-91.
[33] *Greenhalgh v. Douro-Dummer (Township)*, 2009 CanLII 57148 (ON SC) at para. 29.

part with respect to the conduct in question.[34] Namely, the evidence was primarily being heard to determine the plaintiffs' intent in driving on the laneway on the night of the incident. Specifically, Ms. Arthur identified many of the factors in the second part of the *Handy* test.[35] For example, the "back road tours" often took place on Fridays, and they involved aimless driving and drinking.[36]

In the ultimate trial decision, the weight of Ms. Arthur's testimony with respect to the "back road tours" was found to be, on a balance of probabilities, credible given that it was corroborated by others. In essence, the Trial Judge ultimately ruled that the motive for the laneway excursion was aimless exploration.[37]

Concluding remarks

The four reported decisions written by Justice Lauwers in *Greenhalgh v. Douro-Dummer (Township),* provide a textbook analysis not only of civil evidence but also all of the elements of the tort of negligence itself, namely the duty of care, standard of care, causation, and assessment of damages as well as costs. It is a perfect fact pattern for a first-year law school final exam. In many respects, when litigators go to trial, it is essential to return to these basic principles of procedure and evidence. These decisions from 2009 and 2011 are certainly a reminder that in an era where most cases settle, some cases still go to trial and if a litigator is faced with the prospect of conducting a trial, there is much that must be studied in advance to determine the relevance and materiality of evidence. To that end, we hope this brief article will provide some guidance with

[34] Ibid at para. 29-30.
[35] *Handy* at para. 82.
[36] *Greenhalgh v. Douro-Dummer (Township),* 2009 CanLII 57148 (ON SC) at para. 25.
[37] *Greenhalgh v. Douro-Dummer (Township),* 2009 CanLII 71014 (ON SC) at para. 211.

respect to issues of relevance and materiality and just what is expected of counsel at trial should an argument over admissibility arise.

The Civil Litigator's Survival Guide to Evidence

November 6, 2020

Admissibility of Evidence – And Is "Weight" a Thing?

LERNERS

LAWYERS

THE CIVIL LITIGATOR'S SURVIVAL GUIDE TO EVIDENCE 2020

Admissibility of Evidence – How to Gain Weight

Lisa C. Munro

Back to basics: step-by-step approach to assessing evidence:

1. Is the evidence admissible? (question of law)
    a. Is the evidence *factually relevant* in that it tends to make a fact in issue more or less likely to be true?
    b. Is the evidence *legally relevant (material)*, that is, is the fact in issue that the evidence tends to make more or less likely to be true legally significant in establishing an element of the cause of action or defence?
    c. Is the evidence subject to an *exclusionary rule* (for example hearsay, privilege)?
2. Should the court exercise its discretion and refuse to admit the evidence because its *prejudicial effect outweighs its probative value*? (question of mixed fact and law)
3. If the evidence is admitted, how much *weight* should be placed on it? (question of fact)

What is weight?

- Depends upon the strength of the inferences that can be drawn from the evidence
- How believable or strong the evidence is
- How persuasive the evidence is in proving a material fact at issue
- Significance - determines whether burden of proof met
- Because it is a question of fact, it is given high level of deference on appeal

Hatch Ltd. v Atlantic Sub-Sea Construction and Consulting Inc., 2017 NSCA 61:

> [28] *Wigmore on Evidence* explains the distinction between admissibility and weight at §12:
>
> > Admissibility, then, is a quality standing between relevancy, or probative value, on the one hand, and proof, or weight of evidence, on the other hand. Admissibility signifies that the particular fact is relevant and something more, - that it has also satisfied all the auxiliary tests and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved, but merely that is received by the tribunal for the purpose of being weighed with other evidence.

[29] *The Canadian Encyclopedic Digest*, volume 24, Title 62, also addresses the issue:

> 52. Admissibility is always a question of law for the trial judge. Questions of admissibility should not be confused with questions of weight, which is the emphasis placed upon the evidence once admitted. Evidence is often admissible, yet afforded no weight by the trier of fact. So long as it is admissible, the strength of the evidence, and the use to which it is put, is a question of fact, and not one of law.

Factors influencing weight

1. Believability
    a. Is evidence credible?
    b. Is evidence reliable (factually accurate)?

2. Persuasiveness – what is the strength of the inference that can be drawn from the evidence?

Is the analysis different in criminal versus civil cases?

Continental Insurance Co. v Dalton Cartage Co., [1982] 1 S.C.R. 164 at paras. 10 to 12:

- Question is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established
- The standard of proof in civil cases is something less than proof beyond a reasonable doubt, but how much less depends upon the circumstances of the case and the gravity of the accusation
- Where allegation in civil litigation is of conduct that is morally blameworthy or that could have a criminal or penal aspect, the relevant burden of proof remains balance of probabilities
- But there is no absolute standard – there are degrees of probability within that standard – "commensurate with the occasion"

KK v KWG, 2008 ONCA 489 at para. 147 (applying *Continental Insurance* case):

- Courts are to take greater care in scrutinizing the evidence in civil cases when allegations of a serious nature are made – sexual misconduct or other conduct of a morally blameworthy nature
- This view of the civil burden is not a change in the balance of probabilities standard, but the application of that standard, "with careful scrutiny of the evidence in a manner that is proportionate with the serious claims being alleged"

How is evidence weighed? Common sense!

Example – *Cuthbert v TD Canada Trust*, 2010 ONSC 830 at paras. 42 to 43.

- Summary judgment motion – Through fraud, plaintiff received funds from RBC which were deposited into his account at TD, which later returned the funds to RBC. Plaintiff sued for return of funds on the basis that he was entitled to them as an innocent third party to the fraud who received the funds as repayment for legitimate loans

> [42] I am satisfied that Cuthbert's evidence is not credible and does not raise an issue requiring a trial. Although I have not had the benefit of observing his demeanour during his testimony, courts have long recognized that demeanour can be misleading and is but one factor in assessing credibility. Credibility is best tested against common sense, inherent consistency and consistency with contemporaneous and undisputed documents. I have numerous sworn statements….relating to this issue and numerous undisputed documents with which to test his evidence.

[43] Cuthbert's testimony about the loans lacks internal consistency and credibility. He has no records to support his testimony, except bank drafts that bear no relationship to the amounts of the repayment. The loan advances were not made to the person he says borrowed the money; nor were the repayments made by the person he says borrowed the money. He was unable to provide any contact information for the borrower. He has no records and no receipts. He could not provide a credible or consistent account of where he obtained the money to make the loans. He… misled the Trustee in Bankruptcy [when he said that] he had no assets and testified that he did not tell him about the prior receivables… he claims were ultimately repaid by the funds obtained through the mortgage fraud. The undisputed documentary evidence regarding the payments to Cuthbert's account is compelling and is inconsistent with Cuthbert's evidence. Finally the undated letter and promissory note provided in this litigation for the first time, despite his obligation to produce all relevant documents in the mortgage fraud action, are self-serving and inconsistent with his evidence about the loans, his 2003 documentation and the undisputed bank drafts. The documents were obviously created after the fact.

Practical tips: How to maximize the weight of your evidence (1)

1. **Believability (credibility, reliability)**
    - Consistent
    - Corroborated
    - Accurate
    - “Best evidence” rule
    - Ability to test evidence
    - Neutralizing negative inferences with an explanation

    - **Documents**
        - Contemporaneous
        - Business Record under Ontario *Evidence Act*
        - Authentic (Agreed Document Brief)
        - Author available to testify
        - Electronic documents (metadata)

1. **Believability (credibility, reliability)**
   - **Fact Witnesses**
     - Direct/not evasive, not argumentative/defensive, factually accurate, "selective" memory, speculation = judge's impressions
     - Lack of self-interest/bias
     - First-hand knowledge
     - Admissions where necessary
     - Consistent
       - Make sure witness is familiar with discovery transcript and documents!
       - Remember ongoing duty to correct discovery answers
       - Spend time preparing for both discovery and trial
     - How do virtual trials affect this process?

- **Opinion Witnesses**
  - Expertise
  - Facts and assumptions
  - Reputation = do your homework
    - Impartiality
    - Tendency to act on one side of issue
    - Adverse findings in previous court decisions

Practical tips: How to maximize the weight of your evidence (2)

2. Persuasiveness

- Cases won or lost on their facts
- Persuasive writing – pleadings, affidavits, factums
  - Point first writing
  - Key/relevant facts only (page limits help)
  - Tell a coherent story
  - Deal with your “bad facts”
  - Make it easy to understand – headings, lists, tables, charts, time lines/chronologies

2. Persuasiveness

- Oral advocacy – pre-trial motions, opening and closing submissions at trial
  - Answer the Court's questions (usually about your "bad facts")
  - Focus on key points

2. Persuasiveness

- **Demonstrative evidence**
  - Real evidence – allows judge to draw inferences and conclusions directly once authenticated
    - Eg. photograph or video clip, taking a view
  - Illustrative aids – explains or illustrates other admissible evidence = advocacy
    - Eg. models, diagrams, maps
    - Objections where arguably not "neutral"

The Civil Litigator's Survival Guide to Evidence

November 6, 2020

Evidence on Mediations and Arbitrations

The Effective Use of Evidence at Mediation

Kathryn Podrebarac

www.PodrebaracMediation.com

Where is Evidence Presented?

Mediation Briefs/ Statement of Issues

To a lesser extent, at the mediation session

- Documents to support an allegation/position may be produced
- Good mediators will ensure that the mediation session is not used improperly as discovery

Who is your Mediation Brief For?

1. The Other Parties

- They are the **most important** reader – Draft with them in mind
- A **persuasive brief** signals you are a credible threat if the case does not settle and goes to trial – encourages settlement
- Your brief may be the **first** direct exposure that the person with ultimate settlement authority may have with the case and with you as an advocate
    - it forms part of their assessment and negotiation strategy

2. The Mediator

- **In preparing for the mediation**, the mediator wants to get a sense of:
  - What is the case about?
  - What is contested vs. not in dispute?
  - The strengths and weakness of each side's case based on the facts/evidence and the applicable law
  - The range of damages

- **During the mediation**, the mediator may discuss the impact of the evidence in assisting each side with the goal of reaching a settlement

Hallmarks of a Persuasive Mediation Brief – Facts/ Evidence

1. Concise

Brevity is powerful. People have increasingly short attention spans. Executives are busy - you risk them not reading it entirely if it is lengthy

- The written portion should be 20 pages or less, ideally
- 10 attachments or less, ideally
  - rarely are more than 20 documents truly required
- Only attach:
  - Extracts of key testimony not the entire transcript
  - Key documents
    - Uncontested facts do not need documentary support

2. Focuses on the material facts and supporting/corroborating evidence

- **Be Scrupulously Accurate**
  - You lose credibility with the other side & the mediator if you misstate/overstate – foreshadows losing credibility with a trial judge & weakens your bargaining position
- **Address Material Contested Facts Directly**
  - Why is your version more credible/likely?
  - Provide supporting evidence
- **Address the Weakness(es)** in your case
  - Explain how you get around it or why it ultimately doesn't matter
- **Address Differences in Expert Opinions Directly**
  - Why is your expert's opinion 'better'?

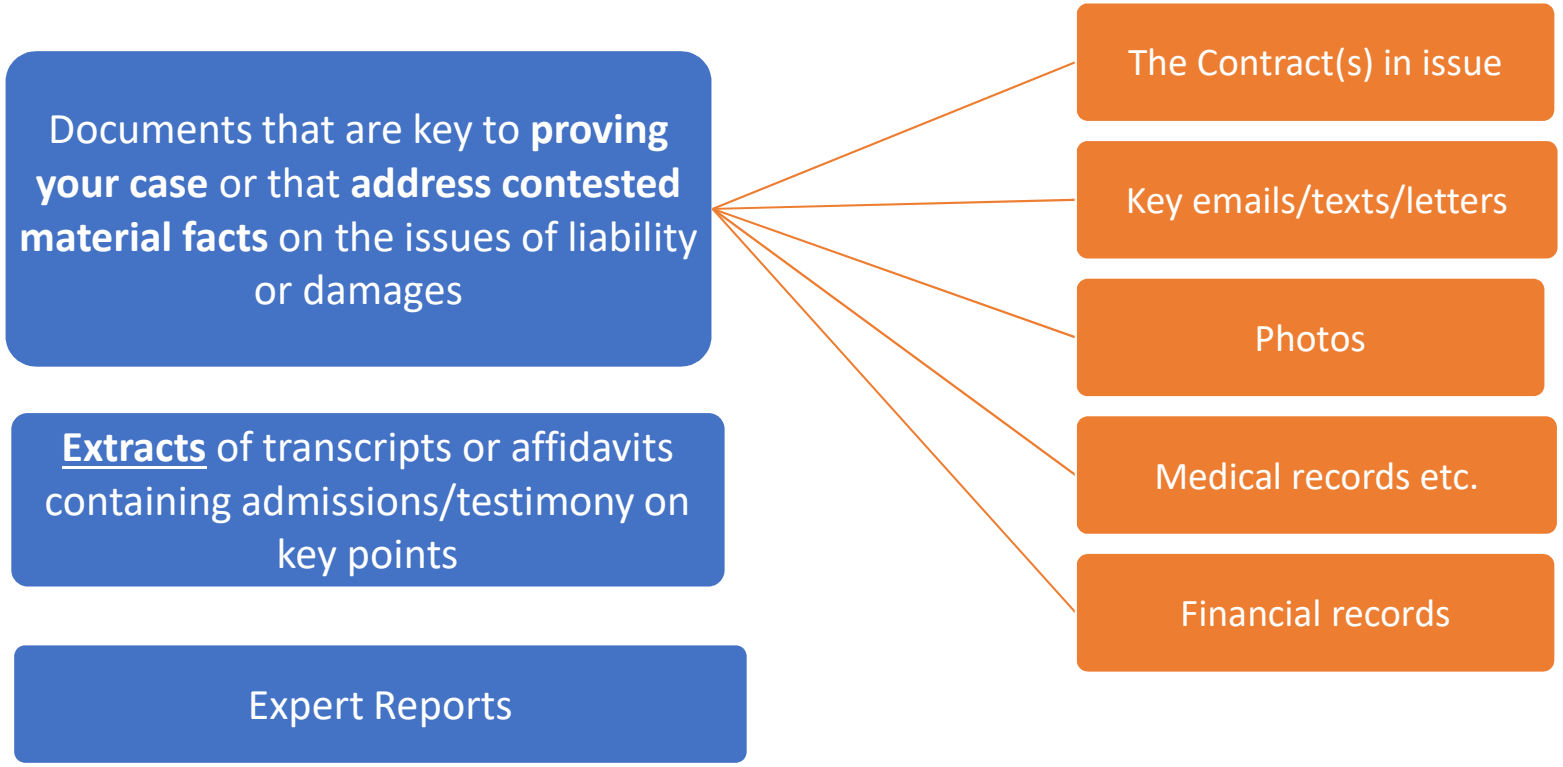
3. Makes an Impact/Creates a Lasting Impression

- You are not limited to the written word
- **Be Creative!**
  - Can you present some evidence **visually**?
  - Colour helps
  - But don’t go overboard

4. Provides a basis for your position on damages

- Bald statements about damages suffered/ economic loss don't fly
    - Provide the documentary support **OR**, better, a concise summary if the underlying documents have already been produced
    - Calculations/Breakdown for each head of damage
- Is an Expert Report(s) desirable/necessary?

What Kinds of Documentary Evidence Should You Attach?



Demonstrative Aids/Evidence

- A visual aid used to illustrate, explain or summarize other admissible evidence – testimony, documentary, real evidence

- A visual is
  - Processed **faster** than text
  - Remembered **better** than text

  "***A Picture is Worth a Thousand Words***"

CHARTS

GRAPHS

DIAGRAMS

PHOTOS

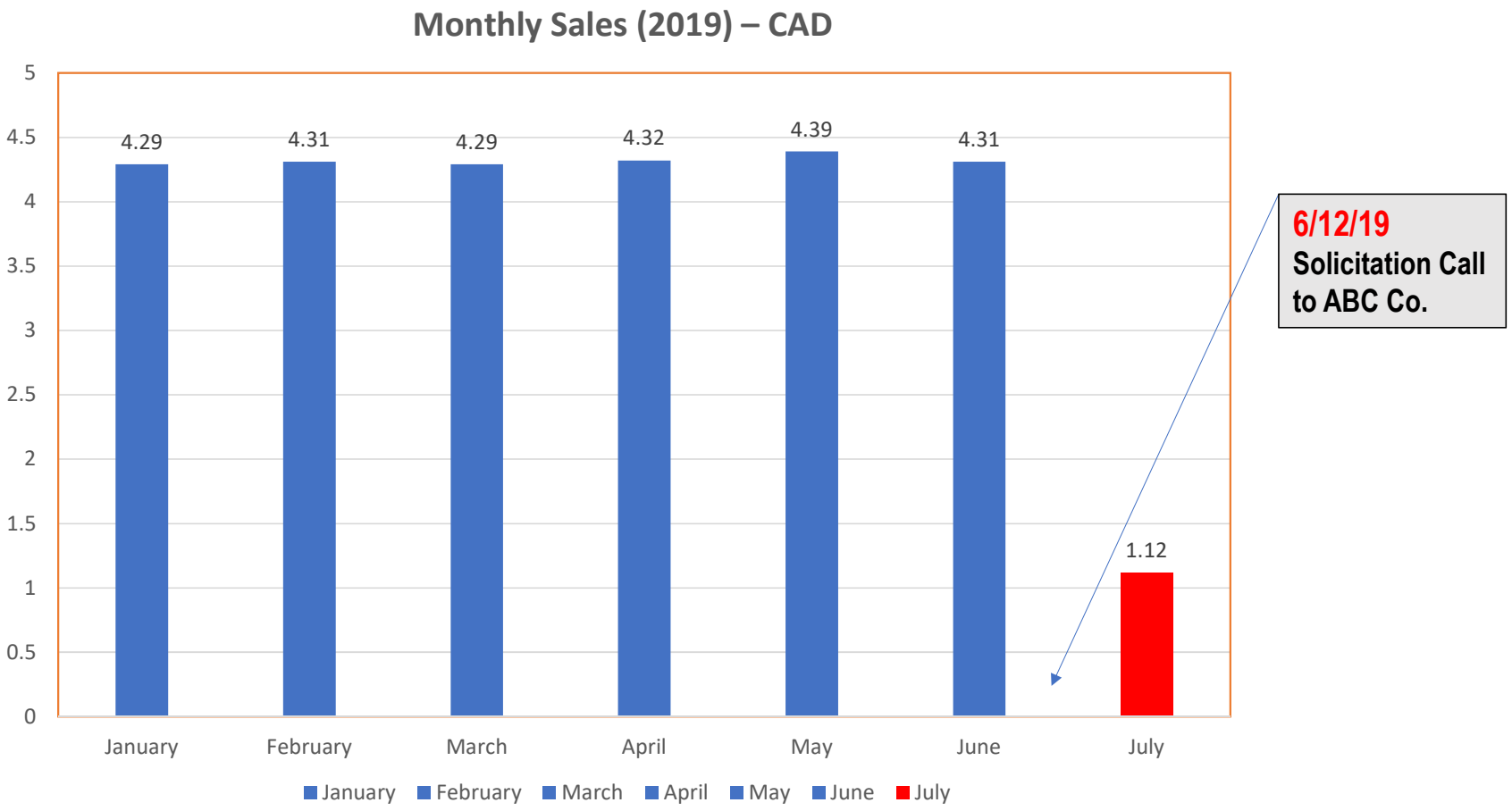
ILLUSTRATIONS

A VIDEO – E.G.
“DAY IN THE LIFE”

ANATOMICAL
MODEL

TIMELINE

Examples


Monthly Sales (2019) – CAD
5
4.5
4
3.5
3
2.5
2
1.5
1
0.5
0
4.29
4.31
4.29
4.32
4.39
4.31
1.12
January
February
March
April
May
June
July
January February March April May June July
6/12/19
Solicitation Call to ABC Co.

versus

Prior to Mr. Stealth's call to ABC Co. on June 18, 2020 (the "**Solicitation Call**"), the Company's sales had been strong and steady in the preceding several months. Within a few short weeks of the Solicitation Call, sales plummeted to a quarter of the prior month's sales.

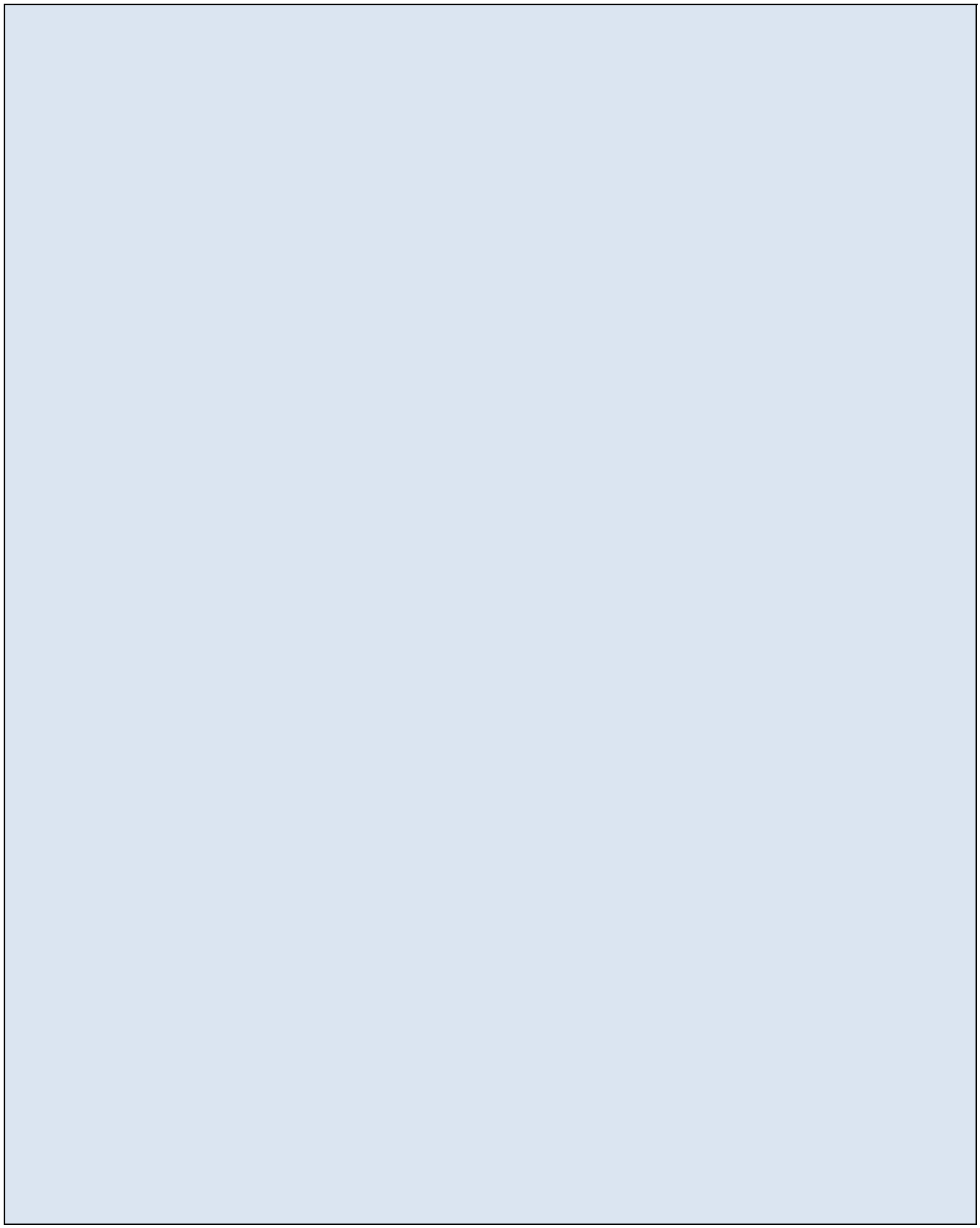

intended path
path vehicle travelled
oncoming vehicle

versus

After the steering failed, the car veered into oncoming traffic in the opposite south-bound lane. There would have been a head-on collision if the oncoming car had not stopped in time.

Conclusion

- Over 90% of cases don't go to trial – **make the most of mediation**
- **Facts/Evidence are foundational in mediation**
  - Devote the most space to them in your mediation brief.
- Strive to be **persuasive**
  - Accurate
  - Concise
  - Well-equipped to deal with contested facts and weaknesses
  - Make an impact!
  - Consider Demonstrative Aids



Chapter 6, A Practitioner's Guide to Commercial Arbitration,
Marvin Huberman ed., Irwin Law, 2017

chapter six

"Evidence First" Arbitration: A Conceptual Framework for Arbitration Efficiency

WILLIAM G HORTON

A. COURT LITIGATION AND ACCESS TO JUSTICE

About ten years ago, I decided to become a full-time arbitrator. One of the factors that moved me in this direction, after thirty years of practising commercial litigation for national and international business clients, was a deep and growing dissatisfaction with the ability of court-based litigation to deliver results that were cost-effective, timely, or even, in many instances, reflective of the legal merits of the case.

As to cost-effectiveness and timeliness, it occurred to me that there are few if any issues that arise in the business world for which cost and time are secondary or irrelevant. The litigation of business disputes seems to be a notable exception. Court cases are regularly conducted on the basis that only a result achieved through an arcane, lengthy, and laborious process can be viewed as a legitimate outcome. Considerations of cost and time are subordinated to this belief, which is inculcated by counsel and readily accepted by clients. It is, therefore, unsurprising that costs routinely approach or exceed the economic value of the dispute and that the resolution of the dispute is routinely delayed well beyond the point at which the utility of a resolution has significant

benefit to the parties. In commercial disputes, access to justice is defined not as much by the ability of the parties to afford the dispute resolution process as by the ability of the process to deliver a result at a reasonable cost and in a reasonable time having regard to the business context. Furthermore, while cost may not be a factor in commercial disputes with very large financial implications, the timeliness of adjudication can be, and almost always is, critical. In these respects, court litigation fails businesses in both small and large disputes.

As to the results' reflecting the merits of the case, the fact that cost and time regularly exceed what is justifiable from a business perspective means that as the litigation grinds on, pressure will build to the point where one or both sides will seek a resolution primarily to bring an end to the pain of the litigation process. The parties may resort to negotiation or mediation. But in these processes, the cost and inefficiency of the litigation process itself will figure prominently as reasons for bringing the dispute to an end. Indeed, the problem of how to allocate litigation costs that have dwarfed the original dispute often proves to be the main challenge.

Mediation may produce finality, but in the absence of an effective adjudicative process, the result produced by mediation is more likely to reflect the power balance, or imbalance, between the parties and their respective abilities to absorb the costs and delays imposed by the litigation process. Thus, the cost and inefficiency of the litigation process will be primary factors in shaping the terms of a settlement.

Because commercial disputes are almost never concluded by court litigation within the business cycle in which they occur, settlement of a dispute will often be brought about not by the Herculean efforts and brilliance of advocates over a number of years but by changes in the circumstances of the parties that have no relationship to what has been occurring in the litigation, such as insolvency, sale of the business, or developments in market conditions or technology — not to mention normal human events such as death and reconciliation.

Despite the emphasis on perfection in procedure and on correctness in the application of the law, less than 5 percent of all cases filed with a court will actually be determined by applying the law to the facts. If the main goal of the *Rules of Civil Procedure* were to *prevent* cases litigated in the courts from being adjudicated, that goal would be achieved in over 95 percent of all cases.[1] Surely, I reasoned, a better process must exist. Arbitration holds out that promise. But often, the same lawyers using more or less the same procedures in arbitration as in court actions tend to achieve similar results, leading to the same complaints.

Since arbitration is based on consent, the question then arises whether there are choices that can be made by the parties and their counsel, as well as by arbitrators, that will deliver more cost-effective and timely results to those — possibly not everybody — for whom these considerations are important.

B. WHAT MAKES COURT LITIGATION COST SO MUCH AND TAKE SO LONG

It is worth spending a bit of time to consider certain key features of the normal court litigation process that contribute the most to the buildup of cost and delay. Once we have identified those features, we can and should try to avoid them in an efficient arbitration process.

1 It has been consistently reported in Canada over many years that less than 5 percent of all cases filed with a court reach trial: see, for example, The Honourable Neil C Wittmann, Chief Justice, Court of Queen's Bench of Alberta, "Judicial Dispute Resolution in the Court of Queen's Bench: Making Resolution Accessible" (2016) 25:1 *Canadian Arbitration and Meditation Journal* 14 at 19, online: http://adric.ca/wp-content/uploads/2016/06/ADRIC_JOURNAL_2016_Vol25_No1.pdf. My own experience as an arbitrator is that well over 50 percent of the cases in which I am appointed will result in an award, almost always within about twelve months and usually within about six months.

1) Loopiness

While we think of normal court litigation as taking place in stages, it is more revealing to think of it as taking place in loops. Broadly speaking, there are seven loops:

1) pleadings loop
2) document disclosure loop
3) discovery loop
4) expert evidence loop
5) interlocutory motion loop
6) trial loop
7) development of the law loop

Each loop anticipates later loops and may be reactivated by one of them. No loop is ever fully complete until a trial judgment is pronounced — and perhaps not even then.

Pleadings may be amended, and arguably should be amended, at any subsequent stage as new information and documents emerge. They may even be amended at the appeal stage to recharacterize the proven facts with a different legal theory.[2] While documents may be referenced or produced in any of the loops, new documents may emerge even during the trial and give rise to the need for amendments to the pleadings or even further discoveries. Expert reports, which are timed to come at a fixed interval before the trial of the action, presumably after all facts and documents have been disclosed and probed, may themselves give rise to new legal or factual theories or inquiries. Finally, the pleadings and every subsequent stage of the process may be informed by the possibility that the law will develop or be clarified as a result of the lawsuit itself to rectify what are perceived to be existing weaknesses in the legal basis of a claim or defence.

2 See, for example, *Clement v McGuinty* (2001), 18 CPC (5th) 267 (Ont CA). See also *Haikola v Arasenau* (1996), 27 OR (3d) 576 (CA). In a system where prejudice is defined as something that cannot be compensated in costs or cured by an adjournment, is it surprising that cases end up costing too much and taking too long?

Interlocutory motions and appeals create more loops in which a variety of judges who will not be involved in the final adjudication are tasked to participate. As these judges will not wish to foreclose a line of evidence or analysis that the trial judge may find useful, there is a tendency for their rulings to be permissive rather than preclusive. This contributes, along with the other factors mentioned, to the elaboration of the dispute rather than its refinement over the course of the litigation.

The adjournment of the trial on multiple occasions to accommodate other loops, and which is sometimes due to the lack of court resources, creates yet another loop. Counsel with only modest levels of tactical acumen can use all of these loops to considerable advantage. In the hands of seasoned practitioners, these loops can become nooses.

2) Stop and Go

As a result of what I have described as the "loopiness" of court procedure, there are frequent pauses in the process when the parties and their counsel recalibrate each element of the process in light of the most recent events. Often this will result in long delays during which work on the file by one or both sides will be postponed while further inquiries are made or actions taken. Every time the file is put down and taken up again, it is necessary for counsel to refamiliarize themselves with the matter at an additional cost to their clients. And each time that happens, it occurs in the context of some new information or development that may cause one or more of the loops in the process to be reactivated as counsel seek to maximize their chances of success (or minimize their chances of failure) with reference to the new information or development. If the original claims or defences falter, new claims or defences are added. The overall effect is reminiscent of the circus act where a performer seeks to keep multiple plates spinning at the top of multiple poles by running among them to attend to the plate most in need of a bit more spin.

The simplest cases can thus take two or more years to process. A complicated case may take as much as ten years to reach trial.

3) Anticipation

Until the presentation of evidence at trial, everything that occurs in a court litigation process merely anticipates what may or may not happen at trial. In chess, there is a saying that the threat is greater than the fulfillment. In litigation, it is all threat, and in the vast majority of cases, there is never any fulfillment in the sense of an adjudicated outcome.

Every fact that is in a pleading may not be proved or provable. Every document that is produced may not be relied upon by any party. Documents that have been produced may be referenced at trial by a witness in a way that was not anticipated by the discovery process. Lengthy examinations for discovery are conducted largely for the purpose of determining what the evidence of the other side will be at trial or trying to pin the opponent down to a particular version of events. Those examinations for discovery may not be referred to at all at trial. Alternatively, selective portions may be read in as evidence often giving rise to contextual objections. Sometimes witnesses who answered questions on their examinations for discovery using certain language may use different language at trial or give different answers, giving rise to issues as to whether or not they have contradicted what they said before or whether what they said before was not fully understood, perhaps as a result of a flawed question.

All of the foregoing is attributable to the fact that from an evidentiary standpoint, nothing actually happens until the trial. Everything that precedes the trial is therefore some combination of provable fact, optimistic or wishful thinking, idle threat, tactical overstatement, and outright prevarication.

4) Ambiguity and Anxiety

All of the aforementioned features of court litigation produce elevated levels of ambiguity and anxiety over a protracted time frame. Each party seeks to maximize its flexibility in terms of how it will present its claims or defences at trial while it seeks to minimize the other side's flexibility.

In the context of an adversarial process, these elements often and predictably lead to mistrust and significant escalations in the dispute that in turn appear to justify irrational levels of emotional and financial investment in the litigation process itself, which often disregard the objective value or time sensitivity of the dispute.

C. HOW ARBITRATION CAN BE DIFFERENT

One of the reasons why evidence in a court proceeding is not presented in a definitive manner until the trial is because that is when the trial judge makes her first appearance. In arbitration, the adjudicator is present from the outset. A neutral and objective presence, in the form of a person or persons chosen by the parties themselves or by an institution in which they have reposed confidence, is available to oversee the entire process from beginning to end. While the final decision on the merits can be pronounced only after the process is complete and after all the parties have had an opportunity to present their case, steps in the adjudicative process can begin immediately and continue in real time until the award is rendered.

Whereas in normal court proceedings a trial date is not set until most if not all preliminary phases of the litigation process have been completed (and given the vicissitudes of litigation, it would generally be foolhardy to do so before), in arbitration a final hearing date is usually one of the first matters that is settled. It is a testament to the efficiency of true arbitration processes (when they are employed) that the final hearing date rarely changes. The expectation is that the parties and the arbitrator will work toward completing the hearing on the set schedule, if for no other reason than that is what makes sense in terms of the nature and scope of the dispute.[3]

3 As with many other individual features of arbitration, the fixed trial date can be duplicated in court proceedings, but often the realities of the court system neutralize the benefit. I know of one case in which a party seeking to stay court proceedings in favour of arbitration was told by the motions judge that

In setting the final hearing date, the arbitrator commits to work with the parties to ensure that all parties will be treated fairly and given an opportunity to present their case within the agreed time frame. In my view, there should be no implication that the values of procedural fairness or the disclosure of relevant information within the power and control of any party will be compromised. Rather, the commitment is to work diligently, pragmatically, and cooperatively toward ensuring that these goals are met. I will say more about this shortly.

Often, counsel or arbitrators who come to arbitration from a litigation background conceive of arbitration as simply a speeded up version of litigation. Using this conception, they adopt the *Rules of Civil Procedure*, or some variation of them, and follow the same process as in court litigation but agree on shorter time frames for each stage. This almost never works. The reasons are obvious if one considers the aforementioned points about normal litigation procedure. The loops and resulting dynamics described above will almost certainly ensure that no agreed-upon time frame will ever be met. Disputes will arise regarding such matters as the particularity of the pleadings, the ability of the parties to review all their documents before deciding what to produce, the scheduling of examinations for discovery, and additional information or documents required to complete expert reports. In my experience, arbitrations that are conducted on this basis simply replicate most if not all of the problems of litigation and are extremely difficult to keep on track.

D. EXAMPLE FROM INTERNATIONAL ARBITRATION

An example of another approach may be drawn from international arbitration. While there is considerable variability among different rules and approaches, one feature stands out: the extent to which

he would give the parties a fixed date for the trial in a year and would personally supervise the litigation if they stayed in the court system. Unfortunately, when the trial date arrived, the judge had been moved to another court, and no other judge was available to make good on the commitment.

parties are required to present the actual evidence in support of their claims or defences at an early stage and as the process unfolds.

Both a claimant and a respondent are expected to deliver with their initial pleading all of the documents on which they rely. After pleadings are delivered, the parties are expected to exchange one or two rounds of "memorials" that will typically be accompanied by the witness statements and expert reports on which they rely (or that they put forward by way of reply in the second round). In their statements or reports, witnesses will reference or attach all the documents on which they rely.

The memorials are what we might call briefs or facta and detail both the facts and the legal theory and authorities on which each party relies. Thus, subject to documentary production, all of the evidence is put forward immediately following the close of pleadings together with each party's explanation of exactly how the testamentary and documentary evidence supports the claim that it is making. In the second round of memorials, each party is expected to put forward the evidence and legal arguments that contradict the position taken by the other party in the first round. Little is left to the imagination — and nothing to anticipation — by the time the two rounds of memorials have been completed.

Leave of the tribunal is required before further evidence is allowed. All that remains is for witnesses to be cross-examined at the final hearing. Because there is no need to repeat impeaching facts that are already to be found in the factual record, cross-examinations tend to be extremely brief and may even be waived in cases where a witness's evidence can be adequately challenged on the record as it exists.[4]

4 In one Stockholm Chamber of Commerce arbitration in which I was involved, one week was set aside for the hearing of a $10–20 million case involving geothermal energy contracts. There were nine fact witnesses and four experts. The hearing was actually completed in one and a half days rather than the scheduled week. Cross-examinations were brief and to the point. I was not left with the impression that any point had not adequately been brought to the attention of the tribunal.

With respect to documentary discovery during the arbitration, an extremely disciplined process is usually employed using the *IBA Rules on the Taking of Evidence in International Arbitration* whereby requests can be made for documents that are

1) within narrow and specific categories of documents;
2) reasonably believed to exist;
3) relevant to the case and material to the outcome; and
4) not in the possession, custody, or control of the requesting party and believed to be in the possession, custody, or control of the other party.[5]

These requests are made in a preformatted document (commonly referred to as a "Redfern Schedule") that anticipates, by blank cells, the response of the other side, the reply if any, and the ruling of the tribunal. The process is conducted in a very linear, disciplined manner.

Examinations for discovery or depositions are, for the most part, not requested or allowed, although exceptions are known to occur.

One of the keys to the efficiency of international arbitration is the emphasis on adducing evidence early in the process, and not at the end. However, there are certain aspects peculiar to international arbitration procedure that should, in my view, be further refined for noninternational commercial disputes arbitrated in Canada. For example, the need to exchange two memorials setting out the legal basis of the claims is understandable where the parties may be from jurisdictions with different legal systems employing different legal categories, statutes, concepts, and terminology. In a purely Canadian setting, it is rare for there to be much doubt as to the legal basis on which a claim is put forward in a business dispute. In some cases, where it is unclear, a direction of the tribunal may be sought ordering that some clarification should be provided or that some other procedural relief be granted. But this is rare and does not justify routinely building into

5 International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (London: IBA, 2010) art 3, online: www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

the arbitration process two rounds of legal briefs and a double rehashing of the facts. It is normal in noninternational arbitration, especially in larger cases, for counsel to provide an overview of the case shortly before the final hearing, and this may even form part of the formal procedure. In my view, this is more than enough in most commercial cases.

E. COMPARISONS WITH CERTAIN COURT PROCEEDINGS

Initially, when I began to try to implement, with the concurrence of counsel, some of the efficiencies inherent in international arbitration procedure in noninternational cases, I met with resistance based on unfamiliarity and skepticism. Ten years ago, almost all arbitration in Ontario was conducted as private litigation. The only difference was the substitution of an arbitrator for a trial judge when the hearing was reached and, perhaps, the elimination of rights of appeal.[6]

However, I found that I could achieve some traction with counsel by analogizing the international arbitration procedure to the "application procedure" available under the Ontario *Rules of Civil Procedure*.[7] The application procedure offers a more summary method for adjudicating certain types of cases. The applicable rules are interesting because they too contemplate an "evidence first" approach for a limited class of cases.

Using the application procedure under the rules, the applicant delivers a document entitled an "application" that sets out in summary form the nature of the dispute and the relief sought as well as the grounds for seeking the relief.[8] The application is a form of pleading but very much to the point with no requirement for any elaboration as to the facts or evidence. The application is typically accompanied (or followed very shortly) by affidavit evidence and

6 Sadly, this remains true for many noninternational arbitrations today, although the tide is changing.

7 RRO 1990, Reg 194, r 14.05.

8 *Ibid*, r 38.04.

exhibits that constitute the documents relied on by the applicant in making the claim. A respondent is expected to respond with similar material. The parties may request further information and documents from each other and may bring a motion before the court for any disputes in that regard. No examinations for discovery, as such, take place. However, either side may cross-examine on the other side's affidavits or seek to examine a nonparty as a witness on the application. The cross-examinations take place out of court (i.e., not in the presence of a judge), but the transcripts automatically become evidence in the case in their entirety, and not on a selective basis as with examinations for discovery.

The application procedure is limited to certain types of disputes and requests, but some of these are commercial in nature, for example, disputes relating to the interpretation of a contract, disputes relating to land and interests in land, and requests for injunctive or mandatory relief. In theory, the application procedure is also limited to situations in which the facts are not materially in dispute. However, where the facts do prove to be in dispute, the judge hearing the application may direct the trial of an issue, in which case the witnesses may have to testify or be cross-examined in court so that the judge can be in a better position to determine a contentious issue.

As it happens, in Ontario something very akin to the application procedure is also used to determine many important commercial cases relating to matters such as insolvencies and commercial disputes arising in the context of corporate reorganizations. With this type of procedure, these disputes are resolved on a very expeditious timeline, as is required by the obvious exigencies of such cases, despite the fact that the amounts involved may be billions of dollars.

The application procedure provides an ideal model for non-international commercial arbitration. The limitation to situations in which the facts are not in dispute is not applicable in the arbitration context since the arbitrator, unlike the application judge, will be present for the cross-examination of all witnesses and can make determinations of credibility and disputed facts when called upon to do so. Once the "undisputed facts" lim-

itation is removed, the subject matter limitations on the application procedure are also not apposite, although most commercial arbitrations involve as a core issue the interpretation of a contract — which is a typical subject matter for the use of the application procedure in court. Certainly, few commercial arbitrations would exceed in value or complexity the types of proceedings that are dealt with in the commercial courts using a procedure similar to the application procedure for matters relating to insolvency and corporate reorganization. Indeed, if the application procedure were to be made available to parties to commercial disputes in court actions on the same basis as it is made available in arbitration, the two processes would be very similar in terms of procedural efficiency, and other reasons for considering commercial arbitration (which are not the focus of this chapter) would have to be weighed in deciding which process to use. However, in the near term, it seems unlikely that the courts will be able to make sufficient resources available to replicate an arbitration process within the court system for *all* commercial disputes.

The courts have made an attempt to provide a more efficient service by making the summary judgment procedure more readily available and taking a robust view as to the kinds of determinations that can be made, in terms of disputed facts, on a summary judgment motion. Such motions now often incorporate a hearing or minitrial at which witnesses who have provided evidence by affidavit are cross-examined in the presence of the judge hearing the motion.[9] However, while this approach does import into the court system some of the methodology of arbitration, the two remain quite different.

An arbitration hearing is a trial. It is not a hearing to determine whether there is a genuine need for a trial, as is the case on a summary judgment motion. Theoretically, the summary judgment procedure is available to decide clear cases. There is a risk that with the provision of summary judgment as an antidote to

9 See Garry D Watson, QC, & Michael McGowan, *Ontario Civil Practice 2017* (Toronto: Carswell, 2016) at 560–61.

the generally inefficient court process, there will be a tendency to overlook factual or legal nuances in an analysis to justify a final disposition using the more efficient summary judgment process.

Although under some arbitration rules, dispositive motions may be granted, it is rare for such motions to be brought or granted given that they duplicate the effort that is already being expended to bring forward the same evidence on more or less the same timeline.

Generally speaking, an arbitration award is subject to very limited rights of appeal, and usually all rights of appeal have been eliminated by agreement. In the summary judgment process, when judgment is granted, an appeal may be brought as of right with respect to both the judgment on the merits and whether or not the summary judgment rule permitted the matter to be adjudicated at that stage. There is a real risk that the loops will be reactivated.[10]

F. EVIDENCE FIRST ARBITRATION

Included in this chapter, as Appendix 1, is the sample procedural order that I typically use in my arbitrations. As with all procedural rules or orders, there is always an issue as to whether one is looking at the forest or at the trees. On the one hand, it is useful to see whether and how the entire set of rules works together to achieve the desired results of efficiency, fairness, and quality. For example, it is not enough to know when written witness statements will be exchanged; one must also know how they may be used at the final hearing. On the other hand, to focus too much on implementing any overall set of rules risks losing sight of the need for flexibility and creativity in fashioning specific rules for a particular dispute. Both perspectives are vital. For that reason, I emphasize that the sample procedural order included here is a product of the arbitrations I have conducted to date using these rules as a model and that they will be changed by the arbitrations I have yet to conduct. It is

10 For a discussion of loops in court litigation, see Section B(1), above in this chapter.

rare for this or any other set of arbitration rules to not be modified in some way according to the circumstances of a given case.

I should also state unequivocally, in case there is any doubt, that in arbitrations I conduct, the parties are always free to agree upon any other procedure that they wish, even after the arbitration has started. It is a choice that I respect once it is made by agreement of the parties.

Having said the above, I will comment on certain features of my sample procedural order under the section headings below.

1) Preliminary Observations

When an arbitrator is called upon to settle procedural rules, the arbitration is already underway. If the parties have agreed to a set of procedural rules, the arbitrator or tribunal may have little to do after being appointed but await the first procedural dispute or — if all goes well — the final hearing. If the parties have not agreed to a set of procedural rules, the arbitrator may be called upon to settle all of the rules or some aspect of them upon which the parties cannot agree.

My arbitrations invariably begin with a preliminary conference call with counsel in which I determine whether a set of rules has already been agreed upon. If not, I get a sense of what the differences in suggested approach might be. Usually, at the time that the first conference call occurs, the terms of my appointment as arbitrator have not yet been settled, and, indeed, one of the items discussed on the call will be the finalization of those terms so that the terms of appointment can be completed and signed shortly after the call. I make it clear to the parties that I will not make any decisions on contentious issues, including as to procedure, until the terms of appointment have been signed. I encourage them to continue their discussions with regard to procedural rules while the terms of appointment are being finalized. During the conference call, I provide counsel with my sample procedural order by directing them to my website, where it can be found, and I encourage them to consider whether the approach represented

in the sample order could work for them. If there are questions regarding the procedure, these are discussed openly and candidly so that the parties will get a good idea of the spirit in which I will implement the sample procedural order if it is adopted.

I have not yet had the experience of parties deciding not to proceed with my appointment as an arbitrator after I have discussed my sample procedural order with them! Perhaps the future holds such an experience. In some instances, counsel discuss the matter among themselves and agree that they will adopt their own procedure, usually one that incorporates the *Rules of Civil Procedure* directly or by analogy. Commonly, when this occurs, the arbitration disappears from my radar screen for months or years — occasionally with brief interludes in which a procedural issue arises. Invariably, on these occasions, one party seeks to enforce the *Rules of Civil Procedure* while the other protests, "But this is arbitration!" My experience is that a hybrid process that uses the *Rules of Civil Procedure* "subject to the discretion of the arbitrator" produces a maximum of confusion, dissatisfaction, and dysfunction in the arbitration.

Introducing my sample procedural order into the discussion, before any agreement on the process has been reached, usually results in one or both parties' seeing the advantages of adopting a procedure that will get to the merits of the case more quickly and efficiently. Counsel then present me with a revised version of the sample procedural order that reflects particular concerns in and circumstances of the case and that sets out an overall timetable with which the parties can live. Usually, this results in an overall schedule that will be completed in six to nine months. I have known many arbitrations using this procedure to be completed in less than two months (some in less than a week!), and some have taken over a year (typically where significant documents are outside the control of either party).

2) Pleadings

Since the procedural order is made after the arbitration has commenced, at a minimum a notice of arbitration (or some similarly

titled document) will have already been delivered by the claimant. Usually an answer or response will also have been delivered by the respondent. These documents may contain more or less detail depending on the advocacy style of counsel. However, all that is really necessary for the purposes of the sample procedural order is that the notice of arbitration does the following:

1) identifies the dispute to be resolved in the arbitration
2) identifies the parties to the arbitration
3) states the relief claimed in the arbitration
4) initiates the tribunal formation process, for example, by appointing or nominating an arbitrator

Typically, some factual allegations will be included to support these essential elements. The sufficiency or particularity of these factual allegations is not a critical feature unless the respondent is left in doubt as to one of the four points listed above.

The answer or response to the notice of arbitration is a somewhat more variable document. In addition to stating the respondent's overall position with respect to the dispute and the claims advanced, the respondent should state any objections to the arbitrability of the dispute or the jurisdiction of the arbitrator or tribunal and take the steps required with respect to the formation of the tribunal, for example, by accepting the arbitrator nominated by the claimant or appointing its own arbitrator.[11]

Certainly, if there is any lack of clarity regarding the matters set out in these documents, that can be discussed, and the arbitrator can provide directions as to whether further details should be provided, for example, with respect to the particular agreement under which the claim is made or the time range to which the claim relates. However, much more detail should not be required as the next stage in the arbitration will be the delivery of witness statements and documents and the making of information and document requests. Once this is understood, counsel are usually

11 The *Arbitration Act, 1991*, SO 1991, c 17, s 17(4) provides that participation in the formation of the tribunal does not prevent a party from making an objection to jurisdiction.

comfortable with closing the pleadings based on the formal documents that have been exchanged to initiate the arbitration, and that is what the sample procedural order provides.

3) Witness Statements

The sample procedural order presumes that there is a factual basis for the claim that can be put forward immediately in the form of witness statements and documents. Given that in commercial arbitration we deal with claims arising out of contractual relationships and are concerned with giving effect to the reasonable, contractually based, expectations of the parties, it may be expected that the claimant has a substantial body of information at its disposal upon which to base the claim. Speculative claims are possible in court litigation, but they are discouraged in arbitration, in part, by the use of "evidence first" types of rules.

Since the claimant chooses the moment to begin an arbitration, it can also be expected that in most cases the claimant has already spent some time reviewing the possible claim as well as the evidence that can be brought forward to support it. Particularly because the rules of evidence do not apply in arbitration (other than rules relating to relevance and privilege), there should normally be no difficulty in providing evidence to the tribunal at an early stage. Such evidence lays a foundation for subsequent requests for information and documents not in the possession of the claimant.

In certain types of cases, the claimant may not have all the information that will ultimately be necessary to make a final determination. For example, a claimant advancing a claim involving an alleged breach of a noncompetition agreement or breach of a cost-plus pricing contract may well require information from the respondent. However, such gaps in the claimant's knowledge are understandable and manageable in the arbitration process. There is no need for the claimant to delay putting forward the evidence that it does have to support both the claim and the making of orders for disclosure from the respondent.

The same considerations apply to the respondent. Understandably, the respondent may require more time to put its information forward because it may not have precisely anticipated the timing of the claim or the factual basis upon which it has been asserted. However, this assumption is not always true. For example, in rent renewal or valuation cases there may be no claimant or respondent as such. Each party may have an equal ability and responsibility to put forward evidence supporting the rent or valuation for which it contends. In such cases, the simultaneous exchange of witness statements and documents may be appropriate.

The sample procedural order assumes that expert reports can be delivered on the same schedule as witness statements. However, this can be altered if the case can be made that a party cannot supply its expert with all the information needed for the opinion or that the expert is unable to source the information needed independently until a later date.

In my view, the early exchange of witness statements and documents on which a party relies (with immediate requests for information that is relevant but not in the party's possession) substantially improves the quality of the evidence. Witness statements are put forward much closer to the events described therein, as opposed to evidence given many years after the fact, as occurs at a court trial. Early witness statements are less likely to have been influenced by the litigation or arbitration process itself and by the reconstruction of events that inevitably accompanies any protracted process that will conclude with the attribution of blame or fault.

All processes that use witness statements as a substitute for evidence-in-chief (including some commercial court processes) are subject to the concern that the statements are likely to be written by the lawyers. I suggest that this concern is less valid when the statements are required early in the process, as opposed to just before the hearing. The opportunity to "spin" the evidence and coach the witnesses is much greater later in the proceedings when the actual memories of the witnesses have begun to weaken and when the familiarity of the lawyers with the entire body

of evidence has grown. At the early stages, there is a much greater risk that spun evidence will be contradicted by subsequently disclosed information. Therefore, early evidence that conforms most closely to established facts is much more likely to survive, uncontradicted, to the hearing.

The checking of every possible version of events against every possible document that might be produced in the case and the construction of the most plausible version of the facts that supports one's case is less possible when using the evidence first procedure. That is an advantage — and a detriment — experienced by both sides equally.

4) Discovery Requests

Discovery is merely the process by which one learns something that one did not know before. The evidence first procedure makes it clear that a party is not excused from placing in evidence that which it has within its knowledge because there is other information that it still requires to complete its claim or defence. Furthermore, a party is not excused from providing relevant information that it alone has in its possession because it has not yet had an opportunity to review all of the information in its possession that may have some bearing on the dispute.

a) Information and Documents

Under the sample procedural order, either side may, at any time, request in writing information or documents from the other side relevant to the issues raised by the pleadings or the witness statements. In addition to specifying the information sought, requests are to be confined to information and documents not otherwise available to the party making the request. Any unreasonable delay in making a request for information may result in the denial of the request if granting the request would cause unjustified delay in the arbitration schedule.

Note that no distinction is made between requests for information and requests for documents, and there is no specific time-

table other than the date beyond which further requests cannot be made without permission from the arbitrator. In my view, the almost exclusive focus on documents and the discouragement of nondocumentary information requests that is evident in many international rules of arbitration[12] is artificial and leads to game playing with respect to the formulation of document requests and answers to document requests.

Whether or not a party is entitled to seek information that is within the possession or control of the other side to complete the proof of its claim or defence is a simple but critical decision that must be made in any dispute resolution process. Many non–common law legal cultures and arbitration rules (especially in the international sphere) manifest ambiguity or agnosticism on this critical point and seek to reduce the number of occasions on which requests for information can be made and to restrict the manner in which such requests must be put forward. Often, this reflects not merely a procedural preference but a fundamental view that parties should not be able to use the dispute resolution process to obtain information from the other party that they would not have been able to obtain in the absence of the dispute.

The sample procedural order is premised on the opposite view — namely, that access to information that is within the possession or control of the other side and that is necessary to the presentation of one's claim or defence is essential to the fairness of any adjudicative result, subject only to questions of relevance and privilege. Once that value judgment is made, an efficient process requires that the participants "cut to the chase" and make relevant information in their possession available without delay. Thus, in the sample procedural order there is no precondition to or rigid schedule for the making of a request for documents or

12 See, for example, International Centre for Dispute Resolution, *International Arbitration Rules* (amended and effective 1 June 2014) art 21(10), online: www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased: "Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules."

information. Such requests may be made at any time during the process until the deadline is reached.

The provision of information in response to specific requests avoids the excuse that a party must find all the information and documents that it might consider relevant before producing any to the other side. It also imposes a discipline that tends to ensure requests are reasonable and pointed because they will be subject to immediate scrutiny by the arbitrator if an objection is raised in that regard. Conversely, the fact that further information requests can be made before the deadline discourages the types of evasive answers that are common when the parties are limited to one or two rounds of requests.

Of course, problems can arise, and in some cases they are insurmountable. For example, in one arbitration, critical documents were in the possession of a third party and could not be provided to the parties to the dispute except through a stringent government security clearance process. We had no choice but to wait for well over a year for the documents to be made available.

A recurring problem is requests involving the production of huge amounts of electronic information — the so-called big data issue. Usually the request is based on a very generalized submission as to relevance. A pragmatic approach is to deconstruct the request by seeking to establish a clearly stated proposition that the request is intended to prove or disprove. Means other than the production of big data may then be considered for verifying or falsifying the proposition. Smaller subsets of the data targeted to specific parameters or time frames may be sufficient for that purpose. Data sampling may be used to establish whether or not an allegation as to a generalized practice is likely to be true. Examination of the data by an objective third-party expert may provide an assurance without requiring the migration of large quantities of data to other secure systems where the data can be examined. This solution may also avoid protracted disputes regarding the access to be given to the data by the opposing side. In extreme cases, the dispute may be bifurcated so that less document-intensive issues (such as contract interpretation) can be determined

before more document-intensive issues (such as causation and damages).

But the most important factor in dealing with such disputes is the arbitrator's communication to the parties that tactical requests and objections will not subvert either the determination of the dispute on its merits or the process by which that determination is to take place.

b) Examinations for Discovery or Depositions

The sample procedural order provides that requests for further discovery may include requests to conduct examinations for discovery. However, unless consented to by the other party, requests for examinations for discovery will be granted only if it is demonstrated (1) that there is a specific need for further information before the hearing and (2) that the information requested can be reasonably obtained only in the manner requested. In other words, examinations for discovery will be available only after all other means of exchanging information have been attempted and found wanting. Furthermore, if allowed, examinations for discovery will be confined to the one or more specific issues for which the need was established. There is no conception of being given a time, however short, to do with as one wishes.

Despite the fact that most counsel in my arbitrations come from a litigation rather than an arbitration background and are accustomed to routinely conducting one or more examinations for discovery in the court cases they conduct, I can report that, to the best of my recollection, when the sample procedural order has been used, I have had no more than one or two requests for examinations for discovery.

5) Motions

The sample procedural order makes it clear that when procedural disputes arise, they must be promptly raised for determination. Formal motions to resolve procedural disputes are a last resort and may be brought only with permission of the tribunal. Furthermore,

it is made clear that parties should not "sit on" procedural disputes until they begin to affect the schedule. The stockpiling of procedural grievances is a principal cause of arbitration schedules gone awry.

It is important to make it clear that the arbitrator is available and willing to address procedural disputes on very short notice. Typically, a conference call in which the arbitrator hears about the problem and the positions of both sides and then offers one or more solutions is all that is required to resolve the dispute and allow the arbitration to stay on track.

Parties understand without any need for explanation that failure to cooperate with the tribunal that will make the final determination is not a sound strategy. There is almost never any need to mention the possibility of adverse inferences.

It is a rare procedural dispute that requires the expense and delay of a formal motion process. Once the process of using informal consultations to determine procedural disputes has been established, it is readily accepted by counsel. Indeed, my experience is that after one or two such informal consultations, counsel develop a good idea of the approach that the arbitrator is likely to take and require little further assistance.

Making all of this clear in the procedural order itself helps counsel to understand and explain to their clients that they are not taking a less aggressive and less effective approach by seeking early assistance from the arbitrator rather than engaging in an extensive motion practice.

6) The Hearing

The sample procedural order contains a number of provisions to ensure that all of the evidence that each party is relying on to establish its claims or defences is in the record before the hearing, including any information or documents that have been obtained from an opposing party through information requests and documents that will be put to a witness in cross-examination. The element of surprise is virtually eliminated. There may be some room

for discussion of whether this is conducive to effective cross-examination of untruthful witnesses. However, it must be remembered that contradictory evidence and documents will already have been put forward in the reply round of evidence exchange when using the sample procedural order. Furthermore, it is open to debate whether a more reliable conclusion as to the facts will be reached if an alleged contradiction in the evidence is raised at the very last moment in a hearing after all opportunities to further explore the factual context have been lost — barring, of course, an adjournment, which would entail additional delay and costs.

In some ways, the downfall of the normal court litigation process is its ambivalence toward the element of surprise. On the one hand, years of convoluted proceedings are justified as avoiding the element of surprise at trial. On the other hand, because only evidence adduced at trial is probative, the element of surprise is unavoidable. The evidence first approach unambiguously eliminates the element of surprise.

G. CONCLUSION

I estimate that I have used the sample procedural order, or some variation of it, in over fifty commercial arbitrations. The amounts in dispute have ranged from under $200,000 to over $100 million. Most disputes have been in the range of $1 to $10 million.

The sample procedural order has worked extremely well. I encourage all counsel and arbitrators to consider using the evidence first approach, and, to the extent that it is helpful, the sample procedural order is included below, as Appendix 1.

APPENDIX 1

Sample Procedural Order

Dates have been preserved to indicate sequence. Note this sample procedural order deals only with the issues addressed in the foregoing chapter.

Pleadings

1) The pleadings shall be limited to the Notice of Arbitration and Answer to Notice of Arbitration, which have already been exchanged.

Exchange of Evidence

2) The evidence of both sides shall be presented in the form of witness statements, which shall be in writing and sworn or affirmed by the witnesses.
3) A party that requires evidence from a witness from whom a witness statement cannot be obtained shall, at or before the time that a witness statement from that witness would have been due, seek directions from the tribunal as to how and when the evidence of the witness in question shall be obtained and submitted to the tribunal.
4) The witness statements submitted by each party shall include all the evidence that party seeks to put forward through its witnesses.
5) The witness statements delivered by each party shall attach or be accompanied by all of the documents on which that party intends to rely at the hearing.
6) Expert reports shall be delivered on the same schedule as witness statements, unless leave is obtained from the tribunal to deliver them on a different schedule. Such leave will not be granted, in the absence of extraordinary circumstances, if it would delay the final hearing.
7) On or before 23 April 20—, the Claimant shall deliver its witness statements, reports, and documents.
8) On or before — May 20—, the Respondent shall deliver its responding witness statements, reports, and documents.

9) On or before 21 May 20—, the Claimant shall deliver its reply witness statements, reports, and documents, if any. The reply witness statements, reports, and documents may include evidence in respect of any information or documents obtained pursuant to the process set out in paragraph 12, below, that the Claimant did not have an opportunity to address in its witness statements, reports, and documents delivered on 23 April 20—.
10) Any witness statement a party needs to file in response to disclosure of documents, or information, or a witness statement from the other side that the party did not have a reasonable opportunity to address, may be filed by agreement of the parties or, failing agreement, pursuant to further direction. No further witness statements shall be delivered prior to the hearing without agreement of the parties or leave of the tribunal.
11) All statements, reports, and documents shall be delivered by sending a copy by email to the other party and the arbitrator, by 5:00 pm Eastern Time of the day in question, with an additional hard copy being delivered to the tribunal within 24 hours.

Discovery Requests

12) Either side may, at any time, request in writing information or documents from the other side relevant to the issues raised by the pleadings or the witness statements. Such requests, in addition to specifying the information sought, should be confined to information and documents not otherwise available to the party making the request. Any unreasonable delay in making a request for information may result in the request being denied, if granting the request would cause unjustified delay in the arbitration schedule.
13) Requests for information or documents shall be responded to promptly as they are received.
14) Any disputes regarding information or document requests, which counsel are unable to resolve after reasonable attempts to do so, shall be raised with the tribunal by email and dealt

with on a conference call, without a formal motion unless so directed by the arbitrator.

15) No issue should be raised with the tribunal before it has been discussed between counsel. All communications with the tribunal shall be copied to the other side. However, it is not necessary to obtain the approval of the other side for the content of any communication to the tribunal.
16) Requests for further discovery may include requests to conduct examinations for discovery. However, unless consented to by the other party, requests for examinations for discovery will only be granted if it is demonstrated that there is a specific need for further information before the hearing and that the information requested can only be reasonably obtained in the manner requested.
17) In the absence of extraordinary circumstances no requests for information, documents, and discovery shall be made after 2 June 20—.
18) By no later than 13 June 20—, each party shall notify the other of the documents, information, or discovery it has obtained from the other side that it intends to use or place in evidence at the hearing.

Prehearing Delivery of Material

19) On or before 27 June 20—, the parties shall provide to the tribunal:
    a) Copies of all witness statements exchanged between the parties;
    b) Copies of expert reports exchanged between the parties;
    c) A joint brief containing all documents produced by both sides, in chronological order, indexed, and tabbed;
    d) Information or discovery from one side that the other side intends to refer to or rely upon at the hearing;
    e) Copies of any key cases or other authorities with important passages highlighted and tabbed; and
    f) A hearing schedule setting out the proposed order of proceeding at the hearing, including the order in which the

witnesses will be examined and the anticipated time required for the examination of each witness.

20) If the parties are unable to agree as to any of the above, one or both of them shall initiate a meeting or conference call with the tribunal to resolve the issue.
21) On or before 10 July 20—, the parties shall deliver any pre-hearing memorial, factum, or other written submissions that a party wishes to submit.

The Hearing

22) The hearing shall take place on weekdays from 14 July to 18 July 20—.
23) The hearing will conclude with oral submissions by both parties. Either party may also submit, or the tribunal may request, written closing submissions at or shortly after the hearing, at such time as can be agreed by the parties or as directed by the tribunal.
24) The hearing may be at any location upon which the parties agree. A transcript of the hearing shall be maintained if it is requested by any party. Costs relating to the hearing facility and transcripts shall be borne equally by the parties, subject to reallocation among the parties in any cost order made by the tribunal.
25) A witness who has provided a statement or report shall be made available for cross-examination at the hearing unless the other side agrees otherwise. If a witness is unavailable for cross-examination, e.g., due to death or disability, the admission into evidence and the weight to be attached to the statement shall be in the discretion of the tribunal.
26) At the evidentiary hearing, witnesses may be briefly examined by the party that submitted their statements or reports, only for the purpose of introducing the witness and highlighting key aspects of the witness's evidence, without adding any new evidence of substance. Such introductory examinations shall not take more than fifteen minutes and shall be followed by a cross-examination of the witness by the other side and re-examination, if required.

27) By agreement of the parties or direction of the tribunal, the cross-examination of any witness or witnesses may take place at a time and place other than the hearing referred to below. However, unless both parties consent, the tribunal shall be present at any such cross-examination.
28) No document may be put to a witness in cross-examination unless it was produced prior to the hearing in accordance with the directions above.

Further Directions

29) Further directions may be sought by either party at any time as the need arises.

The Civil Litigator's Survival Guide to Evidence

November 6, 2020

Commonly-Encountered Evidentiary Conundrums and Their Solution

COMMONLY-ENCOUNTERED EVIDENTIARY CONUNDRUMS AND THEIR SOLUTIONS

SELECTED CASES AND MATERIALS[1]

Justice David M. Brown
Court of Appeal for Ontario

The Civil Litigator's Survival Guide to Evidence 2020
Osgoode Professional Development
November 6, 2020

I. HEARSAY AND SUMMARY JUDGMENT MOTIONS

Drummond v. Cadillac Fairview Corporation Limited, 2019 ONCA 447

> [21] The principles governing the admissibility of evidence on a summary judgment motion are the same as those that apply at trial, save for the limited exception of permitting an affidavit made on information and belief found in r. 20.02(1): Sanzone v. Schechter, 2016 ONCA 566, 402 D.L.R. (4th) 135, leave to appeal refused, [2016] S.C.C.A. No. 443, at para. 15. Rule 20.02(1) provides, in part, that "[a]n affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4)" which, in turn, requires that the affidavit specify "the source of the information and the fact of the belief". However, r. 20.02(1) continues: "[B]ut, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts."
>
> [22] In *Armstrong v. McCall* (2006), 213 O.A.C. 29 (C.A.), at para. 33, this court expressed strong reservations about using r. 20.02(1) to admit affidavits that assert contested facts on information and belief. That caution regarding the use of hearsay evidence on summary judgment motions in respect of contested facts was repeated recently by this court in *Kawartha-Haliburton Children's Aid Society v. M.W.*, 2019 ONCA 316, at para. 80:
>
> > The court must conduct a careful screening of the evidence to eliminate inadmissible evidence. The court should not give weight to evidence on a summary judgment motion that would be inadmissible at trial.

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[1] I wish to thank my clerk, Sean Grassie, for his research assistance in preparing this paper. I also wish to thank my colleague, Watt J.A., for recommending some of the reference material.

[23] Although that caution was made in the context of a summary judgment motion in a child protection proceeding, the caution applies equally to the treatment of hearsay evidence that goes to fundamental issues in dispute on a summary judgment motion under the Rules of Civil Procedure. As Edwards J. stated in *Mitusev v. General Motors Corp.*, 2014 ONSC 2342, at para. 20: "If the hearsay evidence is on a fundamental aspect of the motion, it is unlikely that the motion judge will decide the motion favourably to the party adducing the hearsay evidence."

[24] If the evidence on information and belief in an affidavit goes to a fundamental contested aspect of the summary judgment motion, the motion judge should first determine whether the evidence would be admissible under the rules governing admissibility at trial. If the evidence meets those criteria, it is admissible on the motion. If the evidence does not meet the criteria for admissibility at trial, the onus should fall on the party proffering the evidence to justify some expansion of the rules governing admissibility in the context of the motion. For example, there may be cases in which an affidavit complies with r. 20.02(1) and it can be said that the opposing party had a fair chance to challenge the hearsay evidence, even though the evidence might not qualify as admissible hearsay.

[25] The information that Mr. Drummond relayed from his daughter and fiancé went to the heart of the plaintiff's negligence claim against Cadillac Fairview. While the information in Mr. Drummond's affidavit provided by his daughter met the technical requirement of disclosing the source of the information, that from his fiancé did not. The material information from the fiancé was information provided to her by two unnamed members of the cleaning staff about what they had seen the skateboard owner do some time before the incident with Mr. Drummond. In his factum on the summary judgment motion, Mr. Drummond described the two unnamed cleaners as "essential witnesses". The absence of an actual identification of such essential witnesses is a significant consideration in determining whether the evidence is sufficiently reliable to warrant its admissibility under r. 20.02(1).

[26] In his affidavit tendering the hearsay and double-hearsay statements from his daughter and fiancé, Mr. Drummond offered no explanation about why they could not provide their own affidavits on the motion, especially in light of the materiality of the information he attributed to them. Nor did Mr. Drummond explain why he did not tender direct evidence from the members of the cleaning staff, whom he described as "essential witnesses". In his reasons, the motion judge failed address those evidentiary frailties or explain how, given those frailties, any weight could be given to the hearsay statements, even under r. 20.02(1).

[27] Instead, the motion judge concluded, without analysis, that the hearsay evidence would have been admissible pursuant to the business records exception and the reliability and necessity exception to the rule against hearsay: R. v. Khelawon, 2006 SCC 57, [2006] 2 S.C.R. 787. In admitting the hearsay evidence on those bases, the motion judge committed legal error.

[28] Mr. Summerville's affidavit did not attempt to lay any foundation to admit the unsworn, handwritten statements of the daughter and fiancé under the business records exception. Their handwritten statements patently were not business records.

[29] Nor were the statements by, or the information from, the daughter or fiancé recounted in Mr. Drummond's affidavit admissible under the principled exception to the hearsay rule because there was no evidence about the need to admit that evidence or its reliability.

[30] The motion judge erred in law by admitting that hearsay evidence for the truth of its contents.

[31] The hearsay evidence from the daughter and fiancé played a central role in the motion judge's finding of liability against Cadillac Fairview. The motion judge accepted the information contained in the hearsay evidence as the truth of what the skateboard owner had done before the incident with Mr. Drummond, as can be seen from paras. 52 and 53 of his reasons:

> Cadillac Fairview admitted that the use of skateboards inside the mall was a known hazard. It posted signs prohibiting skateboard use inside the mall, and it admitted that if a person entered the mall with a skateboard, the person was to be told by a security guard to secure the skateboard during the person's visit to the mall. Cadillac Fairview admitted that it required its security guards to patrol the mall to alert themselves whether skateboards were being used in the mall.
>
> However, in the immediate case, the security guard's patrols and their documentation of the patrols were ineffective. The security guards patrolled, but they did not notice that SS had entered the mall with a skateboard. The security guards did not notice that SS with his skateboard was moving through the mall. When the security guards patrolled the food court, they did not notice that SS had not secured his skateboard. They did not notice that SS was playing with the skateboard under his chair in the food court. Although the security guards were not alerted by the cleaning staff that there had already had been an incident in the food court with the skateboard causing minor harm to a cleaning lady, the security guards did not as part of their patrol make proactive inquiries of anyone in the food court, but rather they waited for incidents to be reported to them. (emphasis added)

[32] I accept the submission of Cadillac Fairview that the motion judge's finding of liability against it was grounded in his erroneous admission of hearsay evidence on key, contested issues. That error by the motion judge constitutes an additional reason to set aside the Judgment against Cadillac Fairview.

[33] For those reasons, I would allow the appeal and set aside the Judgment granted in favour of Mr. Drummond against Cadillac Fairview.

II. THE USE OF JOINT BOOKS OF EVIDENCE/DOCUMENTS

Girao v. Cunningham, 2020 ONCA 260

> [33] In my view, counsel and the court should have addressed the following questions, which arise in every case, in considering how the documents in the joint book of documents are to be treated for trial purposes:
>
> 1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?
>
> 2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?
>
> 3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?
>
> 4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?
>
> 5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?
>
> 6. Does any party object to a document in the document book, if it has not been prepared jointly?
>
> [34] It would be preferable if a written agreement between counsel addressing these matters were attached to the book of documents in all civil cases. In addition, it would be preferable if the trial judge and counsel went through the agreement line by line on the record to ensure that there are no misunderstandings.

Bruno v. Dacosta, 2020 ONCA 602

> [54] Even though Girao was released after the trial decision in this case, this situation presents an opportunity for further reflection on trial practice.
>
> [55] The most obvious point, which nonetheless bears emphasis, is that any agreement between counsel as to the admissibility of documents is not automatically binding on the trial judge, who remains at all times the gatekeeper of the evidence. I now turn to the problems experienced in this case.

[56] At the opening of the trial, Mr. McKenna read the parties' initial agreement with respect to evidence into the record:

> The documents contained in the Joint Document Brief are relevant, authentic and the dates of the documents are accurately reflected on their face. Neither of the parties are to be considered as having accepted the truth of the contents of all of the documents. Further, both parties reserve their rights to challenge what is stated in the documents, lead further evidence which may or may not be inconsistent with the documents and argue as to the interpretation and weight to be given to the documents.

[57] This agreement was not helpful to the trial judge because of its ambiguity, which he should have probed immediately and carefully with some obvious questions, among them: If a document is not challenged, is its hearsay content deemed to be admitted? If not "all" documents, then which?

[58] The approach taken by counsel and permitted by the trial judge only invited further contention, which inevitably emerged. On the second day of trial, counsel for the Crown, Mr. MacLeod, attempted to enter a Niagara Regional Police Service Supplementary Report into evidence, leading to the following exchange:

> Mr. McKenna: Just maybe my friend can clear – is this going in as a business record, is that sort of the basis of the admissibility of it?
>
> Mr. MacLeod: Your Honour, this is one our productions. I don't intend to have this marked as, and go in as, a business record as an exception to the hearsay rule. It is a document. I don't think there's any issue between the parties as to its authenticity. I don't think there's any issue as to its relevance. The witness has been questioned about these events, but it does provide evidence of some objective things that were happening at this time.
>
> Mr. McKenna: … It's the officer's document, it's not Mr. Bruno's document. It probably sounds like I'm trying to be difficult, but if we're going to deal with this piece by piece and lead to a bigger problem later on, then I'd like to deal with this issue, you know, as a whole if we can. I just don't want to be seen to be agreeing to letting records just go in and then I'm going to be faced with some argument that I didn't dispute it at this time and I'm going to be faced with the opposite argument with their actual Ministry documents. [Emphasis added.]

[59] After seven days of trial, and at the beginning of the Crown's evidence, Mr. MacLeod stated that the parties wished to make a "further stipulation with respect to some documents" and that this new stipulation would be "in addition to what was already stipulated as the agreement between the parties." Mr. MacLeod then read the following statement into the record:

> The parties agree that the records of the Ministry of Community Safety and Correctional Services contained in the joint document brief (Exhibit 1), as well as exhibits A, B, C, F, and G are business records pursuant to Section 35 of the Evidence Act. However there is no agreement that statements recorded in these records are admissible for the truth of their contents. […] For example, for an occurrence report that states that inmate X said Y, is evidence of the fact that the statement Y made was made by inmate X, [but it is not evidence that it is true.] The standing orders of the Niagara Detention Centre and the adult institutions policies and procedures are not technically business records, but are in evidence and can be referred to by the parties when examining witnesses and in argument.

[60] This agreement is more specific than the first, but it raises problems of its own concerning the proper application and reach of s. 35 of the Evidence Act, R.S.O. 1990, c. E.23, which should have been canvassed and resolved at the outset of the trial. This last agreement came too late; it implies that the statements had to be proved by other means but, by this point, the plaintiffs had referenced and relied on numerous documents involving various degrees of hearsay.

[61] A party properly invoking s. 35 of the Evidence Act is entitled to introduce certain limited forms of double hearsay contained in business records, such as statements made and recorded by two people who are each acting in the ordinary course of business, even if those statements are ultimately accorded little weight: Evidence Act, s. 35(4); Parliament et. al. v. Conley and Park, 2019 ONSC 2951, at para. 36; Setak Computer Services Corporation Ltd. v. Burroughs Business Machines Ltd., et. al., 1977 CanLII 1184 (ON SC), [1977] 15 O.R. (2d) 750; [1977] O.J. No. 2226, at para. 63. In dealing with police reports and occurrence reports, however, trial judges have generally refused to admit business records in which a person, acting in the course of their duty, records unreliable third-party statements or other forms of hearsay: see for example DeGiorgio v. DeGiorgio, 2020 ONSC 1674, at paras. 50 and 54. The parties' agreement simply stipulated that double hearsay is not admissible for the truth of its content. In my view this issue required argument and an evidentiary ruling.

[62] I add an observation about the respondents' s. 35 Evidence Act notice. It seriously overreached and, in so doing, created the uncertainty that set the context for uncertainty about the permissible use of documents. The s. 35 notice, a copy of which this court requested after oral argument, ends with the following description under the heading "Liability Documentation": "All other business and medical records listed in the parties' affidavits of documents and produced subsequently in this proceeding in response to undertaking or production requests'". The idea seems to have been to extend the s. 35 cloak to other documents as yet unidentified. As convenient as this might be, it is unacceptable trial practice and invites contention at trial over the status of individual documents, as transpired here. The rigorous approach set out in Girao as modified in these reasons is a good way to avoid such problems.

[63] As a matter of ordinary trial practice, the parties' agreement should be entered with the joint book of documents at the earliest opportunity. In this case, the need for a timely agreement or resolution of the issues regarding documentary evidence was greater because of the unusually heavy role played by the documents. The fact that the parties felt the need to clarify their agreement so late in the game simply illustrates the inadequacy of the initial agreement and the effect of the absence of judicial scrutiny.

[64] This was a case of far too little, far too late, which left the trial judge in a quandary about the admissibility and use of the business records. This became apparent when he dealt with the factual issue of who assaulted Bruno. The appellant takes issue with the trial judge's factual finding on the assault, at para. 36 of the decision, where he stated: "Having reviewed all the evidence including the photos of the other inmates, the video, and the records of the NDC including the report prepared by CO Tom Bradley, I am satisfied that DaCosta, Gibson, Ashenden and Empey undertook the assault." Despite the parties' reservation in their agreement on the hearsay value of statements in the documents, the trial judge effectively accepted the hearsay content of what was known in the trial as the "Bradley Report," which the Crown produced. CO Bradley did not testify.

[65] This case highlights the deplorable tendency in civil cases of admitting evidence subject only to the weight to be afforded by the trial judge: "Seduced by this trend towards [evidentiary] flexibility, some judges in various jurisdictions have been tempted to rule all relevant evidence as admissible, subject to their later assessment of weight": Teva Canada Ltd. v. Pfizer Canada Inc., 2016 FCA 161, per Stratas J.A. at para. 83. This is legal heresy, as Stratas J.A. noted, citing R. v. Khelawon, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 59. I agree with his trenchant comments.

[66] Finally, as I noted in Girao, at para. 22: "The goal of a trial judge in supervising the assembly of a trial record is completeness and accuracy, so that the panel of this court sitting on the appeal can discern without difficulty exactly what was before [the trial judge] at any moment in the course of the trial." In this case it was necessary for this court to look at the written closing submissions of counsel to the trial judge, but they were not in the trial record. They were sent after oral argument on the appeal at our request. In my view, good trial practice is to include any written arguments in the trial record as lettered exhibits to which the appeal court can have access if necessary.

III. MEDICAL RECORDS AND THE ONTARIO *EVIDENCE ACT*

Girao v. Cunningham, 2020 ONCA 260

(a) The Governing Principles on Expert Evidence

[39] The threshold requirement for the admission of expert evidence has four elements: the evidence must be relevant; it must be necessary in assisting the trier of fact; no other evidentiary rule should apply to exclude it; and the expert must be properly qualified, assuming there is no novel science issue. Then the trial judge must execute the gatekeeper function. See White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 19. See also R. v. Abbey, 2017 ONCA 640, 140 O.R (3d) 40, per Laskin J.A., at paras. 47-48. These four threshold elements implicitly give rise to another element: Can a person who has expertise, but who is not qualified as an expert witness under r. 53.03 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, still provide opinion evidence?

[40] The short answer is that such a person can give opinion evidence as this court affirmed in Westerhof v. Gee Estate, 2015 ONCA 206, 124 O.R. (3d) 721, leave to appeal refused, [2015] S.C.C.A. No. 198. It was a case about the quantum of damages for injuries suffered in a car accident. Simmons J.A. identified two types of witnesses with special expertise who can provide opinion evidence but who are not expert witnesses as described in r. 4.1.01 and Form 53: The first are "participant experts," who form opinions based on their participation in the underlying events, such as treating physicians. The second are "non-party experts," who are retained by a non-party to the litigation and who form opinions based on personal observations or examinations that relate to the subject matter of the case, but for another purpose. One example would be a medical examination of a claimant for statutory accident benefit insurance purposes: see Westerhof, at para. 6. (Westerhof implicitly overrules the trial decision to the contrary reached in Beasley v. Barrand, 2010 ONSC 2095, 101 O.R. (3d) 452.)

[41] Simmons J.A. held, at para. 60, that both participant experts and non-party experts may give opinion evidence without complying with rule 53.03:

> I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:
>
> • the opinion to be given is based on the witness's observation of or participation in the events at issue; and
>
> • the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

(b) The Governing Principles Regarding the Evidence Act

[42] Dr. Sanchez's letter was adduced by the defence in order to substantiate its theory that the appellant was suffering before the accident from the same mental problems that she manifested after the accident. The defence wanted to rely on the words of Dr. Sanchez's opinion as being true. This would be to use Dr. Sanchez's statement for the truth of its content, making it hearsay evidence. Hearsay evidence "is presumptively inadmissible because – in the absence of the opportunity to cross-examine the declarant at the time the statement is made – it is often difficult for the trier of fact to assess its truth": R. v. Bradshaw, 2017 SCC 35, [2017] 1 S.C.R. 865, at para. 1.

[43] There are certain exceptions to the hearsay rule under which a statement may be adduced for its truth value. Two such exceptions, hedged about with additional protections, are found in ss. 35 and 52 of the Evidence Act.

[44] Section 35 of the Evidence Act relates to business records. If a record is made "in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act," then the record is admissible as evidence of such act: s. 35(2).

[45] Section 52 of the Evidence Act relates to medical reports and is more expansive than s. 35. It permits the court to allow the report to be admitted into evidence without the need to call the practitioner. The opinion can then be accepted for the truth of its contents. However, the trial judge must, at the request of a party, oblige the medical practitioner to testify in order to permit cross-examination. See Kapulica v. Dumancic, 1968 CanLII 419 (ON CA), [1968] 2 O.R. 438 (C.A.); Reimer v. Thivierge, 1999 CanLII 9303 (ON CA), [1999] 46 O.R. (3d) 309, at paras. 12-15; see also Doran v. Melhado, 2015 ONSC 2845. See generally Michelle Fuerst, Mary Anne Sanderson, and Donald Ferguson, Ontario Courtroom Procedure, 4th ed. (Toronto: Lexis Nexis Canada, 2016), c. 41.

[46] The respective roles of the two sections have been distinguished in several cases. Section 35 is not a proper basis on which to admit opinion evidence. In Westerhof, Simmons J.A. said, at para. 103:

> Because these reports were tendered under s. 35 of the Evidence Act, the opinions concerning causation were not admissible for the truth of their contents: Robb Estate v. Canadian Red Cross Society (2001), 2001 CanLII 24138 (ON CA), 152 O.A.C. 60 (Ont. C.A.), at para. 152; McGregor v. Crossland, [[1994] O.J. No. 310] 1994 CanLII 388 (Ont. C.A.) at para. 3. Further, the appeal record contains no indication that notice was served for the admission of these reports under s. 52 of the Evidence Act. [Emphasis added.]

[47] In Robb Estate v. Canadian Red Cross Society (2001), 2001 CanLII 24138 (ON CA), 152 O.A.C. 60 (Ont. C.A.), the court noted, at para. 152: "Section 52 differs from s. 35 in that it permits the admission of opinions and diagnoses contained in medical reports

signed and prepared by qualified practitioners… Section 52 was designed as an alternative to oral testimony."

[48] In McGregor v. Crossland, [1994] O.J. No. 310 (Ont. C.A.) the court noted, at para. 3:

> We do not think that the diagnosis … is admissible under s. 35. It does not relate to "any act, transaction, occurrence or event". If the notes were to be admissible at all this would have had to have been under s. 52 of the Evidence Act.

IV. BUSINESS RECORDS

Bruno v. Dacosta, 2020 ONCA 602

[60] This agreement is more specific than the first, but it raises problems of its own concerning the proper application and reach of s. 35 of the Evidence Act, R.S.O. 1990, c. E.23, which should have been canvassed and resolved at the outset of the trial. This last agreement came too late; it implies that the statements had to be proved by other means but, by this point, the plaintiffs had referenced and relied on numerous documents involving various degrees of hearsay.

[61] A party properly invoking s. 35 of the Evidence Act is entitled to introduce certain limited forms of double hearsay contained in business records, such as statements made and recorded by two people who are each acting in the ordinary course of business, even if those statements are ultimately accorded little weight: Evidence Act, s. 35(4); Parliament et. al. v. Conley and Park, 2019 ONSC 2951, at para. 36; Setak Computer Services Corporation Ltd. v. Burroughs Business Machines Ltd., et. al., 1977 CanLII 1184 (ON SC), [1977] 15 O.R. (2d) 750; [1977] O.J. No. 2226, at para. 63. In dealing with police reports and occurrence reports, however, trial judges have generally refused to admit business records in which a person, acting in the course of their duty, records unreliable third-party statements or other forms of hearsay: see for example DeGiorgio v. DeGiorgio, 2020 ONSC 1674, at paras. 50 and 54. The parties' agreement simply stipulated that double hearsay is not admissible for the truth of its content. In my view this issue required argument and an evidentiary ruling.

[62] I add an observation about the respondents' s. 35 Evidence Act notice. It seriously overreached and, in so doing, created the uncertainty that set the context for uncertainty about the permissible use of documents. The s. 35 notice, a copy of which this court requested after oral argument, ends with the following description under the heading "Liability Documentation": "All other business and medical records listed in the parties' affidavits of documents and produced subsequently in this proceeding in response to undertaking or production requests'". The idea seems to have been to extend the s. 35 cloak to other documents as yet unidentified. As convenient as this might be, it is unacceptable trial practice and invites contention at trial over the status of individual documents, as transpired here. The rigorous approach set out in Girao as modified in these reasons is a good way to avoid such problems.

V. PRIOR CONSISTENT STATEMENTS

R. v. D.K., 2020 ONCA 79:

> [34] Prior consistent statements are presumptively inadmissible. There are several rationales for this rule, including that prior consistent statements (1) lack probative value; (2) are often self-serving; and (3) are hearsay: see S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds., McWilliams' Canadian Criminal Evidence, 5th ed. (Toronto: Thompson Reuters, 2019) (loose-leaf updated 2019), at p. 11-2; R. v. Stirling, 2008 SCC 10, [2008] 1 S.C.R. 272, at para. 5; and R. v. Dinardo, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 36.
>
> [35] The overwhelming danger is that a trier of fact may improperly use the mere repetition of a statement as a badge of testimonial trustworthiness. As Hourigan J.A. said for the majority in Khan: "[S]uch evidence cannot be used for the prohibited inference that consistency enhances credibility, or the incorrect conclusion that the simple making of a prior consistent statement corroborates in-court testimony": at para. 41; see also Stirling, at para. 7; R. v. Divitaris (2004), 2004 CanLII 9212 (ON CA), 188 C.C.C. (3d) 390 (Ont. C.A.), at para. 28; R. v. D.C., 2019 ONCA 442, at para. 19; and R. v. S.K., 2019 ONCA 776, 148 O.R. (3d) 1, at para. 90.
>
> [36] The rule against prior consistent statements is subject to a number of exceptions. For example, a prior consistent statement may be admitted for the limited purpose of rebutting an allegation of recent fabrication: Stirling, at paras. 5-7.
>
> [37] Prior statements may also be admitted where they are "necessary to the unfolding of the events or narrative of the prosecution": see Dinardo, at para. 37. On this basis, a prior consistent statement may be admitted to assist with understanding how the case came before the court or to appreciate the "chronological cohesion" of the case: R. v. Fair (1993), 1993 CanLII 3384 (ON CA), 16 O.R. (3d) 1 (C.A.), at p. 18; Khan, per Hourigan J.A., at para. 30. To be admissible under this exception, the statement must be "truly essential" to the unfolding of the narrative: R. v. M.C., 2014 ONCA 611, 314 C.C.C. (3d) 336, at para. 91.
>
> [38] Further, prior statements may be admissible under the narrative as circumstantial evidence exception. Admissibility on this basis of such does not hinge on the mere repetition of the same information. As explained by Hourigan J.A. in Khan: "A prior consistent statement can be used not to corroborate the evidence of the witness, but to provide the surrounding circumstances and context to evaluate the credibility and reliability of the witness's in-court testimony": at para. 39; see Dinardo, at para. 31.

VI. DIGITAL RECORDS: AUTHENTICITY AND BEST EVIDENCE

A. STATUTORY PROVISIONS

Canada Evidence Act, R.S.C. 1985, c. C-5

Authentication of electronic documents

31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

Application of best evidence rule — electronic documents

31.2 (1) The best evidence rule in respect of an electronic document is satisfied

(a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or

(b) if an evidentiary presumption established under section 31.4 applies.

Printouts

(2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

Presumption of integrity

31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

(a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;

(b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

Presumptions regarding secure electronic signatures

31.4 The Governor in Council may make regulations establishing evidentiary presumptions in relation to electronic documents signed with secure electronic signatures, including regulations respecting

(a) the association of secure electronic signatures with persons; and

(b) the integrity of information contained in electronic documents signed with secure electronic signatures.

Standards may be considered

31.5 For the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.

Proof by affidavit

31.6 (1) The matters referred to in subsection 31.2(2) and sections 31.3 and 31.5 and in regulations made under section 31.4 may be established by affidavit.

Cross-examination

(2) A party may cross-examine a deponent of an affidavit referred to in subsection (1) that has been introduced in evidence

(a) as of right, if the deponent is an adverse party or is under the control of an adverse party; and

(b) with leave of the court, in the case of any other deponent.

Application

31.7 Sections 31.1 to 31.4 do not affect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence.

Definitions

31.8 The definitions in this section apply in sections 31.1 to 31.6.

computer system means a device that, or a group of interconnected or related devices one or more of which,

(a) contains computer programs or other data; and

(b) pursuant to computer programs, performs logic and control, and may perform any other function. (système informatique)

data means representations of information or of concepts, in any form. (données)

electronic document means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data. (document électronique)

electronic documents system includes a computer system or other similar device by or in which data is recorded or stored and any procedures related to the recording or storage of electronic documents. (système d'archivage électronique)

secure electronic signature means a secure electronic signature as defined in subsection 31(1) of the Personal Information Protection and Electronic Documents Act. (signature électronique sécurisée)

***Ontario Evidence Act*, R.S.O. 1990, c. E.23**

Electronic records

Definitions

34.1 (1) In this section,

"data" means representations, in any form, of information or concepts; ("données")

"electronic record" means data that is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device, and includes a display, printout or other output of that data, other than a printout referred to in subsection (6); ("document électronique")

"electronic records system" includes the computer system or other similar device by or in which data is recorded or stored, and any procedures related to the recording and storage of electronic records. ("système d'archivage électronique")

Application

(2) This section does not modify any common law or statutory rule relating to the admissibility of records, except the rules relating to authentication and best evidence.

Power of court

(3) A court may have regard to evidence adduced under this section in applying any common law or statutory rule relating to the admissibility of records.

Authentication

(4) The person seeking to introduce an electronic record has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.

Application of best evidence rule

(5) Subject to subsection (6), where the best evidence rule is applicable in respect of an electronic record, it is satisfied on proof of the integrity of the electronic record.

(5.1) The integrity of an electronic record may be proved by evidence of the integrity of the electronic records system by or in which the data was recorded or stored, or by evidence that reliable encryption techniques were used to support the integrity of the electronic record.

What constitutes record

(6) An electronic record in the form of a printout that has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, is the record for the purposes of the best evidence rule.

Presumption of integrity

(7) In the absence of evidence to the contrary, the integrity of the electronic records system by or in which an electronic record is recorded or stored is proved for the purposes of subsection (5),

> (a) by evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record, and there are no other reasonable grounds to doubt the integrity of the electronic records system;
>
> (b) if it is established that the electronic record was recorded or stored by a party to the proceeding who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceeding and who did not record or store it under the control of the party seeking to introduce the record.

Standards

(8) For the purpose of determining under any rule of law whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or stored, having regard to the type of business or endeavour that used, recorded or stored the electronic record and the nature and purpose of the electronic record.

Proof by affidavit

(9) The matters referred to in subsections (6), (7) and (8) may be established by an affidavit given to the best of the deponent's knowledge and belief.

Cross-examination

(10) A deponent of an affidavit referred to in subsection (9) that has been introduced in evidence may be cross-examined as of right by a party to the proceeding who is adverse in interest to the party who has introduced the affidavit or has caused the affidavit to be introduced.

(11) Any party to the proceeding may, with leave of the court, cross-examine a person referred to in clause (7) (c).

B. SECONDARY REFERENCE MATERIALS

[1] David M. Paciocco, ***Proof and Progress: Coping with the Law of Evidence in a Technological Age*** (2013), 11 Canadian Journal of Law and Technology 181

[2] **McCormick On Evidence (8th ed.)**

§ 227. Electronic and computer-generated documents

Due to the enormous growth in electronic correspondence and commerce in recent years, the recording, communication and preservation of digital information pervade society. Understandably, then, electronic writings (also known as e-evidence) are increasingly used in both civil and criminal litigation. The first generation of e-evidence included computer-generated documents and data files, emails and Internet website postings, including chat rooms. Now courts frequently deal with text messages and social network communications and postings. The authentication of such electronic writings can be hotly contested when authorship is in dispute. There are no subsections of Federal Rule 901(b) that address these new electronic technologies specifically, but Rule 901(b) provides flexibility in applying the requisite standard of sufficiency set forth in Federal Rule 901(a). Courts have emphasized that the threshold set by the sufficiency standard raises a question for the jury, and have used the flexibility of Federal Rule 901(b) to develop analogies to traditional writings in admitting all forms of e-evidence.

Again, it must be emphasized that authentication does not secure admissibility of electronic documents into evidence. As with more traditional forms of written evidence, if the electronic or computer-generated writing is used to prove the truth of its contents, the hearsay rule must be satisfied. In addition, the "best evidence" requirement to produce the original document or its authorized substitute may apply. See Chapter 23 infra.

Emails. Emails can be authenticated by their authorship. The electronic signature that they bear may not be sufficient to identify the author, however, because of the risk of manipulation of email headers. Additional data such as the address that an email bears, the use of the "reply" function to generate the address of the original sender, the content of the information included in the email and other circumstances such as "appearance, contents, substance, internal patterns, or other distinctive characteristics … taken together with all the circumstances" can suffice. Emails are also deemed authenticated when produced by, and then offered against, a party opponent.

Evidence that the email to be authenticated is a timely response to an earlier message addressed to the purported sender would be analogous to the reply letter doctrine discussed

in § 224 supra, which is based upon the presumed regularity and dependability of the mails. Applying this doctrine, an email response to an original email message that was sent to the responder's email address has been held sufficient to authenticate the source and genuineness of the response. There are also "a variety of technical means by which email transmissions may be traced."

Text Messages. Text messages sent between cell phone users are treated the same as emails for purposes of authentication. Typically, such messages are admitted on the basis of identifying the author who texted the proffered message. Ownership of the phone that originated the message is not sufficient. Like email, authorship can be determined by the circumstances surrounding the exchange of messages; their contents; who had the background knowledge to send the message; and whether the parties conventionally communicated by text message.

Proving text messages in court often presents additional challenge, however, because their contents are regularly purged by the telephone carrier. Thus, transcripts made by law enforcement at the time the cell phone is seized are often proffered as evidence of the messages and must be authenticated as an accurate transcription.

Website Data and Postings. Information appearing on private, corporate and government websites is often proffered as evidence in litigation. Printouts of Web pages must first be authenticated as accurately reflecting the content and image of a specific web page on the computer. Such accuracy can generally be established if the printout has a URL address and date stamp and is accompanied by an affidavit from a percipient witness, such as trial counsel. Often the printout is relevant only if posted by a particular source (such as the website owner) and thus must be authenticated as having been posted by that source. In the recent past, courts have expressed skepticism about attributing documents obtained from a website to the organization or individual who maintains the site. Private website postings are not self-authenticating and therefore require additional proof of the source of the posting or the process by which it was generated. Courts have also recognized that specific authentication issues exist for website printouts obtained from web archive services. Generally, courts require the testimony of someone with knowledge of the reliability of the archive service. Information retrieved from government websites, however, has been treated as self-authenticating, subject only to proof that the webpage does exist at the governmental web location. Issues of completeness of electronic records can be treated as a matter of evidentiary weight, rather than authentication and admissibility, as long as the complete records are available.

Chat Room Communications. Authentication of chat room communications is not accomplished through identification of the website owner. Rather, the author of the identity-protected posting must be identified. Authorship can be determined by content and circumstances. Courts have noted the need for flexibility in their approach to authenticating this evidence, as several of Federal Rule 901(b)'s provisions are simply not usable. Authentication can be accomplished with evidence linking an individual to a screen name used in chat room conversations; evidence that an individual possessed information sent to

the chat room participant; evidence from an individual's computer hard drive showing that a user of the computer used a particular screen name.

Testimony from a chat participant as to the accuracy of a transcript of the online conversation is sufficient. When computer text files of chat postings have been created, their completeness goes to the weight of the evidence, not admissibility, when all of the files are available.

Social Network Postings and Messaging. Many new types of writings, potentially relevant as evidence in civil and criminal trials, are retrieved from internet sites known as "social networks" or "social media." Social networking websites permit their members to share information with others. Members create their own individual web pages (their profiles) on which they post their own personal information, photographs and videos, and from which they can send and receive messages to and from others whom they have approved as their "friends." "Creating a Facebook account is easy…anyone at least thirteen years old with a valid email address could create a profile."

Despite the seeming novelty of social network-generated documents, courts have applied the existing concepts of authentication under Federal Rule 901 to them. In the existing case law, the key issue is typically one of authorship—who authored/posted the proffered document in question. Of course a witness with personal knowledge of authorship could satisfy the Federal Rule 901(b)(1) foundation. But in most of the existing case law, it is the criminal defendant against whom the document is offered, and the defendant does not testify and/or denies authorship. Thus, as with other forms of electronic evidence, courts look to circumstantial evidence to establish authorship such as the name, birth date, or profile picture attached to a social networking account or the content of posts or messages sent from the account. Courts have generally taken one of two approaches to the authentication issue. Some courts have imposed a heavier burden of authentication on this evidence due to the courts perception of increased dangers of falsehood and fraud in that electronic medium. While these courts purport to apply the relatively lenient standard of Federal Rule 901, they have excluded social networking evidence absent significant corroboration of the identity of the author. For these courts, it appears that the mere possibility that someone other than the purported author could have created the social networking evidence is sufficient to exclude the evidence for lack of authentication.

Other courts have held that concerns about false authorship go to the weight of social networking evidence, as opposed to its admissibility. For these courts, once a proponent has made a prima facie showing that social networking evidence was created by its purported author, concerns about the vulnerability of social networking evidence to false authorship are left to evaluation by the jury.

In addition, some courts have found that other risks inhere in photographs posted on social networks. Such photos have been excluded in the absence of expert testimony that the photos are not composites or "faked," due to "the untrustworthiness of images downloaded from the internet." And courts have yet to grapple with some of the other tools of social

network sites, such as the ability of owners to post “tags” in photos, identifying themselves or other members of the site by name and location. Persons so tagged are informed only if they are the owner of the site. Otherwise, a person's photo may be tagged incorrectly on a third person's site, and the person wrongly tagged may never be informed. New features, such as adding a caption or a comment on photos posted by others, involve additional risks of error.

In sum, courts have not yet reached a consensus on how best to address social networking evidence and a number of issues unique to this type of evidence have yet to be addressed. However, the approach by courts imposing a heavier burden on social networking evidence is reminiscent of the conservative response many courts had to the advent of other technologies such as the telegraph, the computer, and the internet. With time the trend may well shift towards the second category of cases as courts become more familiar with the social networking medium and the perceived dangers of this evidence dissipate. Given that many of the cases taking a lenient approach to social networking evidence have arisen in only the last two to three years, this shift may already be occurring. In addition, solutions to the problems of identity-security may be developed within the social network technology itself.

Computer-Generated Documents. When a computer is simply used as a typewriter, computer-generated documents may be authenticated by any of the means discussed in §§ 222 to 224 supra. Documents stored in a computer frequently need to be authenticated by proof of a connection to a particular person, either to show authorship or possession of the document. The mere presence of a document in a personal or business computer file will constitute some indication of a connection with the person or persons having ordinary access to that file. However, much will depend on the surrounding facts and circumstances, and it is reasonable to require that these include some additional evidence of authenticity.

Authenticity may also depend on the accuracy of the process by which computer documents are generated. To lay this foundation, a qualified witness should have general knowledge of who prepares the printouts, how they are prepared, and the way the system records and retrieves information. If the records are pre-existing and are simply stored in a computer, or are identified as belonging to a party-opponent and are thus admissible as party admissions regardless of their accuracy, the information about their retrieval will suffice. Basic computer operations relied on in the ordinary course of business are admitted without an elaborate showing of accuracy. The accuracy of the individual computer will not be scrutinized unless specifically challenged, and even perceived errors in the output are said to go to the weight of the evidence, not its admissibility.

When a computer is used to create a data compilation, how much information will be required about data input and processing to authenticate the output will depend on the nature and completeness of the data, the complexity of the manipulation, the routineness of the operation, and verifiability of the result. A more elaborate foundation may be required to satisfy Federal Rule 901(b)(9) if the computer is performing more complex manipulations. Testimony about the computer equipment, the hardware and software, the

competency of the operators, the procedures for inputting data and retrieving the outputs may be necessary, particularly if these elements are challenged. The hearsay nature of the output will also require the satisfaction of a hearsay exception, typically the business or public records exceptions to the hearsay rule. The use of computers to generate demonstrative aids and simulations is discussed in §§ 214 and 218 supra.

C. CASE LAW

R. v. C.B., 2019 ONCA 380

[63] To determine this ground of appeal requires consideration of what is involved in the process of authentication; how it may be established, especially with respect to the subject-matter in issue here; and the roles of the trier of law and the trier of fact in the authentication process.

[64] The requirement of authentication applies to various kinds of real evidence. Authentication involves a showing by the proponent of the evidence that the thing or item proffered really is what its proponent claims it to be: Kenneth S. Broun, ed., *McCormick on Evidence*, 7th ed., vol. 2 (Thomson Reuters, 2013), at § 212, pp. 4-5.

[65] Authentication is the process of convincing a court that a thing matches the claim made about it. In other words, it is what its proponent claims it to be. Authentication is intertwined with relevance: in the absence of authentication, the thing lacks relevance unless it is tendered as bogus. Thus, authentication becomes necessary where the item is tendered as real or documentary evidence.

[66] At common law, authentication requires the introduction of *some* evidence that the item is what it purports to be: *R. v. Donald* (1958), 1958 CanLII 470 (NB CA), 121 C.C.C. 304 (N.B. C.A., at p. 306; *R. v. Staniforth* (1979), 11 C.R. (3d) 84 (Ont. C.A.), at p. 89; *R. v. Hirsch*, 2017 SKCA 14, 353 C.C.C. (3d) 230, at para. 18. The requirement is not onerous and may be established by either or both direct and circumstantial evidence.

[67] For electronic documents, s. 31.1 of the *CEA* assigns a party who seeks to admit an electronic document as evidence the burden of proving its authenticity. To meet this burden, the party must adduce evidence *capable* of supporting a finding that the electronic document is what it purports to be. Section 31.8 provides an expansive definition of "electronic document", a term which encompasses devices by or in which data is recorded or stored. Under s. 31.1, as at common law, the threshold to be met is low. When that threshold is satisfied, the electronic document is admissible, and thus available for use by the trier of fact.

[68] To satisfy this modest threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, the proponent may adduce and rely upon direct and circumstantial evidence. Section 31.1 does *not* limit how or by what means the threshold may be met. Its only requirement is that the evidence be *capable* of supporting a finding that the electronic document "is that which it is purported to be." That circumstantial evidence may be relied upon is well established: *Hirsch*, at para. 18; *R. v. Colosie*, 2016 ONSC 1708, at

para. 25; *R. v. Bulldog*, 2015 ABCA 251, 326 C.C.C (3d) 385, at para. 35; see also *R. v. Evans*, 1993 CanLII 86 (SCC), [1993] 3 S.C.R. 653, at p. 663. This accords with general principles about proof of facts in criminal proceedings, whether the facts sought to be established are preliminary facts on an admissibility inquiry or ultimate facts necessary to prove guilt.

[69] At common law, correspondence could be authenticated by the "reply letter" doctrine: to authenticate correspondence as having been sent by one individual to another, evidence is adduced to show it is a reply to a letter sent to that person. As a matter of logic, the same should hold true for text messages and emails. Evidence that A sent a text or email to B whom A believed was linked to a specific address, and evidence of a response purportedly from B affords some evidence of authenticity: David Paciocco, "Proof and Progress: Coping with the Law of Evidence in a Technological Age" (2013) 11 C.J.L.T. 181, at pp. 197-8 (*Paciocco*).

[70] In a similar way, text messages may be linked to particular phones by examining the recorded number of the sender and receiving evidence linking that number to a specific individual, as for example, by admission: *Paciocco*, at p. 198.

[71] But what of the prospect of tampering? Does it have to be negated before digital evidence can be properly authenticated?

[72] As a matter of principle, it seems reasonable to infer that the sender has authored a message sent from his or her phone number. This inference is available and should be drawn in the absence of evidence that gives an air of reality to a claim that this may not be so. Rank speculation is not sufficient: *R. v. Ambrose*, 2015 ONCJ 813, at para. 52. And even if there were an air of reality to such a claim, the low threshold for authentication, whether at common law or under s. 31.1 of the *CEA*, would seem to assign such a prospect to an assessment of weight.

R. v. S.H., 2019 ONCA 669

B. ADMISSIBILITY OF CELL PHONE EVIDENCE

(i) Introduction

[10] Sections 31.1, 31.2, and 31.3 of the *Canada Evidence Act* prescribe the manner in which electronic documents can meet the common law authenticity and best evidence rules, which impose threshold requirements for the admissibility of documents at a trial. In addition to these threshold requirements, electronic documents – like any other form of document – must satisfy common law or statutory admissibility rules to support the admission of their contents.

[11] The trial judge found that the electronic data evidence introduced in this case met the authenticity and best evidence rule requirements set out in the *Canada Evidence Act*. He also found the evidence admissible for the truth of its content. On appeal, the sole challenge to these rulings is the trial judge's reliance on s. 31.3(b) of the *Canada Evidence Act* to support

satisfaction of the best evidence rule. As I have said, the Crown concedes the trial judge's reliance on s. 31.3(b) was in error, but argues the evidence was properly admissible under s. 31.3(a).

(ii) Discussion

[12] Section 31.2 of the *Canada Evidence Act* describes two ways in which the best evidence rule can be met. The first is "on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored": s. 31.2(1)(a). The second is "if an evidentiary presumption under s. 31.4 applies." Section 31.2 reads as follows:

> 31.2 (1)
> The best evidence rule in respect of an electronic document is satisfied
>
> > (a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or
> >
> > (b) if an evidentiary presumption established under section 31.4 applies.
>
> (2)
> Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

[13] In this case, the Crown relies on s. 31.2(1)(a), under which the best evidence rule can be satisfied by proof of the integrity of the electronic documents system on which an electronic document is stored. Section 31.3 describes three methods by which, "in the absence of evidence to the contrary", the integrity of an electronic documents system may be proven. Paraphrased, those methods are:

- presumption of integrity of an electronic documents system arising from evidence capable of supporting a finding of storage of the electronic document[s] on a properly operating computer or other similar device (s. 31.3(a));
- presumption of integrity of an electronic documents system arising from storage of an electronic document by a party adverse in interest (s. 31.3(b)); and
- presumption of integrity of an electronic documents system arising from storage of an electronic document in the usual and ordinary course of business (s. 31.3(c)).

[14] Subsections 31.3(a) and (b) are the relevant provisions for the purposes of this appeal. Those subsections read as follows:

> 31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven
>
> > (a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;
> >
> > (b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it.

[15] The Crown acknowledges that because it alleged that the Samsung cell phone belonged to C.H. – and because C.H. was not the accused in this case – s. 31.3(b), on which the trial judge relied, does not apply. Rather, on appeal, the Crown relies on s. 31.3(a) and argues that the evidence led at trial was "capable of supporting a finding that at all material times the [Samsung cell phone] was operating properly, or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document[s relied on by the Crown] and there are no other reasonable grounds to doubt the integrity of the [Samsung cell phone] system."

[16] The appellant resists this argument on two bases. First, he submits that the Crown did not claim at trial that it had led evidence to satisfy the requirements of s. 31.3(a). Second, he argues that, to satisfy the best evidence rule, the Crown should have called C.H. as a witness at trial to confirm the text messages introduced in evidence were sent or received. Alternatively, the Crown could have adduced evidence of testing the Samsung cell phone to ensure the text messaging function was operating properly. As the Crown failed to adduce either form of evidence, it could not satisfy the best evidence rule.

[17] I accept the Crown's submission that the evidence adduced at trial was capable of supporting a finding that the Samsung cell phone was functioning properly at all material times or, if it was not, that any malfunction did not affect the integrity of the electronic documents relied on by the Crown, and that there are no other grounds to doubt the integrity of the electronic documents system. I am also satisfied that the Crown is entitled to rely on s. 31.3(a) on appeal and that no substantial wrong or miscarriage of justice arises from the trial judge's reliance on s. 31.3(b).

[18] The Crown called four witnesses at trial: i) police officer Justin Ford, who extracted the data from the Samsung cell phone; ii) police officer Mitch Dietrich, who acted as the exhibits officer when the search warrant was executed; iii) police officer Jeff Varey, who

prepared the extraction report and was the officer-in-charge of executing the search warrant; and iv) police officer Steven Martell, who was qualified to give expert opinion evidence concerning trafficking in cocaine and marijuana.

[19] Officer Ford explained that he used a read-only forensic extraction device (a UFED Touch) to unlock, extract data from, and create, in disc format, a copy of the Samsung cell phone. He testified that he is a trained and certified operator of the UFED Touch, that he verified that the disc accurately reflected data from the Samsung cell phone, and that it included deleted content. He also explained that once the cell phone was unlocked, he was able to obtain from it its assigned telephone number, which ended with 0137, and the user's e-mail address. The e-mail address corresponded with the first letter of C.H.'s (the young person alleged to be the appellant's son) surname and his complete forename.

[20] Officer Ford provided a disc containing a copy of the information on the Samsung cell phone and a "reader" program associated with the UFED to officer Varey. Officer Ford explained that the reader program could generate extraction reports isolating text messages between the cell phone from which the data was extracted (the "source data cell phone") and another party. In doing so, the reader program would populate the report with both the telephone number of the other party and the associated name in the source data cell phone's contact list.

[21] While in the witness box, officer Ford examined an extraction report, created by officer Varey[4], which was marked as exhibit 3B at trial. The extraction report isolated text messages sent primarily between the Samsung cell phone and a telephone number ending with 6847, which was associated with the contact name "Dad" in the Samsung cell phone contacts list. Officer Ford confirmed that a status column on the extraction report indicated whether a text message received on the Samsung cell phone had been read or was simply waiting in the inbox. The status column on the extraction report also confirmed whether a text message sent on the Samsung cell phone had been sent and read or whether its status was sent and "unknown". Another column on the extraction report indicated whether the message box contained deleted, but recovered, content.

[22] A review of the extraction report marked as exhibit 3B reveals a record of 965 purported text messages, listed in reverse chronological order, between the Samsung cell phone and the 6847 number. The purported text messages ranged in date from April 17, 2015 to September 22, 2015, the day before the execution of the search warrant. A review of the purported text messages reveals consistently coherent conversations between the sender and recipient, some examples of which are the following:

#	Folder	Party	Time	Status	Message
14	Sent	**To** +1******6847 Dad	18/09/2015 12:06:00 PM	Sent	Dad can u get jars cuz dis stuff is down hanging we just gotta jar it now
13	Inbox	**From** +1******6847 Dad	18/09/2015 12:29:24 PM	Read	If I get chance thought you had some

12	Sent	**To** +1******6847 Dad	18/09/2015 12:47:23 PM	Sent	I dis idk where they went

#	Folder	Party	Time	Status	Message
32	Inbox	**From** +1******6847 Dad	15/09/2015 9:02:02 AM	Read	We need to go pick that one plant today it's done
31	Sent	**To** +1******6847 Dad	15/09/2015 11:30:22 AM	Sent	Aight are u home wanna go do it in a abit
30	Inbox	**From** +1******6847 Dad	15/09/2015 11:32:51 AM	Read	I'm not at home but I'll come in a bit about hour or two it's diffently has to be picked though

#	Folder	Party	Time	Status	Message
38	Inbox	**From** +1******6847 Dad	13/09/2015 5:38:28 PM	Read	No more net flex cause my Internet is over limit alread
37	Sent	**To** +1******6847 Dad	13/09/2015 7:08:33 PM	Sent	What I just started using it

[23] Officer Varey confirmed that, in addition to exhibit 3B, the disc prepared by officer Ford revealed thousands of other text messages exchanged between the Samsung telephone and other recipients as well as photographs. He also stated that the Samsung cell phone was in good working order.

[24] In my view, an examination of exhibit 3B in combination with the evidence of officers Ford and Varey is manifestly capable of supporting a finding that, at all material times, the Samsung cell phone was working properly or if it was not, that any malfunction did not affect the integrity of the electronic documents relied on by the Crown, and that there are no other reasonable grounds to doubt the integrity of the electronic documents system.

[25] In my view, the requirement in s. 31.3(a) of the *Canada Evidence Act* for "evidence capable of supporting" the relevant findings represents a low threshold. This is apparent when s. 31.3(a) is read in context with, for example s. 31.3(b), which requires that it be "established" that an electronic document was recorded or stored by a party adverse in interest.

[26] Exhibit 3B, when reviewed in the light of officers Ford and Varey's evidence reveals the presence of numerous text messages stored in chronological order and customary format, demonstrating coherent conversations, between a sender and a recipient that had been both sent and received by the Samsung cell phone. The extraction report also indicated that numerous messages had been read by a recipient.

[27] Further, the conversations on the extraction report are contextually consistent with other facts in this case. For example, there are references to a dog and a pig in the text messages. According to officer Varey's initial evidence, both a dog and a pig were present when the search warrant was executed. No basis for questioning the integrity of the electronic documents system has been suggested on appeal or in the court below.

[28] In my view, the appellant's arguments that it was necessary that the Crown call C.H. to verify the content of the text messages or provide evidence of testing the Samsung cell phone text messaging system is misconceived. In the context of the evidence adduced in this case, that would amount to requiring that it be established that, at all material times, the Samsung cell phone was operating properly. That is not the threshold under s. 31.3(a).

[29] Similarly, I reject the appellant's argument that the fact that the Crown did not argue that it had satisfied s. 31.3(a) in the court below should foreclose its reliance on that section on appeal. As noted in *R. v. C. (W.B.)*, 2000 CanLII 5659 (ON CA), 130 O.A.C. 1, the Crown, as respondent, is entitled to advance any argument to sustain the conviction that can be based on the record made at trial (citing *R. v. Perka*, 1984 CanLII 23 (SCC), [1984] 2 S.C.R. 232 at 238-40; *Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 S.C.R. 631 at 643-4; *R. v. Keegstra*, 1995 CanLII 91 (SCC), [1995] 2 S.C.R. 381 at 398).

[30] In my view, the evidence at trial clearly satisfied the requirements of s. 31.3(a). The appellant did not argue on appeal that he would have adopted a different trial strategy had the Crown relied on s. 31.3(a) at trial. In any event, had the appellant been in a position to lead "evidence to the contrary" calling into question the integrity of the electronic documents system, he should have done so regardless of which subsection of s. 31.3 on which the Crown relied.

[31] As the impugned evidence was properly admissible at trial, and as no valid concern about prejudice has been raised, I conclude that the trial judge's reliance on s. 31.3(b) of the *Canada Evidence Act* instead of s. 31.3(a) was a minor error that did not affect the outcome of the trial.

A. Authentication of documentary evidence

[14] The primary allegation of error in this appeal is that the trial judge admitted and relied on digital photographs—namely, the screen captures of what was, ostensibly, Mr. Hirsch's Facebook page—to convict Mr. Hirsch, without requiring the Crown to authenticate that evidence and despite his trial counsel's objections to admissibility and authenticity. The screen captures included images of a Facebook page showing a post of a nude photograph of the complainant as well as a post of the textual message complained of in this case.

[15] In his factum, Mr. Hirsch confined his argument to the authentication of the screen captures and, relatedly, authorship of the Facebook posts. In that regard, the Crown had adduced evidence through the complainant to the effect that she recognised the Facebook page shown in screen captures as that of Mr. Hirsch. In his factum, Mr. Hirsch takes issue with this because, as the complainant admitted, Mr. Hirsch had blocked her access to his Facebook page about two months before the offence and, therefore, she had had no recent, direct access to his page and was not in a position to authenticate it. Mr. Hirsch also says the Crown ought to have called the complainant's friend, who had taken the screen captures and given them to the complainant, for authentication purposes and to dispel any speculation about editing or tampering.

[16] In oral argument before this Court, Mr. Hirsch additionally alleged the Crown had failed to comply with the requirements of the *Canada Evidence Act*, RSC 1985, c C-5, as they relate to electronic documents. In particular, the *Canada Evidence Act* provides:

> **Authentication of electronic documents**
>
> **31.1** Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.
>
> **Application of best evidence rule — electronic documents**
>
> **31.2(1)** The best evidence rule in respect of an electronic document is satisfied
>
> > **(a)** on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; …
>
> **Presumption of integrity**
>
> **31.3** For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven
>
> > **(a)** by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of

> the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;
>
> **(b)** if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or
>
> **(c)** if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.
>
> …
>
> **Application**
>
> **31.7** Sections 31.1 to 31.4 do not affect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence.
>
> **Definitions**
>
> **31.8** The definitions in this section apply in sections 31.1 to 31.6.
>
> ***computer system*** means a device that, or a group of interconnected or related devices one or more of which,
>
> **(a)** contains computer programs or other data; and
>
> **(b)** pursuant to computer programs, performs logic and control, and may perform any other function.
>
> ***data*** means representations of information or of concepts, in any form.
>
> ***electronic document*** means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data.
>
> ***electronic documents system*** includes a computer system or other similar device by or in which data is recorded or stored and any procedures related to the recording or storage of electronic documents.

[17] On the basis of his factum and oral arguments, I would identify the issues raised by Mr. Hirsch in relation to this aspect of the appeal as being twofold:

(a) whether the Crown had authenticated an electronic document; and

(b) whether the Crown had proven the integrity of an electronic document.

Authentication of an electronic document

[18] I am not persuaded by Mr. Hirsch's arguments on authentication and the related issue of authorship. In my assessment, s. 31.1 of the *Canada Evidence Act* is a codification of the

common law rule of evidence authentication. The provision merely requires the party seeking to adduce an electronic document into evidence to prove that the electronic document is what it purports to be. This may be done through direct or circumstantial evidence: The Honourable Justice David Watt, *Watt's Manual of Criminal Evidence, 2016* (Toronto: Thomson Reuters, 2016) at 104 [*Watt's Manual*]. Quite simply, to authenticate an electronic document, counsel could present it to a witness for identification and, presumably, the witness would articulate some basis for authenticating it as what it purported to be (see: *Pfizer Canada Inc. v Teva Canada Limited*, 2016 FCA 161 at para 93, 400 DLR (4th) 723). That is, while authentication is required, it is not an onerous requirement. In *Watt's Manual*, the author notes at 1115:

> The *burden* of proving authenticity of an electronic document is on the person who seeks its admission. The *standard* of proof required is the introduction of evidence *capable* of supporting a finding that the electronic document is as it claims to be. In essence, the threshold is met and admissibility achieved by the introduction of *some* evidence of authenticity.
>
> [Emphasis in original]

As this suggests, the integrity (or reliability) of the electronic document is not open to attack at the authentication stage of the inquiry. Those questions are to be resolved under s. 31.2 of the *Canada Evidence Act—i.e.*, the best evidence rule, as it relates to electronic documents. (See, as examples, the applications of ss. 31.1 and 31.2 in *R v Himes*, 2016 ONSC 249 at paras 45–48; *R v K.M.*, 2016 NWTSC 36; *R v Oland*, 2015 NBQB 245 at paras 52–91, 446 NBR (2d) 224; and *R v Moon*, 2016 ABPC 103, 36 Alta LR (6th) 386; but see *R v Moise*, 2016 MBCA 61, decided under the test in *R v Palmer*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759, for admissibility of fresh evidence on appeal.)

[19] As to authentication in this case, as noted, the Crown put the screen captures to the complainant and she testified as to recognising them as depicting Mr. Hirsch's Facebook page. She gave reasons to support her identification of it and its author: a) she was familiar with Mr. Hirsch's Facebook page; b) she recognised the Facebook page as being that of Mr. Hirsch; c) she recognised a nude photograph of herself that she had sent only to Mr. Hirsch; d) he was shown as the author of the posts; and e) the textual postings were consistent with the manner in which Mr. Hirsch communicated.

[20] In cross-examination, the complainant acknowledged she had no way of knowing whether her friend, who had sent her the screen captures, had edited or changed what they purported to show. However, when Mr. Hirsch's trial counsel asked her whether she recognised the words complained of as a quote from a Dave Chappelle comedy sketch, she agreed it was, or some of it was, namely, the choking part. But, she recognised the words "because he [Mr. Hirsch] used to always say that." She had no direct knowledge of the comedy sketch. She also testified under cross-examination that she recognised a small photograph of her cat on the Facebook page, located right beside Mr. Hirsch's name. She said she knew the screen captures had been taken 31 minutes after the nude photograph and threat had been posted to Facebook by reason of the

timestamp on the postings shown in the screen captures, but acknowledged she had no idea when the postings themselves had occurred.

[21] From the transcript, it is clear the trial judge was alive to the issues of authentication and authorship, although perhaps not to the requirements of s. 31.1 of the *Canada Evidence Act*, which had not been raised at trial. Nevertheless, I am satisfied the evidence adduced in this respect was *capable* of authenticating the screen captures as a record of Mr. Hirsch's Facebook page. While it might have been preferable to have the complainant's friend testify as to authenticity, there was sufficient evidence of authentication before the trial judge for him to reach the conclusion that he did and, because of that, I find no compelling reason to interfere with his conclusion that the screen captures were admissible.

Proof of integrity

[22] At common law, the best evidence rule requires the proponent of a record to produce the original record or the next best available record: *Watt's Manual* at 106. However, the concept of an *original* is not readily applied to electronic documents. Further, due to the inherent nature of electronic documents, it is often impossible to provide direct evidence of the integrity of an electronic document sought to be adduced into evidence. For this reason, the *Canada Evidence Act* dispenses with the common law requirement of an *original* record and substitutes other means of satisfying the purpose that underpins the best evidence rule. See, for example, the application of these provisions in *R v Nde Soh*, 2014 NBQB 20, 416 NBR (2d) 328.

[23] The purpose of the best evidence rule is to assist the trier of fact with the verification of the integrity of documents because alterations are more readily detectible on original documents. Sections 31.2 to 31.6 of the *Canada Evidence Act* set out the means by which a party may prove the integrity of an electronic document. In simple terms, under that *Act*, the integrity of an electronic document is proven by establishing the integrity or reliability of the electronic document system in which it is recorded or stored. That is, proof of electronic document *system integrity* is a substitute for proof of electronic *document integrity*.

[24] Of importance in this case, s. 31.3(b) provides for a *presumption of integrity* in the circumstances where a party has established that the electronic document the party seeks to adduce into evidence was recorded or stored by another party who is adverse in interest to the party seeking to introduce it. Although no reference was made to the *Canada Evidence Act* at trial, this was largely the circumstance before the trial judge. The Crown sought to introduce copies of Mr. Hirsch's Facebook page—an electronic document recorded and stored by Mr. Hirsch—through screen captures of that electronic document. It might be suggested that, in one sense, there were actually two electronic documents at issue: the screen captures themselves and the Facebook page itself. However, the more compelling conclusion is that the screen captures are the best evidence available to the Crown to adduce Mr. Hirsch's Facebook page itself into evidence. Indeed, given the fluidity and impermanence of postings on a Facebook page, a screen capture may be one of the few ways of establishing what was actually posted on a Facebook page at any point in time. On this basis, I am satisfied the presumption of integrity under s. 31.3(b) of

the *Canada Evidence Act* applied in these circumstances and was not rebutted (Mr. Hirsch adduced no evidence).

[25] However, as the *Canada Evidence Act* had not been raised, the trial judge approached the matter differently. He addressed only the arguments raised at trial by Mr. Hirsh against admissibility and authentication. In that respect, Mr. Hirsch had argued the complainant's lack of direct access to his Facebook page meant there was no direct evidence that there were nude photographs of her on it or that threats had been conveyed through it. That is, Mr. Hirsch argued identity or authorship could not be proven beyond a reasonable doubt because the screen captures had not been authenticated by the person who had sent them to the complainant.

[26] The trial judge rejected these arguments because, in his assessment, the evidence considered as a whole proved the screen captures accurately depicted Mr. Hirsch's Facebook page. Critically, the trial judge found that Mr. Hirsch was the author of the text messages subsequently sent to the complainant and that those messages were capable of proving Mr. Hirsch had also posted the threatening message on his Facebook page. He marshalled the following evidence in support of his findings:

(a) the complainant was familiar with and recognized Mr. Hirsch's Facebook page;

(b) it was highly likely the Facebook post and the text messages sent to the complainant were authored by the same person given the similarity in the nature of the language used in both;

(c) the language of the threatening Facebook post was similar to how Mr. Hirsch normally spoke to the complainant;

(d) the author of the Facebook post and the text messages referred to the complainant by her first name;

(e) there was a picture of Mr. Hirsch and the complainant's cat on the Facebook page;

(f) Mr. Hirsch was the only person who had nude photographs of the complainant;

(g) it would be highly speculative to find the complainant's friend had modified the screen captures; and

(h) it would be highly speculative to find that someone other than Mr. Hirsch had posted the threatening message on Mr. Hirsch's Facebook page.

[27] Moreover, when discussing the issue of whether time was an essential element of the charge, the trial judge made a finding on the basis of the text messages that I can only interpret as his conclusion that Mr. Hirsch had *admitted* responsibility for posting the threatening message and nude photograph to his Facebook page. In his oral reasons in this regard, the trial judge said:

> In fact, based on Mr. Hirsch's texts, subsequent to [the complainant] raising the issue, *it seems Mr. Hirsch was quite content to take responsibility for the Facebook post.* Again, I look to the upper screen shot on page 4 of Exhibit P-1 [*i.e.*, screen-captures of the text messages], and note that below the shot of the exposed breast, Mr. Hirsch writes: (as read)
>
> > Fuck, I wish I would have kept them ugly pics of you and Facebooked them. I got -- only had a tit shot, but I decided disrespect will get you disrespect like I told you over and over.
>
> I note there is nothing in any of these emails that would suggest Mr. Hirsch felt he had been framed by somebody else. There is no doubt in my mind that Mr. Hirsch also authored the incoming text messages in Exhibit P-1. To find otherwise would be to engage in even greater speculation. …

[28] In addition, although not specifically referenced by the trial judge in his reasons, the evidence was that Mr. Hirsch had also sent the following text messages to the complainant:

> That just got sent to fb and every contact and email in my pphone…have a.goood day looper

and

> Fucking delete it urself.cause i got more…cunt.disrespect me and ull getvit worse in return…if ud have learned this wouldn't happen but ur to outta control to make it throughh a fucking day without disrespecting me..I WANT U DEAD

and

> I'm goonna torment u till u fucking leave me alone.do u think i want u.i can't stand fucking u.its been boring and lame since i met u.

[29] Given the evidence and the presumption of integrity under the *Canada Evidence Act*, I find no reason to disturb the trial judge's decision to admit the screen captures into evidence as an authenticated electronic document depicting Facebook postings authored by Mr. Hirsch.

The Civil Litigator's Survival Guide to Evidence

November 6, 2020

Expert Evidence: How It Can Make or Break Your Case

EXPERT EVIDENCE: HOW IT CAN MAKE OR BREAK YOUR CASE

ROBERT B. BELL

Lerners LLP

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OSGOODE PROFESSIONAL DEVELOPMENT
OSGOODE HALL LAW SCHOOL
YORK UNIVERSITÉ UNIVERSITY

What is Expert Evidence and When is it Needed?

- The rule is witnesses testify at trial as to facts, never opinion
- It is the role of the trial judge to make findings of fact and to draw inferences from proven facts
- Expert evidence is the exception to the rule

What is Expert Evidence and When is it Needed? (Contd.)

- An expert can testify to assist the trial judge where specialized knowledge is required to determine the implications of the bare facts and where the judge is not competent to draw the necessary inferences: see *R.* v. *Mohan*, [1994] 2 S.C.R. 9 and *R.* v. *Abbey*, 2009 ONCA 624

- Court has "gatekeeper" function: it really is NOT everything goes to weight *R.* v. *J* (J.L.) (2000) 192 D.L.R. 4th 416 (SCC)

- Example, bare facts are accident, collision damage and observation or photographs of seat belt webbing.

- Expert knowledge is required to provide an opinion on seat belt use (old school) or now on delta v; interpretation of data; and occupant kinematics

What is Expert Evidence and When is it Needed? (Contd.)

- The expert cannot opine on the ultimate issue in the case, that is the court's function

Imeson v. *Maryvale* et al., 2018 ONCA 888

Will Expert Evidence Make or Break a Case?

- Some stories
  - Spiral fracture
  - Getting opposing expert to help
  - Quantification of loss for entity which did not start up business

ANSWER : **YES**

Cases you should know (after you read Rule 53.03)

- Objectivity/Bias:

  Saguenay 2015 SCC 16

  White Burgess 2015 SCC 23

- Report or no Report?

  Westerhof v. *Gee Estate,* 2015 ONCA 206

- Role of Counsel

  Moore v. *Getahun* 2015 ONCA 55

Rule 4.1.01

- *Westerhof* is also informative on what the court ought to be concerned about in considering expert testimony. Prior to the 2010 amendments to the Rule, it seemed that "too many experts are no more than hired guns who tailor the reports and evidence to suit the client's needs."

- Part of the 2010 amendments include Rule 4.1.01 which sets out that "the overriding duty of every expert engaged by or on behalf of a party to provide opinion evidence that is fair, objective and non-partisan and within the expert's area of expertise."

Expert as Advocate

- Be aware that you can hire an expert as advocate – she will be a “consulting expert” but will never testify

- Deep 6 Rule – requires undertaking not to call the expert at trial

What Goes in the Report?

As of January 1, 2019 Rule 53-03 (Experts' Reports) was amended. It now reads:

EXPERT WITNESSES

Experts' Reports

- **53.03** (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48; O. Reg. 170/14, s. 17.
- (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.
- (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:
  1. The expert's name, address and area of expertise.
  2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
  3. The instructions provided to the expert in relation to the proceeding.
  4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
  5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
  6. The expert's reasons for his or her opinion, including,
- i. a description of the factual assumptions on which the opinion is based,
- ii. a description of any research conducted by the expert that led him or her to form the opinion, and
- iii. a list of every document, if any, relied on by the expert in forming the opinion.
- 7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.

What Goes in the Report?

As of January 1, 2019 Rule 53-03 (Experts' Reports) was amended. It now reads: (Contd.)

Schedule for Service of Reports

(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1), (2) and (3), unless the court orders otherwise. O. Reg. 438/08, s. 48; O. Reg. 537/18, s. 8 (1).

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

(a) a report served under this rule;

(b) a supplementary report served on every other party to the action not less than 45 days before the commencement of the trial; or

(c) a responding supplementary report served on every other party to the action not less than 15 days before the commencement of the trial. O. Reg. 348/97, s. 3; O. Reg. 537/18, s. 8 (2).

Extension or Abridgment of Time

(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,

(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or

(b) by the court, on motion. O. Reg. 570/98. s. 3; O. Reg. 186/10, s. 4.

Exceptions to Rule 53-03

- Medical reports – Admitted as evidence under Rule 52

  Girao v *Cunningham*, 2020 ONCA 260

- "Participant experts" and "non-party experts" – Do not have to comply with Rule 53-03

  Westerhof

- Judges have discretion to excuse failure to provide Form 53 and admit expert evidence

  Ontario v *855 Darby Road*, 2019 ONCA 31

How Much Substance?

- Read Rule 31.06(3)
- Entitled on discovery to disclosure of “findings, opinions and conclusions.”
- Why so many games on disclosure? Early disclosure should encourage resolution.
- Delay in disclosing expert opinions according to 2003 Task Force leads to “difficulties.” Further, proliferation of expert reports is “an ongoing challenge.”

How Much Substance? (Contd.)

There should be no surprises at trial on:

- Facts used for opinion
- Assumptions
- Answers to hypothetical questions

Guidance On Working With Experts – Principles To Apply

- **First Principle**: do nothing to interfere with independence and objectivity of the expert

- Why? The court will reject the testimony of an expert who appears to be an advocate for a party instead of offering an opinion to assist the court

Guidance On Working With Experts – Principles To Apply (Contd.)

- **Second Principle**: There is nothing wrong with counsel working with the expert prior to arriving at the impartial opinion. "Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to pertinent legal issues in a case"

Guidance On Working With Experts – Principles To Apply (Contd.)

- **Third Principle**: Litigation privilege applies to communications with the expert and draft reports and need not be documented and disclosed to an opposing party: "Compelling production of all drafts, good and bad, would discourage parties from engaging experts to provide careful and dispassionate opinions and would instead encourage partisan and unbalanced reports."

Guidance On Working With Experts – Principles To Apply (Contd.)

- **Fourth Principle**: At trial, the expert's testimony is the evidence, not the report produced pursuant to Rule 53.03 (2.1). It is good practice to provide the report as an aid memoire to the trial judge. Be careful about permitting the report to be marked as an exhibit, although this regularly happens in commercial cases

The New Hot Tub

- What to do when experts seek to consult together
- To create written points of agreement and disagreement with a summary of reasons

Qualifying the Expert

- Qualify and tender the witness as an expert in relevant area
- Only then can expert opinion be given as evidence
- Read checklists/sample examination questions in *Mauet* et al, Fundamentals of Trial Techniques or other texts
- Qualifying an expert is more than marking C.V. as an exhibit

Tips in Qualifying the Expert

- What to do re “no objections” to qualifications
  - focus on accomplishments most relevant to the issues
  - efficiently demonstrate preeminence, i.e. expert testimony accepted on multiple occasions; peer recognition; relevant publications
  - probe practical not just academic experience

Challenge Qualifications?

- Before ruling on qualifying expert, cross-examine on :
  - Limitations to expertise
  - Too general
  - Never testified or been accepted as expert witness
  - No practical experience
  - Any bias – research how the witness has been received by the courts in the past
  - A paid shill?

Be Aware Expert will be Disqualified:

- If there is a direct financial interest in the outcome of the case
- Is a relative of a party
- May incur professional liability if the opinion is not accepted by the court

Vulnerable Areas for the Expert

- Failed to consider all relevant facts
- If asked to assume, is there any air of reality to the assumption?
- Was the testimony arrogant, filled with jargon and well, just not clear ?

Vulnerable Areas for the Expert (Contd.)

- Hallmark of an advocate, not an objective expert
  - When questioned were there self-serving speeches, not responsive to the question?
  - Did the expert refuse to concede the obvious just because it might hurt the opinion?
  - Has the expert displayed expectation bias, that is, the sequence of events must fit the conclusion, no matter how farfetched the sequence becomes?
  - Will expert give just a bit when faced with an eminently reasonable proposition or simply continue to demand “pound of flesh”?
- Not scientific in approach
- Failed to test hypothesis; i.e. testimony is hypothesis not opinion

Vulnerabilities Inform How to Effectively Assist the Court with Expert Testimony

- Also informs areas for cross-examination

Expert Under Cross Examination May : (Note How Points Become Riskier For Lawyer)

- Concede some points favorable to your client's case
- Acknowledge superior credentials and experience of your client's expert
- When confronted with facts not considered, accept that opinion would change
- Become queasy if failed to do "homework" e.g. inspect the product
- Concede that facts relied upon were not proven, opinion suspect
- Concede made errors in testing
- Concede element of work offside peer reviewed literature
- Accept that opinion differs from other opinions expressed

BUT THEY MIGHT NOT !

QUESTIONS?

THANK YOU

THE END

The Civil Litigator's Survival Guide to Evidence

November 6, 2020

Ethical and Professional Issues Relating To Evidence

Dale & Lessmann LLP
Canadian Legal Counsel

BYLD BARRISTERS
BERKOW YOUD LEV-FARRELL DAS LLP

WALKERLAW 10 A DECADE

Ethical & Professional Issues Relating to Evidence

November 6, 2020

Ranjan Das, Tanya C. Walker and Akua Carmichael

Thank you: Natasha Papulkas and Emilie Attia, Students-at-Law

The Civil Litigator's Survival Guide to Evidence 2020

OSGOODE HALL LAW SCHOOL PROFESSIONAL DEVELOPMENT

YORK UNIVERSITÉ UNIVERSITY

ETHICAL SCENARIO #1

- You are the senior lawyer and your client is undergoing a virtual examination for discovery. You are in your office and your client is at home. After it finishes, you discover that your client was communicating with your junior lawyer by text during the break. **What are your obligations?**

ETHICAL SCENARIO #2

- Your client is being examined in a virtual cross-examination. She is at home and you are in the office. Although you have informed her that she should ensure that no one else is in the room with her while being examined, you can hear someone whispering the answers to her during her examination. **What are your obligations?**

ETHICAL SCENARIO #3

- Your client, who is the defendant, has informed us that the strategy is to delay. When the pandemic is announced in the middle of March, we refuse to produce our client for discoveries and explain that in person examinations are required to be more effective. The Consolidated Notice to the Profession dated May 13, 2020 recommends that discoveries be conducted virtually. Your client is insistent that you continue to maintain the position that in-person examinations be conducted after the pandemic is over as that will cause delay. **What are your ethical obligations?**

ETHICAL SCENARIO #4

- You are preparing an affidavit of documents for your client. You notice that only excerpts of text messages and emails that assist your case have been produced. You ask your client for the entire text and email chain. Your client tells you that it will not be produced because it is “not relevant”. **What are your obligations?**

ETHICAL SCENARIO #5

- You are counsel during an examination for discovery. During a break, the opposing side forgot to turn off their microphone and you overhear their conversation with information that is helpful to your case. **What are your obligations?**

ETHICAL SCENARIO #6

- Your client tells you he is not working but “off the record” he is working for his brother being paid cash and is collecting the unemployment COVID-19 benefits, to which he is not entitled. He does not want this revealed in examinations for discovery and has informed you that he will not tell the truth if this question is asked. **What are your obligations if he does not tell the truth in examinations?**

ETHICAL SCENARIO #7

- You have growing concerns about your main witness in a trial which is likely more than a year away. She is elderly and appears to be demonstrating signs of dementia. **What can you do to make sure the evidence is fairly before the Court?**

ETHICAL SCENARIO #8

- Your client always attends meetings with their common law spouse, who has very strong opinions about the case. You receive an offer to settle from the defence. Your client is on the fence about accepting it because he feels the amount offered is too low, however, the common law spouse is insistent it is a good offer and instructs you to accept it. **What do you do?**

ETHICAL SCENARIO #9

- Following an unsuccessful mediation, you receive a letter from the Plaintiff's counsel accusing you of acting in bad faith, uncivil behavior, and engaging in sharp practice. The lawyer advises a complaint to the Law Society will be forthcoming. **What should you do?**

ETHICAL SCENARIO #10

- You retain an expert who delivers a report that is contrary to your client's interest and position. **Must you serve the report?**

OSGOODE HALL LAW SCHOOL PROFESSIONAL DEVELOPMENT | YORK UNIVERSITÉ UNIVERSITY

The Civil Litigator's Survival Guide to Evidence

November 6, 2020

Evidence and the Trial

CARSWELL

ANNUAL REVIEW OF CIVIL LITIGATION

2016

THE HONOURABLE
MR. JUSTICE TODD L. ARCHIBALD
SUPERIOR COURT OF JUSTICE (ONTARIO)

THE LATE HONOURABLE
MR. JUSTICE RANDALL SCOTT ECHLIN
SUPERIOR COURT OF JUSTICE (ONTARIO)


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The Closing Address: The Opening Chapter in Trial Preparation: The Art and Science of Persuasion — Chapter VI

JUSTICE TODD L. ARCHIBALD AND ERIC BROUSSEAU*

The summation is the high point in the art of advocacy; it is the combination and the culmination of all of its many elements. It is the climax of the case. It is the opportunity to rescue a cause until that time perhaps seemingly lost. It calls for every skill the advocate possesses. It calls for more than skill — it is a summons to his courage, a testing ground of his character, a trial of his logic and reasoning powers, his memory, his patience and his tact, his ability to express himself in convincing words; in short, it is an assay of every power of persuasion he possesses. Small wonder, then, that there have been few great summations.

Lloyd Paul Stryker

The Art of Advocacy: A Plea for the Renaissance of the Trial Lawyer

INTRODUCTION

The reader starts with us on the final day of trial. The opening address was long ago, perhaps long since forgotten by the jury or the judge. The evidence is in the record, hopefully as planned or, more likely, with a few surprises for both sides. At last comes that "high point in the art of advocacy," the closing address,[1] during which the advocate gets to do what he or she has prepared to do since the outset of the trial: to tell a persuasive story, argumentatively, emotively and logically. Although the esteemed American trial advocate's comments in our opening quote are a bit hyperbolic, his overall message still resonates. The primary goal of this article is to provide all advocates with some constructive building blocks for a persuasive closing address.

This is the sixth article in a series dedicated to the Art and Science of Persuasion. The first article explored the importance of storytelling to the role of advocate.[2] The second article mapped out the relationship between persuasion

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1 Referred to as a "summation," "closing address," or "final argument" by those who have written on the subject.

2 Justice Todd L. Archibald and J. Manuel Mendelzon, "The Trial Advocate as

and cognitive decision making.[3] The third instalment in the series bridged the gap between theory and practice when it comes to making impactful opening statements.[4] The fourth article in the series examined the use of and reliance on soft science evidence in a courtroom setting.[5] The fifth article explored alternative dispute resolution through the lenses of experimental psychology and behavioural economics.[6]

This article expands on the themes and discussions in the previous articles. It continues to explore the role of trial advocate as storyteller, though in the specific context of the closing address. Part I of this article focuses on what the trial advocate is trying to accomplish in the address. It deals with the broad aims and parameters of the closing and places it in the context of the trial as a whole. Part II is the heart and soul of this article. It picks up on and continues the discussion about storytelling, controlling theme and theory, topics that have formed a common thread throughout this series. It deals with the role of language, organization and context. It also contains suggestions for structuring the closing, dealing with the evidence and effectively delivering the address, all crucial considerations. Part III deals with the legal rules generally applicable to closing addresses, and with objections and remedies for an improper address.

We hope to contribute to the literature on closing addresses, and on advocacy generally, in several important ways. The advocate-as-reliable-narrator is a noteworthy conceptualization of the advocate's role, one that will greatly benefit all practicing trial lawyers. Similarly, the relationship between compelling storytelling and the advocate's personal credibility is rarely discussed in as much depth. Finally, we hope to bridge the gap between written and oral advocacy by applying suggestions which have traditionally been made in the context of written advocacy, such as context, organization and the role of language, to the closing address and to oral advocacy generally.

Storyteller: The Art and Science of Persuasion," in *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2011) [Archibald and Mendelzon, "Trial Advocate as Storyteller"].

3 Justice Todd L. Archibald and Shannon S.W. O'Connor, "Cognitive Psychology in the Courtroom: The Art and Science of Persuasion — Chapter II," in *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2012) [Archibald and O'Connor, "Cognitive Psychology"].

4 Justice Todd L. Archibald and Joshua Tong, "Impactful Trial Opening Statements in the Courtroom: The Art and Science of Persuasion — Chapter III," in *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2013).

5 Justice Todd L. Archibald, "Examining the Reliability of Expert Soft Science Evidence in the Courtroom: The Art and Science of Persuasion — Chapter IV," in *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2014).

6 Justice Todd L. Archibald and Christian Vernon, "Incorporating Insights from Experimental Psychology and Behavioural Economics into ADR Practices: The Art and Science of Persuasion — Chapter V," in *Annual Review of Civil Litigation* (Toronto, Thomson Canada Limited, 2015).

There is one final introductory note. Most rules and suggestions in this article will be equally applicable to all trials, whether before a judge and jury or judge alone. Consequently, this article uses "judge" or the neutral term "trier of fact," but encompasses all triers of fact. The suggestions virtually all apply to trials by judge or jury, and many of the legal rules are the same, if less stringently applied in the context of a judge-alone trial. Where there are differences in the rules, procedures or practices of closing addresses before a jury or a judge, or different considerations to be weighed, this article sets out those differences.

PART I: THE BASICS OF CLOSING: THE CLOSING ADDRESS IN THE CONTEXT OF THE TRIAL

The closing address is the final chapter in the litigation process, but it should be the opening chapter of trial preparation. Trial counsel will be much better situated to make decisions about which witnesses to call, which documents to tender, even which lines of questioning to pursue on examination for discovery and in cross-examination, if she has grasped the themes and the requisite evidence to cover in the closing address. It is the blueprint from which counsel will work backwards to determine the necessary steps at every stage of the trial.

1. Using All the Modes of Persuasion during the Closing

Judges and juries *want* to do the right thing, and the skilled advocate will appeal to the trier of fact's innate sense of justice to get them there.[7] In order to do so, counsel must convince the judge of the justice of their client's case. Aristotle wrote of three modes of persuasion: *ethos* (credibility), *pathos* (emotional appeal), and *logos* (logical coherence).[8] Slightly reformulated, counsel's goal during the closing address is to synthesize the arguments based on four distinct modes of reasoning: logical, moral, legal and emotional. We will briefly look at each one in turn.

(a) Logical

Logic is a cornerstone of human reasoning. Successful counsel must persuade the judge that their story is more logical than that of their opponents. Counsel face an uphill battle trying to convince the trier of fact that a highly illogical story is the true or more probable version of events. Using logic effectively in the

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[7] John Olah, *The Art and Science of Advocacy*, looseleaf (Toronto: Thomson Canada Limited, 2015), Vol. II, 17-4 [Olah, *Art and Science of Advocacy*].

[8] Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans. George A. Kennedy, New York: Oxford University Press, 1991; *cf*. Justice John I. Laskin, "What Persuades (or What's Going On Inside the Judge's Mind)" in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004*, Ed. David Stockwood, Q.C. and David E Spiro (Toronto: Irwin Law, 2005) at 227 [Laskin, "What Persuades"].

closing means marshalling the facts and evidence in such a way that the outcome of the trial appears all but inevitable. It means making concessions, dealing with bad facts, engaging in point-first advocacy, and using the tools of primacy and recency to greatest effect. Each of these tools of effective advocacy is dealt with in greater detail below.

Compelling logic is simple logic. In our instant communication age, the trial advocate has to contend with a limited attention span. A judge, and certainly a jury, will not follow a convoluted series of "ifs," "ands" or "buts." The logic should come down to one or two simple questions which will determine the outcome and which the trier of fact will have no choice but to answer in your client's favour. Reducing complex cases to a few simple issues takes courage and skill. However, the winning argument is often the simplest one because it is more easily absorbed and accepted by the trier of fact.

(b) Moral

Moral persuasion is about what you say, and how you say it.

The "what you say" aspect means crafting a compelling theme and returning often to that theme in the course of the trial. While it can be stated in the opening address and alluded to throughout the trial, the closing address is the time for the theme to be "hammered home."[9] Both sides will have a theme if they are well-prepared, and counsel's role is to ensure that their theme trumps that of the other side, i.e. that it is most in line with the values of the trier of fact or is more worthy of vindication when stacked up against the other side. In this way, trial counsel may be thought of as salespeople. They are selling the judge or jury on their client's version of events through a carefully scripted closing address.

Winning the moral battle also means seizing and maintaining the high moral ground throughout the trial — this is the "how you say it" aspect of moral persuasion. No matter what happens or how opposing counsel conduct themselves, counsel must maintain their composure and always show the utmost respect to the judge, to opposing counsel, to witnesses and to the jurors themselves. Treating all parties with respect will enhance the advocate's stature as the reliable narrator in the room and will incline the trier of fact to find in favour of the advocate's client.

Touching on both the "what you say" and the "how you say it" is a concept which is at the heart of moral persuasion: credibility. This means casting your client, your witnesses and yourself as the credible and reliable narrators of the story unfolding in the courtroom. The importance of being perceived as the

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[9] Stephen Lubet, *Modern Trial Advocacy*, Canadian Edition, Sheila Block and Cynthia Tape (editors), National Institute for Trial Advocacy, 1995 at 378 [Lubet, *Modern Trial Advocacy*].

reliable narrator was dealt with in depth in the first article of this series, "The Trial Advocate as Storyteller," and is further expounded on below.

(c) Legal

As every experienced trial advocate knows, there are two sides to every story. It is the advocate's job to synthesize the good and bad facts, and the law, into a coherent narrative. In doing so, counsel must explain to the trier of fact why it is that their client is legally entitled to the remedy sought, or why the plaintiff is not entitled to the relief sought, if acting for the defence. In judge alone trials, this is also done in conjunction with the argument on the law and reference to the pertinent case law in the course of closing submissions. In a jury trial, counsel's review of the law will be brief and general, but counsel will need to package the facts together with the law and with the desired verdict in order to make the jury's task as easy as possible. In both judge and jury trials, the goal is to seamlessly blend the facts and the law together into one coherent narrative. Weaving such a three dimensional case is no easy feat. Former Supreme Court Justice Ian Binnie once wrote that "It is, I think, the highest role and function of the advocate to lift the court out of the humdrum detail of the law, to focus the appeal on some higher objective."[10] Addressing truly bad facts head on, i.e. those which cannot be spun in any other way, will redound to counsel's benefit. For example, counsel could open their closing address by saying "I acknowledge that you may find that my client is not very sympathetic, but . . ."

(d) Emotional

In the words of former Chief Justice of the United States Supreme Court, Charles Evans Hughes, "ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections."[11] Aristotle, too, knew that emotions — *pathos* — play an important role in the art of persuasion.

Of all the modes of persuasion, this one requires the most skill of an advocate. The importance of ensuring that your client and your client's case are emotionally appealing to the trier of fact cannot be overstated. However, open appeals to emotion or sympathy are prohibited, as is asking the jury to place itself in the plaintiff's or defendant's shoes. The appeal to emotion therefore requires subtlety. This is not to say that it cannot be accomplished. Counsel must elicit an empathetic response without overtly asking for it. Emotion plays a special role with a jury, but trial judges are also human and

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[10] Justice Ian Binnie, "In Praise of Oral Advocacy," in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004*, Ed. David Stockwood, Q.C. and David E. Spiro (Toronto: Irwin Law, 2005) at 45 [Binnie, "In Praise of Oral Advocacy"].

[11] William O. Douglas, *The Court Years: 1939-1975* (New York: Random House, 1980) at 8 and 33.

emotion can — and should — be brought to bear in even the most legally complex trials before a judge alone.

Of course, it will not always be possible to achieve success in each of the above categories. As the famous trial lawyers' aphorism goes, "When the facts are on your side, pound the facts. When the law is on your side, pound the law. When neither is on your side, pound the table." We would ruefully not recommend the strategy of pounding the table. Rather, counsel should attempt to settle that kind of weak case. If you cannot settle, then counsel should not underestimate the value in tactically abandoning one or more issues in order to focus the judge's attention on the critical matters.

2. Parameters of the Closing Address

Advocacy textbooks and judicial decisions universally acknowledge the wide latitude that counsel are afforded in their closing address.[12] As the saying goes, "a jury trial is a fight and not an afternoon tea party,"[13] and nowhere is this more evident than during the closing address. At no other point during trial does counsel have the same leeway to engage in argument, to attack witness credibility, to openly suggest findings of fact and to make an impassioned appeal.

Trial counsel, as narrator, has complete control of the stage during the closing address:

> Final argument is the advocate's only opportunity to tell the story of the case in its entirety, without interruption, and free from most constraining formalities. Unlike witness examinations, the final argument is delivered in counsel's own words and without the need intermittently to cede the stage to the opposition. Unlike the opening statement, it is not bound by numerous rules and traditions governing proper and improper content. In other words, final argument is the moment of pure advocacy, when all of the lawyer's organizational, analytic, interpretive, and forensic skills are brought to bear on the task of persuading the trier of fact.[14]

While the cardinal rule of opening statements is that counsel must not engage in argument, in closing "you may, should and must argue if you are serious about winning your case. The gloves are off, and the limitations are removed."[15]

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[12] Justice John Sopinka, Donald B. Houston, and Melanie Sopinka, *The Trial of an Action* (2nd ed.) (Toronto: Butterworths, 1998) at 130 [Sopinka, Houston, Sopinka, *Trial of an Action*].

[13] Riddell J.A. in *Dale v. Toronto Railway*, 1915 CarswellOnt 173, 34 O.L.R. 104 (C.A.) at 108 [O.L.R.], oft-cited since. See also Molloy J. on behalf of the Divisional Court majority, in *Abdallah v. Snopek*, 2008 CarswellOnt 997, 89 O.R. (3d) 771 (Div. Ct.) at para. 1: "a jury trial is a 'fight' that must be conducted within rules designed to ensure fair play."

[14] Lubet, *Modern Trial Advocacy* at 361.

[15] *Ibid.* at 369.

Indeed, many textbooks refer to it as "final argument," a trite but perfectly apt phrase.

The wide latitude counsel are afforded in closing is not, however, boundless. There is a "general rule [. . .] that the language of counsel to a jury should not be of such character as is likely to prejudice the cause of an opponent in the minds of honest men of fair intelligence to such an extent as to work an injustice."[16] Brazen appeals to emotion or highly inflammatory remarks may occasion a strong rebuke from the trial judge or, worse yet, appellate intervention.

A trial judge's strong rebuke can have a devastating effect on counsel's credibility with the jury, and his hard work in gaining the jury's trust will be immediately undone. Even without judicial intervention, the jury may be turned off by inflammatory or aggressive language and be less inclined to find in favour of that lawyer's client.

3. Begin with the Closing

In the 1992 film "Glengarry Glen Ross," Alec Baldwin berates a group of car salesmen who have had dismal sales numbers. In a memorable and oft-quoted portion of his tirade, he admonishes them to ABC, or "Always. Be. Closing." In other words, these salesmen should always be looking to close the sale and should never take their eyes off that goal. Everything they do should advance the goal of having the client sign on the dotted line. This advice is equally applicable to the trial lawyer. As mentioned, a trial lawyer is "selling" the client's story to the trier of fact, while hoping that the trier of fact will "buy" into it and find in their client's favour. Counsel who have assiduously cultivated their reputation as the trial's reliable narrator will more easily persuade the jury to accept their version of events.

Following the ABC rule during a trial means thinking about your closing address, and even constructing it, before doing other preparatory trial work. It also means evaluating every decision made prior to and at trial through the lens of the closing address. As Geoff Adair, a well-regarded senior trial advocate in Ontario, has written:

> Experienced and capable advocates select their central theme for the case prior to trial and have at least a rough idea before the trial begins as to the basic nature of the core submissions they will make to the trier of fact at the conclusion of the case.[17]

The late Yankees legend Yogi Berra is credited with saying, "If you don't know where you are going, when you get there you are sure to be lost."[18] Stephen

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[16] Justice Hogg in *Stewart v. Speer*, 1953 CarswellOnt 234, [1953] O.R. 502 (C.A.) at 508 [O.R.] cited in *Brochu v. Pond*, 2002 CarswellOnt 4334, 62 O.R. (3d) 722 (C.A.) at para. 17.

[17] Geoffrey D.E. Adair, *On Trial: Advocacy skills, law and practice* (2nd ed.) (Markham: LexisNexis, 2004) at 481 [Adair, *On Trial*].

Lubet suggests asking oneself two questions: What do I want to say at the end of the case? What evidence must I introduce or elicit in order to be able to say it? The answers will give you the broad outline of your entire case.[19] The closing address is the trial advocate's compass which guides him safely through the trial's shoals. It goes without saying that under no circumstances should the closing address be written the night before or delivered without sufficient practice and preparation. Indeed, ''[a] good closing address and an extemporaneous closing address are mutually exclusive.''[20]

The benefits of planning the closing address at the outset of the case are manifold. First, counsel will avoid useless fishing expeditions and the many red herrings and rabbit holes that modern litigation has to offer. By honing in on what will matter at the end of the day, counsel will save their client considerable expense, will expedite the litigation process, and will be better placed to articulately argue the key points of the case. Writing the closing first will also impact upon the witness list, witness order and choices about evidence adduced at trial. Counsel, knowing what they wish to say to the jury at the end, will be better placed to make tactical and evidentiary decisions along the way. Finally, the exercise of writing the closing and knowing the strengths and weaknesses of your case will encourage early settlement in appropriate circumstances.

The closing address must fit in seamlessly with the other aspects of the trial. Ideally, ''all three aspects of the trial — opening, witness examinations, and closing — should combine to evoke a single conception of events.''[21] The trial advocate's goal is to tell the trier of fact what will be proven (the opening statement), to prove it (the tendering of evidence and calling of witnesses), and then tell the trier what has been proven (the address).[22]

Lloyd Paul Stryker compares the roles of trial lawyer and author, and offers this comparison:

> A summing up may be likened to the writing of a book. Before an author dares commit his thoughts to paper, he has first gone through long, painful months or perhaps years of hard, laborious research. He has culled his facts from every source available. He has corrected every date, verified every reference, weighed and

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[18] Lee Stuesser, *An Advocacy Primer* (3rd ed.) (Toronto: Thomson Carswell, 2005) at 3, 169-170 [Stuesser, *Advocacy Primer*].

[19] Lubet, *Modern Trial Advocacy* at 9.

[20] Richard J. Sommers, Q.C., ''The Opening Statement and Closing Argument to the Jury in a Civil Case'' in *Advocacy in Court: A Tribute to Arthur Maloney, Q.C.*, ed. Franklin R. Moskoff, Q.C. (Toronto: Canada Law Book, 1986) at 169 [Sommers, ''Opening and Closing to the Jury''].

[21] Lubet, *Modern Trial Advocacy* at 361.

[22] Roger G. Oatley, *Addressing the Jury: Achieving Fair Verdicts in Personal Injury Cases* (2nd ed.), (Aurora: Canada Law Book, 2006) at 35 [Oatley, *Addressing the Jury*]; Olah, *Art and Science of Advocacy*, Vol. II at 17-21.

> considered every proof, and resolved all questions of conflicting evidence. The trial, for the lawyer, is what research is for the author.[23]

Although none of us have that degree of time in our practices, the point nonetheless is a good one concerning the preparation required for an effective closing address.

PART II: THE ART OF CLOSING: MAKING THE MOST PERSUASIVE CASE FOR YOUR CLIENT

> It has been said that addressing the jury in opening or closing is an art — that it cannot be taught.[24]

That point is interesting but, in our view, quite overstated. The building blocks of advocacy required to construct an effective closing address can be taught. A preferable view is that of Ontario trial lawyer John McLeish, who writes that "Advocacy is a learned skill. Eloquence may be borrowed and techniques may be acquired."[25] If the *art* of closing cannot be taught, as the late esteemed medical malpractice advocate Richard Sommers contends, it can certainly be learned through trial and error, and especially through error. The aim of this part of the article is to equip would-be artists (trial counsel) with the necessary palette (winning skills and strategies) in order to let them paint a picturesque landscape (a convincing closing address).

This part of the article is divided into a number of sections. The first section focuses on the themes which will be familiar to readers of the previous articles in this series: storytelling, advocate-as-narrator, and the importance of a controlling theme and theory of the case. The second section deals with the role of language in the closing. The third section addresses structure and context. The fourth section takes up one of the principal tasks of the advocate in a closing address: dealing with the evidence. The final section of this part of the article touches on the topic of how to deliver the closing.

1. Storytelling, Counsel as Narrator and Controlling Theme and Theory

Every trial is a story. Persuasive stories share certain common elements. Moreover, trials, like stories, require a controlling theme, a coherent theory, a reliable narrator and relatable characters.

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[23] Lloyd Paul Stryker, *The Art of Advocacy: A Plea for the Renaissance of the Trial Lawyer* (New York: Simon and Schuster, 1954) at 113 [Stryker, *Art of Advocacy*].

[24] Sommers, "Opening and Closing to the Jury" at 163.

[25] John McLeish, "Advocacy in Jury Trials" in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004*, Ed. David Stockwood, Q.C. and David E. Spiro (Toronto: Irwin Law, 2005) at 93 [McLeish, *Advocacy in Jury Trials*].

(a) The basic elements of a persuasive story

A persuasive story has all or most of the following characteristics:

1. it is told about people who have reasons for the way they act;
2. it accounts for or explains all of the known or undeniable facts;
3. it is told by credible witnesses;
4. it is supported by details;
5. it accords with common sense and contains no implausible elements; and
6. it is organized in a way that makes each succeeding fact increasingly more likely.[26]

Each of these elements can be brought out in a closing, as they ought to have been from the outset of the trial. Take, for instance, the requirement that the characters must have reasons for the way they act. An excellent example of this is to be found in the 1949 trial of Billie Holiday, in which the famous female jazz singer was acquitted of five charges of possession of narcotics. The first article in this series highlighted Sara Ramshaw's work, "He's my man!: Lyrics of Innocence and Betrayal in *The People v. Billie Holiday*," which demonstrated how Holiday's lawyer created a convincing persona for Holiday which would explain her actions and which led to her acquittal.[27] Despite being a famous singer making $200,000 a year (quite a lot of money in the 1940s), Holiday's lawyers successfully played on prevailing stereotypes and cast Holiday as a woman who was "unlucky in life" and who fell prey to the men in her life.

A winning story must account for all, or as many as possible, of the incontrovertible facts. Counsel who spend the majority of their address discounting bad facts, explaining why they are irrelevant, or attacking their opponent's story fail to weave for the trier of fact a plausible explanation that encompasses the evidence at trial. While raising a reasonable doubt will often suffice in the criminal context, it is far more persuasive in the civil context to tell a competing, compelling narrative. Give the trier of fact something to believe in rather than only reasons to disbelieve the other side.

It is important that the story be relayed by credible witnesses. This applies to the advocate's client, and the advocate must prepare his client within the parameters of ethical conduct to come across as honest and sincere. It applies equally to the witnesses chosen to present other aspects of the case. They should not leave the trier of fact with the impression that they have an animus or axe to grind against any of the parties or other witnesses. There is an obvious danger in building a case on the shaky foundation of a witness whose credibility is easily

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[26] Lubet, *Modern Trial Advocacy* at 1-2

[27] Sara Ramshaw, ""He's my man!': Lyrics of Innocence and Betrayal in *The People v. Billie Holiday*" (2004) 16 Can. J. Women & L. 86; further discussed in Archibald and Mendelzon, "The Trial Advocate as Storyteller."

called into question or who may be easily tripped up in cross-examination. To the extent that this is a potential problem, appropriate witness preparation is in order.

The story should also be supported by details. In the context of a closing address, this principle means marshalling the trial evidence to greatest effect. This is equally applicable to counsel's comments on witness credibility. The more the closing address is grounded in the trial evidence, the more believable it will be.

That trial counsel's story should accord with common sense is itself a common sense suggestion. It will be easier to persuade the trier of fact if the trier of fact not only knows why someone acted in a particular way, but accepts that such action was normal and plausible in the circumstances. One way to do this is through the use of archetypes, whose utility was explored in the first article in this series. Archetypes are "characters in stories and narratives that symbolize recurring patterns of universal human behavior."[28] Plato wrote about them and they feature prominently in the writings of Carl Jung, the famous Swiss psychiatrist. Archetypes provide context and depth to a story and bolster the credibility and reliability of the story's narrator. Most importantly, archetypes draw from the millennia of human experience in order to create characters whose actions resonate with the audience's life experiences and common sense. Counsel should note, however, that there is a fine line between using accessible archetypes and relying upon worn out stereotypes and outdated tropes.[29]

Finally, a persuasive story will be organized and told in such a way that each fact makes the next fact more likely. In the context of a novel, this is called character development. By the end of the novel, a character's reasons for acting in a particular way and for making certain choices should have become clear through the narration of facts and details about that character. This organizing principle is equally useful in trial preparation. Absent an agreed statement of fact, it makes little sense to jump right into expert evidence on technical aspects of the case without having laid the story's factual foundation. When it comes to the closing, good organization means being focused and concise rather than meandering through the evidence. It means organizing your review of the evidence such that the conclusions you want the trier of fact to reach become immediately apparent and practically inevitable. This may, or may not, mean organizing your review of the evidence chronologically.

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[28] Archibald and Mendelzon, "The Trial Advocate as Storyteller" at 9.
[29] *Ibid*. at 9-10.

(b) Controlling theme and theory in the closing address

Every case, no matter how simple or complex, needs a theory and a theme. But what are they and what's the difference? Stephen Lubet has compared the relationship between the theme and theory as follows:

> Just as your theory must appeal to logic, your theme must appeal to moral force. A logical theory tells the trier of fact the reason why your verdict must be entered. A moral theme shows why it should be entered. In other words, your theme — best presented in a single sentence — justifies the morality of your theory and appeals to the justice of the case.[30]

The theme is your "foundation of persuasion" — it controls the way in which the trier of fact receives and perceives the evidence. A good theme may be powerful enough that the trier of fact will actually ignore, minimize or rationalize any evidence that conflicts with it.[31] A good theme is therefore a powerful tool for dealing with bad facts.

Because counsel will want to refer to the theme from the outset and because the opening address must not be argumentative, the theme should be firmly grounded in the facts of the case.[32] The theme may also dictate linguistic choices. The late Justice Edson Haines, while a practicing lawyer, once acted for the defendant in a personal injury case in which a child had become permanently disabled after hitting his head on the ledge of a pool. He referred to the ledge as a "safety ledge" at every opportunity in the course of trial, to the extent that even plaintiff's counsel had adopted the term during the trial. Haines' theme was centered around this one term, and it worked. Since everyone in the courtroom had adopted the term, the outcome was virtually assured.[33]

The theme is referred to as "controlling" because it should dictate decisions made in the course of the trial. The theme "should be a constant presence throughout the final argument. Unlike opening statement and witness examinations, where a theme can only be used intermittently, the entire final argument can be organized so as to emphasize your theme."[34] Counsel should take care not to overdo it, though, and should use variations of the theme rather than repeating the same sentence *ad infinitum*.

The human brain's capacity to absorb and process information is not unlimited. This is why the theme is an important component of trial preparation. For maximum effect, the theme can be deployed in conjunction with the tools of cognitive psychology.[35] The second article in this series explored a variety of

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[30] Lubet, *Modern Trial Advocacy* at 8.
[31] Oatley, *Addressing the Jury* at 34.
[32] *Ibid.* at 31, 45.
[33] Archibald and O'Connor, "Cognitive Psychology" at 21.
[34] Lubet, *Modern Trial Advocacy* at 368.
[35] Archibald and O'Connor, "Cognitive Psychology."

such tools and how they could be used in the opening address. But the tools of cognitive psychology apply throughout the trial process, and can be highly effective in ensuring that the theme resonates with the trier of fact throughout the trial. The following are examples of how a theme can be used alongside certain psychological tools:

1. A theme that is introduced early will have an *anchoring* effect, providing a lens through which the trier of fact will receive and interpret information during the trial.
2. A common theme will allow counsel to take advantage of the *representative heuristic*, which prompts the trier of fact to compare the case to a common "type" of case and understand it in that light. For instance, pitching one's case as a "typical" wintertime slip-and-fall case subtly asks the trier of fact to understand the case as an example of that type of case. This, in turn, means that the trier of fact will fit the information they receive during the trial into that model.
3. *Framing* refers to the tendency of people to evaluate the same option, when presented in different formats, in different ways. It is an important psychological tool, especially where counsel find themselves on the wrong side of a "typical" case or where the relief sought is unorthodox.
4. Finally, *coherence-based reasoning* allows people to reason through complex tasks by unconsciously manipulating information in order to create a straightforward choice, one that is made easier by creating one compelling choice and one weaker one. In short, a simple, resonating theme will allow the trier of fact to work through complex trial evidence with constant reference to that guiding proposition.

Fashioning the facts into a compelling theme is one of the most difficult tasks facing trial counsel. But it is critical. The theme must be one that will speak to a larger audience. It must be accessible to "lay persons" who may not be familiar with legal concepts or jargon. It requires both imagination and ingenuity.[36] In fact, "Imagination for the trial lawyer is as essential as for the novelist, the artist, or the poet."[37]

The impact of a theme on the outcome of a case can be seen in the results of O.J. Simpson's criminal and civil trials. O.J. Simpson was acquitted for the murder of his ex-wife, Nicole Brown Simpson, and Ronald Goldman, but was later found civilly liable for their wrongful deaths. Bearing in mind the lower standard of proof in a civil case, Janice Schuetz has made a compelling case for the way in which vastly different themes, as borne out in the closing addresses in each case, played a role in Simpson's criminal and civil trials.[38] Simpson's

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[36] Adair, *On Trial* at 482.
[37] Stryker, *Art of Advocacy* at 128.
[38] Janice Schuetz, "Final Summation: Narratives in Contrast" in Janice E. Schuetz & Lin

criminal defence team successfully recast his trial as an indictment of a racist police force, while plaintiff's counsel in the civil trial portrayed Simpson as a jealous ex-spouse.

An excellent example of competing themes also comes from the *Adler* case, which had to do with provincial funding of religious schools.[39] One side sought funding for Jewish schools equivalent to that given to Roman Catholic schools in Ontario. Their argument was based on the *Charter* values of freedom of religion and equality — a compelling theme indeed. The other side, which was ultimately successful in the Supreme Court, based their theme on the nature of the bargain which had been struck between Canada's religious groups back in 1867. Both arguments were reasonable and resonated with the trier of fact, but only one could carry the day.[40]

However compelling your theme, it alone is not enough to convince the trier of fact. The trial advocate also needs a coherent theory of the case. The closing address is the time for counsel to explain to the trier of fact why their client is legally entitled to judgment in their favour. A winning theory is one that: (1) is logical; (2) speaks to the legal elements of your case; (3) is simple; and (4) is easy to believe.[41] While the theory will integrate legal concepts, the facts — not the law — should dictate the theory of the case.[42]

A coherent theory of the case underpins everything counsel does from discovery to the closing address. McElhaney described the importance of a case theory as follows:

> The theory of the case is the basic, underlying idea that explains not only the legal theory and factual background, but also ties as much of the evidence as possible into a coherent and credible whole. Whether it is simple and unadorned or subtle and sophisticated, the theory of the case is a product of the advocate. It is the basic concept around which everything else revolves.[43]

The theory must permeate every aspect of the trial: the opening should tell the jury what you will prove, examinations and cross-examinations should prove those points, and the closing is the time to hammer home what you have proven. The theory is so important that the rule "Never do anything inconsistent with

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S. Lilley, *The O.J. Simpson Trials: Rhetoric, Media, and the Law* (Carbondale: Southern Illinois University Press, 1999); see also Archibald and Mendelzon, "The Trial Advocate as Storyteller" at 12-13.

39 *Adler v. Ontario*, 1996 CarswellOnt 3989, 1996 CarswellOnt 3990, [1996] 3 S.C.R. 609 (S.C.C.).

40 Laskin, "What persuades" at 236; Binnie, "In Praise of Oral Advocacy" at 23.

41 Lubet, *Modern Trial Advocacy* at 8.

42 Olah, *Art and Science of Advocacy*, Vol. II at 17-8.

43 James W. McElhaney, *Trial Notebook* (2nd ed.), American Bar Association, 1987 at 48 [McElhaney, *Trial Notebook*].

your theory of the case" has been described as "one of the most fundamental rules in trial practice. [. . .] It is simple, understandable, and nearly absolute."[44]

Counsel may, however, have more than one theory of the case. They may even conflict or be mutually exclusive alternatives to one another. For example, a defendant in a breach of contract case could take the position that he never signed the contract in question and that, if he did, he was not mentally competent at the time. Either one of these may be successful and there is no rule against advancing them simultaneously. However, this is a potentially dangerous tactic. Counsel should recall that "[t]he signal you send when you refuse to put very many eggs in any one basket is that you do not trust the basket."[45]

The theory of the case should be as simple as possible. This means that it should take into account as many facts as possible, leaving few, if any, to be explained away or minimized during the closing address. Remember that "plausibility [. . .] is a constant advocate."[46] Facts left out tend to undermine the strength of the basket weave.

In sum, the controlling theme and the theory of the case, two strands woven seamlessly together, form the thread that will lead the trier of fact through the labyrinth of trial evidence and towards a verdict in your client's favour. Theme and theory are often discussed alongside one another, but counsel must know the difference and devote time and energy to each one to be persuasive.

(c) The advocate as storyteller and reliable narrator

> One can stand as the greatest orator the world has known, possess the quickest mind, employ the cleverest psychology, and have mastered all the technological devices of argument, but if one is not credible, one might just as well preach to the pelicans.[47]

Of all the tools of persuasion at the disposal of the advocate, credibility is amongst the most important. If the advocate is not perceived as credible, the trier of fact will not believe — and will not *want* to believe — what he or she is saying, no matter how true or well-supported the story is. In other words, the force of a strong closing address will be lost if it is not delivered with credibility and conviction. The advocate-as-reliable-narrator theme has been constant in these articles, and for good reason: it is a conception of one's role that must guide the trial lawyer in everything he or she does. Because, as any textbook on advocacy will tell you, credibility is "a one-time thing. Once lost it is gone for good in that particular trial at least."[48] Credibility is of such monumental

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[44] McElhaney, *Trial Notebook* at 48.
[45] *Ibid.* at 54.
[46] *Ibid.* at 50.
[47] Gerry Spence, *How to Argue and Win Every Time* (St. Martin's Press, 1995) at 4.
[48] Adair, *On Trial* at 502.

importance that counsel ought to evaluate *everything* done in the course of a trial through the following question: How will this affect my credibility as an advocate?[49]

Trial counsel may need to overcome a credibility deficit. We live in an age of ubiquitous advertising. We are constantly bombarded by legal sales pitches in all media platforms. For many outside of the legal profession, the word "lawyer" or "attorney" conjures up the image of an ambulance chaser. Knowing that he or she may be regarded as untrustworthy from the get-go by at least some jurors, effective trial counsel must work every step of the way to gain the trust of the jury and be regarded as a credible narrator throughout the trial's unfolding. This admonishment applies equally to a judge alone trial, though credibility in that case may take on the added aspect of counsel's reputation at the Bar and with the judiciary.

Important points regarding credibility and reliability are woven throughout this article, and indeed, throughout the articles in this series. However, since lists are an effective heuristic tool, the following are some of the crucial building blocks for counsel who wish to be seen as the reliable narrator:

1. *Honesty* — never give in to the temptation to exaggerate or be anything but 100 per cent truthful;
2. *Integrity* — being perceived as a lawyer who keeps her word is worth its weight in gold;
3. *Courtesy* — being polite *is* good advocacy, a point often lost on many lawyers;
4. *Professionalism* — always follow the spirit, and not just the letter, of the *Rules*;
5. *Preparation* — a lack of preparation is often obvious and is always harmful to one's case;
6. *Punctuality* — jurors and judges will think poorly of counsel who are perpetually late;
7. *Appearance* — appearances matter, plain and simple;
8. *Restraint* — avoiding the urge to constantly object makes your objections more powerful;
9. *Humility* — never verbally or visibly express anger at the judge or opposing counsel; and
10. *Morality* — seize the high moral ground early and maintain it to the last minute of trial.

Credibility is largely about the synthesis of good and bad facts. Burying or failing to address bad facts hurts your credibility as a narrator. On the other hand, addressing bad facts head on enhances it. A good example of this is

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[49] McElhaney, *Trial Notebook* at 66.

Buckley's Cough Syrup, which famously uses the tagline "It tastes awful. And it works." Owning up to bad facts, even making a critical concession, takes courage but will always pay off when it comes to credibility.

Credibility in the delivery of the closing address is equally important. There is, of course, a rule against expressing counsel's own personal belief in the client's case. Nor can counsel directly appeal to the trier of fact as an honest person or openly impugn the honesty of opposing counsel. But the implicit syllogism that counsel are aiming for is the following:

> I am honest.
> You should believe me.
> Therefore, you should decide for my client.[50]

The logic in this syllogism can only be accomplished if the trier of fact does, in fact, believe you. Persuading the trier of fact to believe you is part and parcel of the art of advocacy. It consists of not misstating the evidence, keeping promises made in the opening address, and not overstating one's case or engaging in hyperbole. Overreaching, exaggeration and asking for too much, with respect to damages or any other aspect of the case, will only hurt counsel's credibility. By this same token, too much humility can be equally damaging to credibility. Counsel should never understate their client's case — this trap can be avoided by not overreaching in the first place.[51]

Emotion displayed by counsel during the closing address must be credible. False or insincere displays of emotion are not persuasive and may actually backfire. On the other hand, "[t]he absence of emotion may be taken as a lack of belief in the righteousness of your case. [. . .] A flat presentation may be regarded as an absence of conviction."[52] In all cases, counsel should strive to convey their feelings without stating them.[53] Indeed, credibility and conviction go hand in hand. President Lyndon Johnson once remarked:

> What convinces is conviction. You simply have to believe in the argument you are advancing. If you don't, you are as good as dead. The other person will sense that something isn't there.[54]

2. The Language of the Closing Address

> Language is not a handmaiden to perception; it *is* perception; it gives shape to what would otherwise be inert and dead. The shaping power of language cannot be avoided.

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[50] *Ibid*. at 65.
[51] Olah, *Art and Science of Advocacy*, Vol. II at 17-15.
[52] Lubet, *Modern Trial Advocacy* at 399.
[53] Oatley, *Addressing the Jury* at 275.
[54] Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* (New York: Alfred A. Knopf, 2002) at 887.

> We cannot choose to distance ourselves from it. We can only choose to employ it in one way rather than another.[55]

Words are some of counsel's most important tools of persuasion — they should be chosen carefully and wielded with surgical precision. Counsel must pay close attention to the language they use throughout the trial, and the language of the closing address should be equally carefully and deliberately chosen. An ill-timed slip of the tongue can leave a lasting impression to devastating effect. On the other hand, deliberate linguistic choices can meaningfully influence the trier of fact. Recall the outcome of Edson Haines' use of the "safety ledge" descriptor, a theme built on a subtle, but powerful, linguistic premise. In a more dated example, there was a measurable impact on the outcome of a theoretical case based simply on the language used to describe an abortion.[56] The deliberate use of language can even be applied to the parties. Roger Oatley suggests that in a jury trial, counsel should use the language of inclusion (you and I, we) as much as possible so that the jury will identify with their client, and use the language of exclusion for the opposing party.[57]

Keep the language simple and remember that the goal is to communicate. In closing before either a judge or a jury, in both written and oral advocacy, the rule is "never to use a three-syllable word where a one-syllable word will do."[58] Counsel would also be well-advised to avoid judgmental or conclusory terms as they are generally less persuasive than active nouns and verbs.[59]

Carefully chosen plain language will always be more persuasive, but it is especially crucial when closing before a jury. Justice John Laskin of the Ontario Court of Appeal has written extensively on the role of language in advocacy. He urges advocates to use common language and pretend that we are speaking to well-informed next door neighbours: use "cars," not "motor vehicles;" talk about "where they work," not "where they are employed;" and "using their savings to build a cottage," not "utilizing the proceeds of their remuneration to build a summer dwelling-place."[60]

In a famous Advocates' Society Journal article on the subject of language, Justice Laskin observed that "Language and content are intimately connected. Forceful language makes for more persuasive content."[61] While the article's

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[55] Stanley Fish, *How to Write a Sentence: And How to Read One* (Toronto: Harper Collins, 2011) at 42 [Fish, *How to Write a Sentence*].

[56] Sommers, "Opening and Closing to a Jury" at 166.

[57] Oatley, *Addressing the Jury* at 282-283. However, the suggestion of a special bond between counsel and the jury is prohibited and jurisprudence suggests that this is therefore a fine, and possibly dangerous, line for counsel to tread: *R. v. S. (F.)*, 2000 CarswellOnt 467, 31 C.R. (5th) 159 (C.A.); *Hall v. Schmidt*, 2001 CarswellOnt 3899, 56 O.R. (3d) 257 (S.C.J.) at para. 45.

[58] Adair, *On Trial* at 496.

[59] Lubet, *Modern Trial Advocacy* at 401.

[60] Laskin, "What Persuades" at 229-230.

focus is on written advocacy, its suggestions apply equally in our view to oral advocacy. Justice Laskin exhorts advocates to "develop a simple, concise style that uses active verbs, avoids excessive use of adjectives and adverbs, limits the use of the passive voice, and puts the subject, verb, and object close to each other" for greater clarity.[62] John McLeish, a well-known Ontario trial lawyer, advises lawyers to speak to the jury in the present tense as much as possible, so that the jurors will experience the address as if they were alongside the parties.[63] He also recommends a number of linguistic tricks which are helpful with juries and judges alike:

- The deliberate use of impact words ("crash" or "collision" versus "accident")
- The Rule of Three (using three adjectives to create a memorable rhythmic pattern)
- Parallelism (maintaining consistency in the construction of phrases and sentences. McLeish's example — "Sandy believed in education. He believed in his family. He believed in his community." — uses parallel sentence construction so that the trier of fact can focus on the words "education," "family" and "community.")
- Repetition (a key to retention in memory)

Advocates should "Paint word pictures that judges can see, hear, and feel." A memorable example is Oliver Wendell Holmes' famous qualification on the right of free speech: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing panic."[64] The operative rule for counsel ought to be to "show, don't tell."

Sentence-level organization and language, while admittedly more important in a factum, can nonetheless play a significant role in oral advocacy. Justice Arnup of the Ontario Court of Appeal observed that "Short sentences make crisp writing and cogent oral argument. A blue pencil is worth five pens."[65] More recently, Stanley Fish, an American law professor, has written a *New York Times* bestseller called, *How to Write a Sentence: And How to Read One*. The

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[61] Justice John I. Laskin, "Forget the windup and make the pitch: Some suggestions for writing more persuasive factums" in Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004, Ed. David Stockwood, Q.C. and David E. Spiro (Toronto: Irwin Law, 2005) at 219 [Laskin, "Forget the windup"].

[62] Laskin, "Forget the windup" at 219.

[63] McLeish, "Advocacy in Jury Trials" at 98.

[64] From *Schenck v. United States*, 249 U.S. 47 (Pa. S.C., 1919) as quoted in Laskin, "What Persuades" at 237-238.

[65] Justice John D. Arnup, "The Importance of Advocacy" in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004*, ed. David Stockwood, Q.C., and David E Spiro (Toronto: Irwin Law, 2005) at 3.

book holds out sentences as the building blocks of all speech and all meaningful communication, and includes this paean to the sentence:

> If you can write a sentence in which actors, actions, and objects are related to one another in time, space, mood, desires, fears, causes, and effects, and if your specification of those relationships is delineated with a precision that communicates itself to your intended reader, you can, by extrapolation and expansion, write anything: a paragraph, an argument, an essay, a treatise, a novel.[66]

3. Organization, Context and Structure

(a) Effective use of organization and context in the closing address

> The human mind is not a computer. It cannot absorb and remember vast banks of mysterious data, waiting patiently for the writer to punch a "compute" button to make sense of it all. Readers absorb information best if they understand its significance as soon as they see it.[67]

The above quote is equally applicable, if not more so, to information transmitted aurally — the listener will not have the benefit of re-reading a confusing passage and will instead be relying upon the speaker to help them grasp the relevance of information as it is received.

In their book, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing*, Stephen Armstrong and Timothy Terrell extol the virtues of organization and context as a means of achieving clarity. The authors propose four principles of super-clarity which apply to a document's organization as well as to its individual sections, paragraphs, even sentences. The principles of super-clarity which they set out are the following:

1. Readers absorb information best if they understand its significance as soon as they see it.
2. Readers absorb information best if its form (its structure and sequence) mirrors its substance (the logic of an analysis, the plot of a story, the theme of an argument).
3. Readers absorb information best if they can absorb it in pieces.
4. Readers pay more attention if you approach your material from their perspective, not yours.[68]

While Armstrong and Terrell's book is about legal writing, replace "readers" with "listeners" and the principles of super-clarity apply equally, if not more so,

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[66] Fish, *How to Write a Sentence* at 7-8.

[67] Stephen V. Armstrong and Timothy P. Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* (2nd ed.) (New York, NY: Practicing Law Institute, 2003) at 20 [Armstrong and Terrell, *Thinking Like a Writer*].

[68] Armstrong and Terrell, *Thinking Like a Writer* at 16-17.

to oral advocacy. During the closing, the advocate should ensure that his or her audience, the jury or trial judge, are prepared to absorb the information being transmitted to them by using outlines and overviews. Counsel should consider the relationship between the structure of their closing and its content. Lists, headlines (short statements which signal your next topic and situate it within the broader context of your case) and appropriate pacing will ensure that the audience receives the information in appropriately-sized bites. Finally, the trial advocate should always consider what their audience's task will be following the closing address, and construct the address to help their audience accomplish the task with ease.

The first of Armstrong and Terrell's principles of super-clarity might also be called context. Professor Emeritus Edward Berry has written extensively on context and its central role in conveying meaning.[69] His work has focused on judgment writing, but the importance of context is applicable to closing addresses, advocacy and all forms of conveying meaning through language. Counsel must consider context in the organization of their closing address and in their advocacy and trial plan generally.

Context-first writing is an umbrella term that captures both focus-first and point-first advocacy. Focus-first and point-first are related, but are not coextensive. Focus-first advocacy guides the listener as to what he or she will be hearing, providing some relevance to the facts and details which follow. Point-first advocacy does this as well, but also gives the conclusion to be drawn from the facts. Both focus-first and point-first advocacy use context to shape the way in which the reader or listener receives information. The difference between them is a rhetorical one: "The point-first method is arguably the clearest since it announces at the outset the conclusion that we have reached. [. . .] The focus-first method is more collaborative, but arguably less efficient."[70]

All lawyers are taught during law school that point-first advocacy means stating the conclusion (to a sentence, paragraph, section or judgment) at the outset. It is, by necessity, also context-first. On the other hand, focus-first means telling the reader (or listener) at the outset what the details are about and why they matter. Focus-first is about providing the big picture before zooming in, the forest before the trees. Focus-first is also context-first advocacy. In both cases, the context provides greater clarity of thought, and dramatically reduces the possibility that the listener will be confused by what you are telling them. Context is "a fundamental principle of persuasive factum writing,"[71] and it is equally true of oral advocacy.

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[69] See Edward Berry, *Writing Reasons: A Handbook for Judges* (4th ed.) Toronto: LexisNexis, 2015 [Berry, *Writing Reasons*].

[70] Berry, *Writing Reasons* at 5.

[71] Laskin, "Forget the windup" at 206.

If point-first advocacy is recommended, then context-first advocacy is imperative. In other words, even if your aim is best achieved by leaving the conclusion for last, beginning with context — i.e. an overview statement — is essential to ensuring that your audience, whether they are readers or listeners, are along for the ride. The trial advocate should never leave her audience pondering the question "Why is she telling me this?"[72]

Berry uses Aesop's fable about the wolf in sheep's clothing to illustrate the differences between point-last, focus-first, and point-first writing. Aesop's fables are point-last — they have a conclusion which is the moral of the story, but which only makes sense in light of the preceding facts. As an example of that same story but told from a focus first perspective, Berry suggests opening lines such as "Let me tell you a story about appearances," "Let me tell you a story about behaviour," and "Let me tell you a story about careless lambs." Each of these provides a lens through which the subsequent information will be received, but notice how the changing focus sentence colours the listener's interpretation of what follows. Finally, a point-first approach to the fable might be "Let me tell you a story about how appearances can deceive."[73]

Remember that language loses its power if the ideas you are trying to convey are not meticulously organized: "Good advocates do not leave the judge in a state of confuzzlement."[74] The closing address is not a mystery novel, and the final moments of the address are not the time to deliver the conclusion for the first time. State the conclusion up front and give the trier of fact a clear, concise roadmap of how you (and hopefully they) will get there. This, in a nutshell, is context-first and point-first advocacy. Headlines and lists are the signposts that keep the listener on track. For example, "Now I'll go over the three reasons why the plaintiff was not wrongfully dismissed . . ." tells the trier of fact to focus on those three reasons.

(b) Structure of the closing address

> No strict rules can or should be laid down as to the content of an address to the jury or of the argument before a judge. The ultimate goal is persuasion and the preparation of the address should be based on what will be most persuasive to the tribunal in the particular case. Counsel should strive to be imaginative in the organization of the material and to avoid slavish adherence to precedents from previous addresses even though such addresses are those of eminent counsel.[75]

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[72] Berry, *Writing Reasons* at 4.

[73] *Ibid.* at 4.

[74] Justice Robert Blair, "Oral Advocacy in Matters Argued before Superior Court Judges" in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004*, ed. David Stockwood, Q.C. and David E Spiro (Toronto: Irwin Law, 2005) at 79.

[75] Sopinka, Houston, Sopinka, *Trial of an Action* at 131.

When it comes to form or structure of the jury address, there are no set rules. John Lorn McDougall, Q.C., recommends structuring the closing address around the following two questions: How can I win this case? How can I lose this case?[76] The best structure will reflect what counsel believes is the most persuasive way of putting the client's case to the judge or jury. While the "traditional" structure involves an introduction, argument on the facts, and a brief peroration, experienced counsel might start with a story that includes a powerful opening passage.[77] This non-traditional approach, however, must be delivered with conviction: "It is not for the timid or uncertain advocate."[78] The order, scope and structure of the closing address before a judge may also differ substantially from that before a jury.[79] Before a judge, it is helpful to begin with a full outline of the closing address. Indeed, according to Adair, "[t]he best opening for a non-jury final argument often lies in the words: 'Your Honour, the issues in this case are as follows . . .'"[80]

Point-first advocacy applies every bit as much to oral advocacy as it does to written. Counsel should make the start of the closing address count. As Chief Justice Gale used to say, "The first three minutes are free."[81] Justice Catzman of the Ontario Court of Appeal observed, in 2004, that the three-minute time limit has become a lot shorter. In the decade since then, counsel's "free" time has surely become shorter still. We live in an Apple and Blackberry age. A judge may provide his or her undivided attention for longer than most jurors, but neither will be paying attention to the seminal point if it is buried deep in the closing address. Building to a crescendo may have dramatic effect but it will not capture the trier of fact's attention the way a forceful first sentence will and counsel risks having lost the trier of fact's attention long before reaching the conclusion. The closing must not play out like a mystery novel. It should give the audience the conclusion up front and then immediately provide a reliable roadmap to that conclusion.

In a jury trial, it is permissible to briefly discuss such topics as the roles of counsel, the judge, and the jury, and burdens of proof.[82] This may be more important as a tactic for criminal defence counsel than for plaintiff's counsel in a

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[76] John Lorn McDougall, Q.C., "Last Impressions: The Role of Closing Argument" delivered at The Advocates' Society Civil Litigation Skills Certificate Program: A Trial from A to Z (Toronto, Ontario, April 3, 2008).

[77] Adair, *On Trial* at 487.

[78] *Ibid.* at 490.

[79] Sopinka, Houston, Sopinka, *Trial of an Action* at 134.

[80] Adair, *On Trial* at 506.

[81] As quoted by Justice Marvin Catzman, "Losing Tip #14: Openers and Closers" in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004*, ed. David Stockwood, Q.C. and David E. Spiro (Toronto: Irwin Law, 2005) at 315.

[82] Sopinka, Houston, Sopinka, *Trial of an Action* at 132.

civil action. Counsel should never spend too much valuable time on this subject, one which will be explained to the jury by the judge in any event.

Counsel may also wish to speak to the jury briefly on the applicable law, though such comment should be prefaced with the words "subject to Her Honour's instructions on the law . . ."[0] It is embarrassing and credibility-destroying for counsel's comments on the law to be corrected by the trial judge in his or her charge to the jury.[83]

In a non-jury trial, however, counsel are expected to argue the applicable law.[84] Counsel should state what he or she submits the state of the law to be, and support that submission with relevant authority. One or two leading cases will suffice.[85] The preparation of a book of authorities in advance of argument (with the relevant passages highlighted or side-barred) will help the judge follow along during the closing argument and will be more easily referenced by the trial judge when the trial is long over.[86] However, counsel should never focus primarily on the law in a non-jury trial. It is equally as important to review the facts and evidence in a judge-alone trial.[87]

At the end of the address, it is appropriate to walk the jury through the specific questions it will be asked to decide, and to state counsel's desired answer to each.[88] With a judge, this exercise will take the form of a restatement of key factual or legal disputes that counsel wishes to have adjudicated and the relief sought, along with any alternatives.[89]

Sopinka, Houston and Sopinka write that "In all cases, the address should strive to conclude on a high note which will stir the imagination of the jury members and stay with them during their deliberations."[90] Or, as Adair puts it, "The single most important point to bear in mind is that all good final submissions should build naturally toward a compelling conclusion on the central factual issue upon which the jury must decide."[91]

In structuring the closing address, counsel should take advantage of both primacy and recency, which have been described as follows:

> The psychological notion of primacy is that what is heard first has a special claim to acceptance. The effect of recency — what is heard last — is that it is more easily

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0 *Ibid.* at 132; see also Justices Robert F. Reid and Richard E. Holland, *Advocacy: Views from the bench* (Aurora: Canada Law Book, 1984) at 158 [Reid and Holland, *Advocacy*].
83 Olah, *Art and Science of Advocacy*, Vol. II at 17-10.
84 Adair, *On Trial* at 506; Sopinka, Houston, Sopinka, *Trial of an Action* at 135.
85 Sopinka, Houston, Sopinka, *Trial of an Action* at 136.
86 Adair, *On Trial* at 506.
87 Stuesser, *Advocacy Primer* at 170.
88 Sopinka, Houston, Sopinka, *Trial of an Action* at 134; Adair, *On Trial* at 493.
89 *Ibid.* at 136.
90 *Ibid.* at 134.
91 Adair, *On Trial* at 493.

> remembered than other things that were said. To be both remembered and believed is valuable, indeed.[92]

Primacy and recency are an ingrained part of trial practice. They apply to the trial as a whole (who speaks first and last), but also apply to the structure of the address.[93] The first few minutes of the closing address will colour the interpretation of the remainder of the address. It is the information most likely to be believed.[94] Counsel must therefore make their single most important point in the first couple of minutes of the closing and should carefully rehearse this "set piece."[95] Conversely, as they commence their deliberations, jurors will most likely remember a forceful point made at the end of counsel's address. A pithy summation of the reasons your client should win will stick with the trier of fact and its value should not be underestimated.

It is worth bearing in mind that while trial judges have specialized legal training, "every judge is a juror at heart."[96] That is to say that they are human beings, susceptible to the same types of passionate appeals and persuasive argument as would be a jury. Judges are more capable than a jury of disregarding impassioned, even inappropriate, appeals to emotion, and such comments made in closing during a judge alone trial will rarely result in appellate intervention. But it should never be lost on counsel that at the end of the day, judges want to do the right thing and arrive at a just outcome for the parties. In reference to appellate judges, Justice Laskin wrote: "We are powerfully influenced by the equities of the case, by the needs of real people. If we have to, we will bend the law to reach a fair result."[97] Our judges' ability to do so is enhanced by their residual, equitable discretion.

4. Dealing with Evidence during the Closing Address

> A piano has its octaves, its white keys and its black, its sharps and its flats. An advocate is a pianist whose white and black keys are the facts. His task is to play them.[98]

A thorough review of the evidence should be the basis of every closing address. Counsel should spend the majority of the address dealing with the evidence,[99]

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92 McElhaney, *Trial Notebook* at 481; see also Sommers, "Opening and Closing to a Jury" at 165.
93 Oatley, *Addressing the Jury* at 278.
94 *Ibid.* at 291.
95 Olah, *Art and Science of Advocacy*, Vol. II at 17-11.
96 Chief Justice Robertson as quoted in Justice John Sopinka, "The Many Faces of Advocacy" in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004*, ed. David Stockwood, Q.C. and David E. Spiro (Toronto: Irwin Law, 2005) at 15.
97 Laskin, "Forget the windup" at 209.
98 Stryker, *Art of Advocacy* at 115.
99 Sopinka, Houston, Sopinka, *Trial of an Action* at 132.

though the trial advocate should not attempt to cover every fact and every piece of evidence in the case.[100]

Where the evidence in the trial has been extensive, a brief overview of the evidence prior to counsel's more detailed review will catch the trier of fact's attention and will tell them where you are headed.[101] Reference to exhibits is always useful as they will be available to the trier of fact during deliberations.[102] Particularly key or favourable evidence given by a witness at trial could be transcribed and read in verbatim.[103] Helpful evidence that has come from the opposing party or that party's witnesses, including the reading in of discovery transcripts, is also of value as the trier of fact will likely find it less inherently suspect and more credible.[104] While the trial judge can be expected to have taken notes and formed tentative opinions during the evidentiary phase of trial, the closing address is the time for counsel to remind the judge of particularly important or persuasive pieces of evidence, to place a favourable interpretation on the evidence, and to weave disparate pieces of evidence into one, coherent whole.[105]

Counsel will almost always have to deal with witness credibility. One pair of commentators suggests that counsel should consider the following factors:

1. which version is more inherently probable;
2. the fact that the evidence of your witness was not shaken on cross-examination;
3. the fact that the evidence of your witness was supported by contemporaneous notes or by documentary evidence and by exhibits (photographs, maps, charts, etc.);
4. inconsistencies in the evidence opposed to the evidence of your witness; and
5. bias.[106]

Jurors have a strong olfactory sense — they know instinctively when a witness's testimony does not "pass the smell test." Therefore, commenting on witness credibility is fundamental. Smart counsel will pay attention to the way in which the trier of fact — judge or jury — reacts during a witness's testimony, then comment on any aspects of the testimony that were particularly well or poorly received. However, counsel should exercise caution in referring to a witness as a "liar," as the word implies an act of active deception. Rather, using

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[100] Adair, *On Trial*, at 491.
[101] Sopinka, Houston, Sopinka, *Trial of an Action* at 132.
[102] *Ibid*. at 132.
[103] *Ibid*. at 132-133.
[104] Stuesser, *Advocacy Primer* at 176.
[105] Sopinka, Houston, Sopinka, *Trial of an Action* at 135.
[106] Reid and Holland, *Advocacy* at 157.

moderate terms such as "inaccurate historian" or "mistaken eyewitness," or describing the witness's account as "clearly mistaken," conveys to the trier of fact that the witness was incorrect in her testimony, for any number of potential reasons, without asking that the trier of fact pass harsh judgment on the witness.

Inconsistencies play a major role in attacking witness credibility. Several types of inconsistency may be exploited by counsel. The first are internal inconsistencies within the witness' own evidence. For example, a witness might have originally described an event as occurring in the evening but subsequently, the witness might be sure that the same event occurred in the early morning. Bringing this obvious inconsistency to the trier of fact's attention will help undermine the witness's evidence on that point, and possibly the overall reliability of his or her testimony generally. Another type of inconsistency is between evidence given in chief and evidence given on cross-examination. This can usually be combined with comments on the witness's demeanour in order to make the point that the witness was combative in cross-examination and therefore subjective, rendering his or her evidence suspect. A third form of inconsistency is the prior inconsistent statement. Such statements often come from evidence given on examination for discovery, in prior but related proceedings, or in previous interviews or written statements. The circumstances in which the prior statement was given are highly relevant and must be placed on the record. Moreover, counsel should turn their minds to whether the statement they ultimately want accepted is the prior statement or the one made at trial.[107]

Counsel should reserve most comment for major or relevant inconsistencies, and should not dwell on minor and irrelevant ones. An exception is if the minor but pertinent inconsistencies are so numerous as to overwhelm the remainder of the witness's testimony. One can imagine a biased witness whose position on the central aspects of a case remains unwavering but whose inconsistencies on minor details are such that the veracity of the testimony as a whole is suspect. The collateral facts bar prevents the introduction of evidence intended to contradict only collateral points in a witness's testimony. It is a similarly fruitless endeavour to try to undermine a witness's credibility on the basis of inconsistencies which are not related to some fact or issue in dispute.[108]

It is particularly persuasive to comment on allegations or statements made in opposing counsel's opening address that have not been proven or followed through on.[109] It is also permissible to comment on potential witnesses who did

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[107] For greater analysis, please see Justice Todd L. Archibald and Ken Jull, "An Empirical Approach towards a New Methodology of Impeachment" (September 2011) The Advocates' Journal 3.

[108] Justice William Anderson, "The Argument of a Case at Trial" in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004*, ed. David Stockwood, Q.C. and David E. Spiro (Toronto: Irwin Law, 2005) at 52.

not give evidence at trial, and to ask the trier of fact to look negatively upon the other party's failure to call that witness.[110] The right to comment on a party's failure to call a witness is not the same as a right to have an adverse inference drawn against that party.[111] The failure of a party in a civil case to testify may also lead to an adverse inference against that party in certain circumstances.

In the course of covering the evidence, counsel should "tie up" cross-examinations, meaning, draw conclusions for the trier of fact from answers given by witnesses that counsel has cross-examined.[112] Note, however, that the rule in *Browne v. Dunn* has broad application.[113] The rule holds that a cross-examiner usually cannot rely on evidence that is contradictory to the testimony of a witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction. While the rule was at one time more narrowly construed, today it applies both to contradictory evidence to be tendered during the trial and conclusions or propositions of fact to be asserted by counsel in closing.

It is critical that counsel not ignore evidence that is harmful to their client's case. Failure to address it will destroy counsel's credibility and will leave the jury with the impression that counsel and the client have something to hide. The evidence's impact should be minimized by rationally explaining it away, or by making it fit within counsel's theory of the case, or, as a last resort, by challenging the credibility of the witness who gave it.[114] In all cases, the best closing address is one which builds a three-dimensional case by synthesizing the good and bad facts. This is what John Olah calls the "persuasive mosaic."[115]

5. Delivery of the Closing Address

> Final argument is generally regarded as the advocate's finest hour. It is the time when all of the skills — no, the arts — of persuasion are marshalled on behalf of the client's cause. While a polished delivery will not rescue a lost cause, a forceful presentation can certainly reinforce the merits of your case.[116]

As with the structure of the closing address and apart from platitudes about public speaking, there are few hard-and-fast rules with respect to counsel's delivery of the closing address. However, good counsel pay meticulous attention to their delivery in order to ensure that their message is not lost on a distracted trier of fact. The aphorism "Practice makes perfect" is apt.

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[109] Lubet, *Modern Trial Advocacy* at 394.
[110] Sopinka, Houston, Sopinka, *Trial of an Action* at 133.
[111] Olah, *Art and Science of Advocacy*, Vol. II at 18-11.
[112] Lubet, *Modern Trial Advocacy* at 393-394.
[113] (1893), 6 R. 67 (U.K. H.L.).
[114] Sopinka, Houston, Sopinka, *Trial of an Action* at 133.
[115] Olah, *Art and Science of Advocacy*, Vol. II at 17-2.
[116] Lubet, *Modern Trial Advocacy* at 397.

There are myriad tools of persuasion that might be deployed in the course of the final argument, among them:

1. The rhetorical question, though to be truly effective, it must be powerful, convincing and directed to a central point of evidence;
2. Presenting the facts in such a way that only one conclusion can be reached;
3. The "argument from probabilities";[117]
4. Putting the matter such that there can be only one common sense conclusion;
5. Reducing the case to a single factual issue;
6. Reducing the other side's position to the absurd;
7. Seizing upon a single piece of undisputed evidence and building the entire argument around it.[118]

Setting out the evidence so that the jury comes to its own conclusion is a particularly powerful, if subtle, way to have the jury find for your client. A simple way in which to accomplish this feat is through the analogy, which is "a distinguishing mark of outstanding final arguments."[119] Moreover, analogies and storytelling permit counsel to do indirectly what they cannot do directly, such as to have the jurors place themselves in the position of the plaintiff or defendant.[120] There is no rule of advocacy or practice that requires that an analogy or parable relayed in the closing address must be true, although it is prudent that it should be and it is unlikely to resonate if it is not.

The tone of the closing address is an important consideration. A closing address is neither a speech nor a lecture. It should be conversational in tone, "like a fireside chat."[121] Righteous indignation and raw emotion have their time and place, but they lose their effectiveness — and you lose your credibility — if they are overused or ill-timed. While a jury closing is a one-sided conversation, counsel should anticipate and answer the questions which the jurors have been, are, or will be asking themselves.

Body language must also be monitored and deployed to greatest effect. Above all, body language should "leak no clues," but ideally, counsel's non-verbal and verbal behaviour will match and resonate serenity and confidence.[122] This rule applies throughout a trial, whether speaking or listening, and is just as

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[117] McElhaney, *Trial Notebook* at 50: "The closer your case is aligned with basic probabilities, the better".
[118] Adair, *On Trial* at 492-493.
[119] McElhaney, *Trial Notebook* at 504.
[120] *Ibid.* at 515.
[121] Olah, *Art and Science of Advocacy*, Vol. II at 17-12.
[122] Oatley, *Addressing the Jury* at 277.

important in a judge alone trial — if any readers doubt this, they should see the view from the judge's dais the next time they are in a courtroom.

The length of the address is another consideration. Counsel must balance the competing imperatives of covering all of the critical issues with the need to retain the trier of fact's attention.[123] Unless the case is exceptionally complex, a closing address to the jury should not take any longer than one hour, or two hours at the outside. Abraham Lincoln's jury addresses were rarely longer than 20 minutes, and his Gettysburg Address is remembered for its breathtaking concision.[124] Closing addresses in some judge-alone trials will take longer, but counsel should be mindful of the need to avoid "overkill."[125] A short, focused closing requires courage and conviction but the benefits are manifold — in advancing only their best points, counsel focus the trier of fact and avoid diminishing the impact of the closing address.[126] The "less is more" maxim is true of arguments on appeal — Justice John Sopinka wrote that "Multiplicity [of arguments] hints at a lack of faith and confidence in your major grounds of appeal and may dilute or weaken a good case and not save a bad one."[127]

PART III: THE SCIENCE OF CLOSING: THE LEGAL RULES APPLICABLE TO CLOSING ADDRESSES[128]

Counsel are constrained by fewer rules during their closing than during their opening address. It is the time to synthesize the evidence and make the most credible and compelling case based on the evidence adduced at trial. In this respect, the "dont's" of the closing address, below, are the only real limitations on what is otherwise an opportunity for counsel to engage in wide-ranging argument.

The order of closing addresses varies from province to province. In British Columbia, for instance, plaintiff's counsel in civil cases always argues first.[129] In Ontario, in jury trials, the plaintiff argues last unless the defendant has adduced no evidence, in which case the defendant has the right to address the jury last.[130]

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[123] Olah, *Art and Science of Advocacy*, Vol. II at 17-15.
[124] Reid and Holland, *Advocacy* at 155.
[125] Adair, *On Trial* at 501. Though Lubet, *Modern Trial Advocacy* at 408, suggests that judges are "justifiably impatient" with long final arguments and suggests keeping them as short as possible, implying that they be even shorter than a jury closing.
[126] Laskin, "What Persuades" at 231.
[127] Justice John Sopinka, "Appellate Advocacy" in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004*, ed. David Stockwood, Q.C. and David E. Spiro (Toronto: Irwin Law, 2005) at 197.
[128] For a list of permissible and prohibited practices, see Dan Ferguson, "The law relating to jury addresses" The Advocates' Society Journal (July 1997) 16 Advocates' Soc. J. No. 2, 19-23.
[129] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 12-5(72).
[130] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 52.07(1) [Prince Edward Island's

In closing argument before a judge, the plaintiff generally goes first whether or not the defendant has called any evidence. In addition, the plaintiff will be able to reply to the defendant's arguments.

Note that in a judge-alone trial, a written argument or an outline provided in advance will help the judge follow along and to better absorb what counsel is saying when the matter is reserved.[131]

The rules which apply to closing addresses are well-developed, though many require the exercise of judgment both in their application and in order to remedy their breaches. Below are some of the longstanding rules, along with examples in order to help counsel avoid breaking them.

Counsel must not misstate the evidence, though this error can often be rectified by way of a jury instruction.[132] Counsel must also refrain from referring to anything not in evidence[133] and must not speculate about evidence which is not in the record.[134] While this is generally true, it may have a particularly harmful effect where the evidence improperly referred to has been the subject of an agreement between the parties or has been excluded following a *voir dire*, or was otherwise excluded from the trial by the rules of evidence. Other than those facts of which the trier of fact is entitled to take judicial notice, all facts referred to in the closing must have been established through evidence at trial.

Statutes often prohibit reference to certain topics altogether. For example, counsel are not permitted to refer to any offers to settle, either their existence or their quantum, in the course of the trial (including closing argument).[135] This

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Rules of Civil Procedure are identical to Ontario's]. For the order of closing in other provinces, see *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 8.10 (applies to jury and non-jury trials); *The Queen's Bench Rules*, Sask. Gaz. Jun. 21, 2013, 1370, r. 9-27(1)–(2) ((1) applies to jury trials, and (2) applies to non-jury trials); *Court of Queen's Bench Rules*, Man. Reg. 553/88, r. 52.07(1) (both jury and non-jury trials); *Rules of Court*, N.B. Reg. 82-73, r. 54.07 (both jury and non-jury); *Nova Scotia Civil Procedure Rules*, Royal Gaz. Nov. 19, 2008, r. 51.05 (which sets out different orders for jury and non-jury trials); *Rules of the Supreme Court*, *1986*, S.N.L. 1986, c. 42, Sch. D, r. 42.04 (jury and non-jury trial (cf. r. 45.08)); *Federal Courts Rules*, SOR-98/106, rr. 274, 278.

131 Sopinka, Houston, Sopinka, *Trial of an Action* at 135; Adair, *On Trial* at 506; Reid and Holland, *Advocacy* at 156.

132 *Ibid*. at 130.

133 McElhaney, *Trial Notebook* at 484. Note, however, that this does not prevent argument from common sense or general knowledge. It does not prevent an adverse inference based on evidence that could have been – but was not – before the court.

134 Olah, *Art and Science of Advocacy*, Vol. II at 18-22.

135 *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-1(2); *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 4.28; *The Queen's Bench Rules*, Sask. Gaz. Jun. 21, 2013, 1370, r. 4-30(1); *Court of Queen's Bench Rules*, Man. Reg. 553/88, r. 49.06; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 49.06 [the same applied to Prince Edward Island]; *Rules of Court*, N.B. Reg. 82-73, r. 49.05(2); *Nova Scotia Civil Procedure Rules*, Royal Gaz. Nov. 19, 2008, r. 10.16; *Rules of the Supreme Court*, *1986*, S.N.L. 1986, c. 42, Sch. D, r. 20A; *Federal Courts Rules*, SOR-98/106, r. 422.

prevents the trier of fact from being led to believe that one party has been reasonable while the other has unreasonably continued the litigation. References to specific insurance coverage or the parties' financial situations are also generally prohibited if not relevant. In the criminal context, the Crown and the judge are both precluded from commenting on the accused's failure to testify.[136] Counsel may never ask the jury to disregard the law or to substitute their own opinion on what the law should be.[137]

Counsel must not misuse evidence that has been admitted for a limited purpose.[138] This prohibition is less of a concern in a judge-alone trial than one with a jury, but it is nonetheless important that counsel not construct the narrative of their closing address on evidence admitted for a limited purpose. In a trial before a jury, misuse of limited-use evidence can often be corrected by way of a jury instruction, since the evidence itself has already been admitted and the jury will be instructed as to its use in any event.

The closing address may be an emotional appeal; it must not however be inflammatory.[139] The jurisprudence reveals that the line between the two is a fine one. In a way, the rule against inflammatory closing addresses or overt appeals to passion or prejudice is "an open recognition of the power of persuasion."[140] In *Fiddler v. Chiavetti*, though finding that any injustice had been corrected by way of jury instruction, the Ontario Court of Appeal agreed with the appellants that a number of comments made by plaintiffs' counsel in closing had been inflammatory.[141] In an automobile accident case in which liability had been admitted and only damages remained at issue, the following comments were considered inflammatory:

- plaintiffs' counsel told the jury that they were there to "right a wrong";
- invited the jury to compensate the plaintiffs for anguish suffered as a result of the trial process;
- made a plea to the jury to render a verdict of which they were proud; and
- made a plea to the jury to "value" the deceased's life without regard to her financial circumstances.

The Ontario Court of Appeal has strongly condemned inflammatory remarks in closing addresses, noting that "if left unchecked, inflammatory comments can undermine both the appearance and the reality of trial fairness."[142] However, inflammatory remarks in a closing will rarely be grounds for an appeal in a

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[136] See s. 4(6) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.
[137] Olah, *Art and Science of Advocacy*, Vol. II at 18-4.
[138] Lubet, *Modern Trial Advocacy* at 405.
[139] Sopinka, Houston, Sopinka, *Trial of an Action* at 131.
[140] McElhaney, *Trial Notebook* at 486.
[141] 2010 ONCA 210, 2010 CarswellOnt 1670 (C.A.) at paras. 49-57.
[142] *Brochu v. Pond*, 2002 CarswellOnt 4334, 62 O.R. (3d) 722 (C.A.) at para. 16.

judge-alone trial, as judges are considered to be less susceptible to such remarks.[143]

Counsel must not express personal opinions regarding the righteousness of their client's cause or the merits of the case.[144] While counsel's credibility is an important tool of persuasion, counsel must never place their credibility directly on the line, nor may they openly question the credibility or ethics of counsel for the other party.[145] In *Landolfi v. Fargione*, the Court of Appeal rebuked plaintiff's counsel for having accused defence counsel of having "made up" evidence and for repeatedly referring to him as "Dr." McCartney.[146]

Counsel may not openly invite the trier of fact to find in their client's favour because they believe in their client or have inside information. Out of sheer prudence, counsel may wish to avoid altogether the expressions "I think," "I believe," or "in my opinion." The rationale for this prohibition was set out by the Ontario Court of Appeal in *Brochu v. Pond*:

> 15 Some restrictions apply to both opening and closing addresses. For example, the expression by counsel of personal opinions, beliefs or feelings regarding the merits of a case has no place in either an opening or a closing address to a jury. That restraint is designed to prevent lawyers from putting their own credibility and reputations in issue, and to avoid any indirect invitation to a jury to decide a case based on information or opinion not established in the evidence.[147]

Counsel may not ask the jury to place themselves in the same position as the plaintiff or defendant and have the jury decide the case on that basis. This is often referred to as the "Golden Rule," in reference to the biblical principle of the same name.[148] In *Hesse v. Saint John Railway*,[149] jurors were asked, as part of the jury instruction, to consider how much damages they ought to pay if they were a defendant, and how much they should receive if they were a plaintiff. They were effectively asked to stand in the shoes of both the plaintiff and the defendant. This was held to violate the "Golden Rule." In *Brochu v. Pond*, the Ontario Court of Appeal distinguished the scenario in *Hesse*. In *Brochu*, the respondents' counsel had asked the jury to "use your own common sense and your own experiences" to determine whether the failure to disclose a piece of information constituted contributory negligence. The Ontario Court of Appeal held that this statement had not violated the "Golden Rule."[150] In short, asking

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[143] Sopinka, Houston, Sopinka, *Trial of an Action* at 134.
[144] *Ibid.* at 131.
[145] Olah, *Art and Science of Advocacy*, Vol. II at 18-8 to 18-9.
[146] 2006 CarswellOnt 1855, 79 O.R. (3d) 767 (C.A.) at paras. 90-91.
[147] 2002 CarswellOnt 4334, 62 O.R. (3d) 722 (C.A.) at para. 15.
[148] Olah, *Art and Science of Advocacy*, Vol. II at 18-25. See Matthew 7:12 and Luke 6:31.
[149] 1899 CarswellNB 40, 30 S.C.R. 218 (S.C.C.).
[150] *Brochu v. Pond*, 2002 CarswellOnt 4334, 62 O.R. (3d) 722 (C.A.) at paras. 53-55.

jurors to rely on common sense and experience is permissible, while asking them to place themselves in the shoes of the client is not.

1. Questions

Counsel delivering a closing address in a jury trial need not fear questions from the bench. During their closing submissions, they will have an uninterrupted stretch of time during which to deliver their address, hopefully to the receptive and attentive members of the jury. On the other hand, counsel should anticipate being asked questions in the course of their closing arguments in a judge-alone trial. Varying judicial styles mean that counsel may face a barrage of questions, a silent bench, and everything in between. There are also many types of questions you may receive.[151] In all cases, counsel should be prepared to field and respond to all inquiries from the bench.

Counsel should see questions from the bench not as a nuisance, distraction, or derailment from their planned closing, but as a welcome opportunity to persuade by clarifying legal and factual issues for the judge.[152] The following is a list of basic suggestions for effectively responding to questions from the bench:

1. Counsel should stop as soon as the judge starts speaking or signals that she has a question. A sigh or look of exasperation will not be well-received.
2. Counsel should listen attentively and avoid the temptation to answer the question before the judge has finished posing it. Take notes if the question is lengthy or if it will help in answering the question.
3. There is no embarrassment in asking the judge to clarify his question, though it will be obvious if this is being used as a delaying or obfuscating tactic.
4. Unless counsel will be addressing the judge's question *very* shortly thereafter, counsel should answer the question immediately and avoid the common refrain "I'll be addressing that point later in my submissions."

Finally, it is a best practice to end the closing address in a judge-alone trial with the phrase "Subject to any further questions from the Court, those are my submissions." Counsel should remain standing until the judge has signalled that he or she has no more questions.

2. Reply

Reply in a judge-alone trial is an opportunity for the plaintiff to take advantage of recency and to have the last word. A good reply will resonate with

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[151] Justice Ian Binnie, "A Survivor's Guide to Advocacy in the Supreme Court of Canada" in *Ethos, Pathos, and Logos: The Best of the Advocates' Society Journal 1982-2004*, ed. David Stockwood, Q.C. and David E. Spiro (Toronto: Irwin Law, 2005) at 253-256.

[152] Olah, *Art and Science of Advocacy*, Vol. II at 17-82.

the judge and give him or her something to ponder while the case remains fresh in his or her mind. A poorly executed reply may snatch defeat from the jaws of victory: it will detract from counsel's credibility and may leave the judge confused or with the impression that counsel has not thought through the counter-arguments. As such, the reply should not consist of a laundry list of minor errors or disagreements.[153] Rather, plaintiff's counsel should recall the words of the late Walter B. Williston: "The best place for reply is on the seat of your pants."[154] If a reply is in order, it should be pointed and short, and counsel should recall that like the closing generally, "[i]f you want a brilliant rebuttal, you should prepare it before trial."[155]

3. Objections

While counsel might wish to object immediately to misstated evidence in the course of opposing counsel's closing to a jury, the "better practice" is to make the objection when the address is over and in the absence of the jury.[156] This obviates the need to excuse the jury in order to argue the objection while still preserving the objection for appeal. It also means that the trial judge will have an opportunity, with the input of counsel, to fashion a remedial jury instruction if it is necessary to do so. Finally, it preserves counsel's credibility with the jury if the trial judge does not think the objection was well-founded.[157]

Objections during a judge-alone trial should be made immediately, but sparingly. There is no advantage to waiting until the address is finished. The matter should be rectified at the time it occurs.

4. Remedies

As with the opening address, the trial judge has three options when faced with a closing address that has run afoul of the law. The trial judge may caution the jury, strike the jury and conduct the trial by judge-alone, or declare a mistrial.[158] The usual course of conduct will be to correct any injustice by way of a correcting jury instruction, especially where counsel has made only one or two missteps.[159] However, where the harm cannot be undone by way of a cautionary

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[153] Stuesser, *Advocacy Primer* at 183.
[154] Laskin, "What Persuades" at 232.
[155] McElhaney, *Trial Notebook* at 523.
[156] Sopinka, Houston, Sopinka, *Trial of an Action* at 130, citing Riddell J. in *Dale v. Toronto Railway*, 1915 CarswellOnt 173, 24 D.L.R. 413 (C.A.) at 416 [D.L.R.] for the proposition that counsel should object "openly and at once" where a remark is "injurious to his client". See also McElhaney, *Trial Notebook* at 483, for a discussion of the perils of this objection; Ian Kirby, "Civil Jury Trials: A Practical Guide," *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2007) at 217-218.
[157] Olah, *Art and Science of Advocacy*, Vol. II at 18-26.6.
[158] *Fiddler v. Chiavetti*, 2010 ONCA 210, 2010 CarswellOnt 1670 (C.A.) at para. 37.
[159] James K. Fireman, "Avoiding a Mistrial in Opening and Closing Statements: Dr.

instruction, a mistrial may be the only available remedy.[160] Given the importance of the right to a jury, most judges will resort to a strong cautionary instruction to remedy the error, or declare a mistrial in extreme cases. The remedy of striking the jury and having the judge alone decide the result is rare.

Improper comments must be looked at cumulatively. While any one comment may reasonably be corrected by a jury instruction, the cumulative effect of multiple misleading, inflammatory or otherwise inappropriate comments may leave a trial judge with no choice but to conclude that they have collectively impacted one party's right to a fair hearing such that a mistrial is necessary.[161] In a long trial, the results which will flow from a mistrial can be devastating.

The standard for appellate intervention is high. Section 134(6) of Ontario's *Courts of Justice Act* stipulates that "a court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred."[162] While improper comments in a closing address may be offside for any number of reasons, the question on appeal is whether, individually or collectively, the improprieties "deprived the appellant of a fair hearing or otherwise resulted in a miscarriage of justice."[163] Significant deference will be paid to the trial judge's decision, whether it is to correct any misstatements or errors by way of a cautionary instruction or to strike the jury.[164] The reason for this is obvious:

> The trial judge was of the view that nothing he could say would "disabuse the minds of the jury." I don't think it is open to us to say that he could have exercised his eloquence and persuasive powers effectively, and thereby erred by not doing so. He was there. He was in a position to assess the impact upon the jury. He was alive to the ambience of the courtroom and the dynamics of the trial. I do not see how we could say that he erred in his conclusion.[165]

McCartney (or How I learned to Stop Arguing and Keep my Jury)" (April 2009) *The Litigator*.

[160] Lubet, *Modern Trial Advocacy* at 408.

[161] *Groen v. Harris*, 2010 ONCA 621, 2010 CarswellOnt 7277 (C.A.) at para. 8.

[162] Similar standards for appellate intervention: *Judicature Act*, R.S.P.E.I. 1988, c. J.2.1, s. 21(7); *The Court of Appeal Act*, C.C.S.M. c. C.240, s. 27(1). The other provinces do not have legislation which sets out the applicable standard.

[163] *Brochu v. Pond*, 2002 CarswellOnt 4334, 62 O.R. (3d) 722 (C.A.) at para. 30.

[164] See generally *Fiddler v. Chiavetti*, 2010 ONCA 210, 2010 CarswellOnt 1670 (C.A.), where a number of inflammatory or improper comments were addressed in the jury instruction and did not give rise to a miscarriage of justice; *R. v. Munroe*, 1995 CarswellOnt 19, 96 C.C.C. (3d) 431 (C.A.) at para. 49, affirmed 1995 CarswellOnt 989, 1995 CarswellOnt 1183 (S.C.C.).

[165] Justice Gibbs in *Birkan v. Barnes*, 1992 CarswellBC 195, [1992] B.C.J. No. 1440 (C.A.) at 5 (cited in *Gemmell v. Reddicopp*, 2005 BCCA 628, 2005 CarswellBC 3041 (C.A.) at para. 39), in which the trial judge had struck the jury; see also *Groen v. Harris*, 2010 ONCA

As a final cautionary tale, in *Knauf v. Chao*,[166] the British Columbia Court of Appeal reduced non-pecuniary damages awarded by a jury from $235,000 to $135,000 on the basis that the jury had probably been influenced by a number of improper comments made in closing by the plaintiff's lawyer. Trial counsel should therefore avoid making improper remarks in closing, if only to protect their client's entitlement to an award of damages in the event of an appeal.

CONCLUSION

The closing address is rightly regarded as the high point of advocacy. All of the skills of an advocate can and must be brought to bear in crafting and delivering a persuasive closing. In doing so, the advocate must never lose sight of his or her role as a storyteller.

This article started off with a discussion of the big picture: the closing address broadly and in the context of the trial as a whole. It then delved into the ways in which the constant themes of this series of articles — advocate as storyteller, controlling theme and theory, use of emotional and psychological tools — could be best deployed in the closing address. Finally, the article gave a brief overview of the legal nuts and bolts of closing addresses. Our hope is that counsel are now well-equipped not only to construct a legally sound closing that will not warrant appellate intervention, but one that will echo persuasively in judicial chambers and jury deliberation rooms.

The following are the top five points which counsel should take from the preceding discussion:

1. *Always be Closing*: From the moment the file lands on your desk, think about the closing address you will want to deliver and focus your trial preparation, and the trial itself, on being able to deliver that closing.
2. *Tell a Story*: It is of utmost importance that counsel develop a controlling theme and a coherent theory early in their trial preparation. This principle will allow the trial advocate to tell a compelling story and to weave good, bad and neutral facts seamlessly together.
3. *Credibility is Key*: Every aspect of your case — your client, your witnesses, and yourself as narrator — must be as credible as possible. Establishing and protecting your credibility with the trier of fact is crucial to winning them over and wanting them to decide in your client's favour.
4. *Watch your Language*: The language of the closing address should be carefully and deliberately chosen. The address's content, structure, and delivery must also be thoughtfully planned and executed. However,

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621, 2010 CarswellOnt 7277 (C.A.) at para. 9; *Fiddler v. Chiavetti*, 2010 ONCA 210, 2010 CarswellOnt 1670 (C.A.) at para. 48.

[166] 2009 BCCA 605, 2009 CarswellBC 3515 (C.A.) at paras. 43, 57-58.

counsel must remember that the closing address is a conversation with the judge or the jury — it is not a speech or a lecture, and should never be delivered verbatim from a factum or from notes.

5. *Preparation, Preparation, Preparation*: A good closing address, like the trial itself, requires an inordinate amount of preparation and organization. Counsel must always have their closing address at the top of their mind and must lay the groundwork for it at every stage of the trial. Under no circumstances should the closing address be treated as an afterthought and prepared the evening before it is to be delivered. An effective closing is the application of science to art. It can be taught and learned.

On that note, and because we cannot overstate the importance of preparation, we end this article with a quote from the late John J. Robinette, one of the finest trial advocates in Canadian history. In a 1979 Globe and Mail interview, Robinette described the key to winning as follows:

> You win by preparation and drudgery. You do research and you read. The actual appearance in court is often like the tip of an iceberg. You try to be succinct. You formulate your argument as concisely yet as effectively as possible, getting down to the point of the case, avoiding red herrings. Sometimes it means weeks of preparation.[167]

Having read this article and digested its contents, we hope that the only thing standing between trial advocates and an outstanding closing address is the preparation.

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[167] Quoted in David Stockwood, Q.C., LSM, Benjamin Zarnett, and Sheila Block, "Shortening trials: Less is more," *The Advocates' Society Journal* (Autumn 2005), 24 Advocates' Soc. J. No. 2 at 1.

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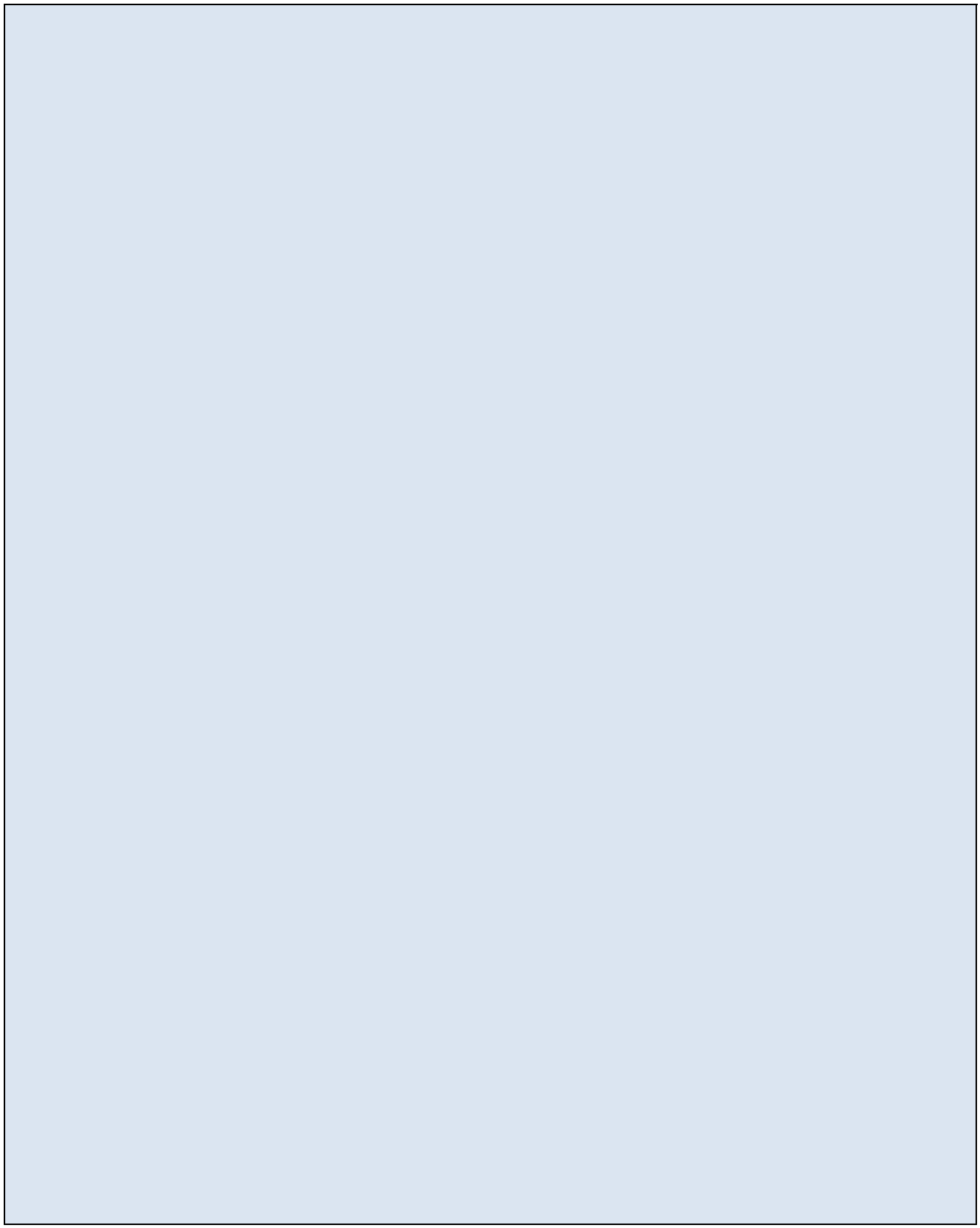

Bruno v. Dacosta, [2020] O.J. No. 4073

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

P.D. Lauwers, D.M. Brown and I.V.B. Nordheimer JJ.A.

Heard: August 28, 2020 by video conference.

Judgment: September 23, 2020.

Docket: C66667

[2020] O.J. No. 4073 | 2020 ONCA 602

Between Paul ***Bruno***, Martha ***Bruno***, Mary Catherine ***Bruno***, Paul John ***Bruno***, and Jake ***Bruno*** under the age of 18 by, his Litigation Guardian Martha ***Bruno***, Plaintiffs (Respondents/Appellants by way of cross-appeal), and Joshua Dacosta, Guy Gibson, Daniel Ashenden, Terry Empey, Her Majesty the Queen in the Right of Ontario Represented by the Ministry of Community Safety and Correctional Services, the Niagara, Detention Center, Wendy Southall as the Chief of Police of the Niagara Regional Police Service, Police Officers Jane Doe and John Doe, the Niagara Regional Police Services Board, the Corporation of the Regional Municipality of Niagara and William Shilson, Defendants (Appellant/Respondent by way of cross- appeal)

(68 paras.)

Case Summary

Civil litigation — Civil procedure — Trials -- conduct of — Giving reasons for judgment — Appeal by the Crown from trial judgment finding the Crown liable for injuries suffered by respondent, a vulnerable prison inmate allowed — New trial ordered — Respondent was severely beaten by other inmates in his wing — Trial judge found standard of care required that other inmates be kept separate from respondent — Reasons for decision insufficient to permit meaningful appellate review — Trial judge did not clearly and consistently identify the key issues, find the relevant facts, assess credibility and reliability, or set out the chains of reasoning applicable to each issue free of gaps and assumptions.

Appeal by the Crown from trial judgment finding the Crown liable for injuries suffered by the respondent, a prison inmate. The respondent was severely beaten by other inmates in his wing. The appellant was a vulnerable inmate because his father was a retired police officer. The trial judge found the standard of care required that the other inmates be kept separate from the respondent and not be housed together and that staff had to consult with inmates about potential incompatibilities before the appellant was placed into protective custody in this wing. The trial judge was satisfied that the gang assault would not have occurred had staff separated the inmates and that but for the breach of duty, the inmates would not have been together and could not have acted in concert. The trial judge further found that had the officers made any inquiries of the other inmates prior to placing the respondent there, the assault would not have occurred.

HELD: Appeal allowed.

New trial ordered. The reasons for decision were insufficient to permit meaningful appellate review. The trial judge's reasons were mostly conclusory. The reasons could be read as focusing on institution-level liability, contrary to the legal test an could also be read as the trial judge recognizing the legal necessity of finding negligence on the part of individual employees despite his failure to identify them by name or their negligent

actions by description. Read as a whole, the trial judge's reasons did not adequately justify the result he reached. The trial judge did not clearly and consistently identify the key issues, find the relevant facts, assess credibility and reliability, or set out the chains of reasoning applicable to each issue free of gaps and assumptions.

Statutes, Regulations and Rules Cited:

Evidence Act, *R.S.O. 1990, c. E.23, s. 35*

Proceedings Against the Crown Act, R.S.O. 1990 c. P.27, s. 5(1) (a), s. 5(2)

Appeal From:

On appeal from the judgment of Justice Paul R. Sweeny of the Superior Court of Justice, dated February 7, 2019, with reasons reported at *2019 ONSC 99*, and from the costs decision dated February 26, 2020, with reasons reported at *2020 ONSC 1258*.

Counsel

Ian MacLeod and Robert Trenker, for the appellant Her Majesty the Queen in Right of Ontario.

Gregory P. McKenna and Sabrina L. Seibel, for the respondents Paul John ***Bruno***, Martha ***Bruno*** and Jake ***Bruno***.

[Editor's note: A correction was released by the Court October 5, 2020; the change has been made to the text and the correction is appended to this document.]

The judgment of the Court was delivered by

P.D. LAUWERS J.A.

A. OVERVIEW

1 On August 25, 2006, the respondent, Paul ***Bruno***, was an inmate being held in protective custody at the ***Niagara Detention Centre*** ("NDC").

2 The trial judge found that inmates Joshua Dacosta, Guy Gibson, Daniel Ashenden, and Terry Empey assaulted ***Bruno*** in the washroom of 3-Wing, in which they were all housed. ***Bruno*** suffered serious personal injuries and was found unconscious. He was in a coma for nearly a month and continues to suffer from the sequelae of his injuries.

3 The issue before the trial judge was whether the Crown, represented by the Ministry of Community Safety and Correctional Services, is liable to ***Bruno*** in negligence because NDC employees failed to take reasonable steps to

protect him as a vulnerable inmate. He was vulnerable for several reasons, the most prominent being that his father was a retired police officer. The trial judge was not required to assess damages because the parties had agreed on the quantum at $1.5 million.

4 Dr. Michael Weinrath provided expert evidence for ***Bruno*** and Dr. Ralph Serin for the Crown. The trial judge relied on the evidence of Dr. Weinrath and rejected that of Dr. Serin. He found two breaches of the standard of care: first, the standard required that inmates Ashenden, Gibson, and Empey be kept separate from ***Bruno*** and not be housed together; and, second, the standard required NDC staff to consult with inmates about potential incompatibilities before ***Bruno*** was placed into protective custody in 3-Wing.

5 With respect to the first breach of the standard of care, the trial judge said he was "satisfied that the gang assault would not have occurred" had NDC staff "separated Empey and Gibson and Ashenden or any of them." He found that: "But for the NDC's breach of duty, Gibson, Empey, and Ashenden would not have been together and could not have acted in concert."

6 As for the second breach of the standard of care, the trial judge stated: "had the [officers] made any inquiries of the inmates in 3-Wing prior to placing ***Bruno*** there, I am satisfied the assault would not have occurred."

7 However, because ***Bruno*** did not speak up when he noticed the presence of an old enemy, Gibson, in the wing, the trial judge found ***Bruno*** contributorily negligent. In his view, "it was not foreseeable to [***Bruno***] that a gang assault would have occurred." He assessed ***Bruno***'s contributory negligence at 15 percent.

8 The Crown appeals and asks that the action be dismissed. ***Bruno*** cross-appeals and asks that the level of contributory negligence attributed to him be reduced to zero.

9 The appellant argues that the trial judge made numerous serious errors, in particular:

1. finding liability on a Ministry-level basis not tied to the negligence of specific employees, contrary to the *Proceedings Against the Crown Act*, *R.S.O. 1990 c. P.27* and case law;
2. finding that the four named inmates assaulted ***Bruno*** in the washroom, particularly given the presence of a fifth inmate whose actions, if any, were not mentioned in the reasons;
3. preferring the expert evidence on the standard of care advanced by ***Bruno***'s expert witness over the evidence of the Crown's witness;
4. finding that the breaches of the standard of care caused the assault because the causation finding was speculative, based on hindsight, and not supported by the evidence; and
5. assessing ***Bruno***'s contributory negligence too low at 15 percent (the Crown had argued at trial for 50 percent).

10 ***Bruno*** cross-appeals and asserts that the contributory negligence should be set at zero.

11 In considering the evidence and arguments on these issues, I have come to the regrettable conclusion that there must be a new trial. For the reasons set out below, I would allow the appeal on the basis that the reasons for decision are insufficient to permit meaningful appellate review. I would remit the case to the Superior Court for trial by another judge. Because the case must be tried anew, I will avoid unnecessary comment on the live issues.

B. ANALYSIS

12 I begin with a discussion of the governing principles on the sufficiency of reasons of trial judges and when an appellate court can salvage a judgment despite insufficient reasons, and then apply the governing principles to this case.

(1) The Governing Principles on the Sufficiency of Trial Reasons

13 The Supreme Court explored the functional purposes for good reasons in *Baker v. Canada (Minister of Citizenship and Immigration)*, *[1999] 2 S.C.R. 817*, at para. 39, *per* L'Heureux-Dubé J.:

> Reasons ... foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: ... Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given. [Emphasis added; citations omitted.]

See also Canada (Minister of Citizenship and Immigration) v. Vavilov, *2019 SCC 65*, at paras. 79-81.

14 Beginning with the Supreme Court's decision in *R. v. Sheppard*, *2002 SCC 26*, *[2002] 1 S.C.R. 869* and most recently in *Vavilov*, there has been a continuing judicial conversation about the duty of judges and tribunals to give reasons that properly explain a decision. The cases speak about accountability, intelligibility, adequacy, and transparency. In *Vavilov*, the court invoked the need to "develop and strengthen a culture of justification": at paras. 2, 14, 79 and 99; see also *Vancouver International Airport Authority v. Public Service Alliance of Canada*, *2010 FCA 158*, *[2011] 4 F.C.R. 425*, at para. 16, considering a decision of the Canada Industrial Labour Board, *per* Stratas J.A. I do not see this project of justification, which originated in several seminal criminal law decisions, as limited to administrative law: *Vavilov*, at paras. 79-80.

15 In *Sheppard*, the court noted at para. 55 that "[t]he delivery of reasoned decisions is inherent in the judge's role [and] is part of his or her accountability for the discharge of the responsibilities of the office." The court continued, at para. 55:

> The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision. [Emphasis added.]

16 A meaningful right of appeal "must not be an illusory right": *R. v. Richardson (1992), 9 O.R. (3d) 194* (C.A.), *[1992] O.J. No. 1498*, at para. 13.

17 In *R. v. R.E.M.*, *2008 SCC 51*, *[2008] 3 S.C.R. 3*, McLachlin C.J. focussed on intelligibility, stating at para. 35 that "[t]he basis for the trial judge's verdict must be 'intelligible,' or capable of being made out." She was referring to the trial judge's duty to lay out the chain of reasoning, in which "a logical connection between the verdict and the basis for the verdict must be apparent." She explained, at para. 35, that in discerning whether there is such a logical connection, "one looks to the evidence, the submissions of counsel and the history of the trial to determine the 'live' issues as they emerged during the trial." In that task of discernment, the appellate court reads the reasons "as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered": see also *Vavilov*, at para. 85.

18 Drilling down to the practical elements, in order to provide for a meaningful right of appeal, trial judges must identify the key issues; find the facts relevant to the issues; assess credibility and reliability where there is conflict; set out the chain of reasoning; make the decision; and then write the reasons to clearly communicate the decision: *Welton v. United Lands Corp.*, *2020 ONCA 322*, at paras. 57 and 58. Appellate courts rely on trial judges to find the facts and to assess credibility and reliability where there are live witnesses, as in this case. Appellate courts recognize that trial judges attend to these tasks from a privileged vantage point.

19 But the principles governing the sufficiency of the reasons of trial judges do give rise to a difficult issue: To what extent should appellate courts work to salvage inadequately explained or conclusory trial reasons?

(2) When Appellate Courts can Salvage a Judgment for which there are Insufficient Trial Reasons; the Governing Principles

20 I begin with the observation that this court is reluctant to order a new trial in civil matters. A new trial "should not be ordered unless the interests of justice plainly require that to be done": *Brochu v. Pond* (2002), 62 O.R. (3d) 722 (C.A.), at para. 6; see also *Nemchin v. Green*, 2019 ONCA 634, 147 O.R. (3d) 530, at para. 71. The court must find a real prospect "that a substantial wrong or miscarriage of justice has occurred": *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(6); *Vokes Estate v. Palmer*, 2012 ONCA 510, 294 O.A.C. 342, at para. 7; see also *Iannarella v. Corbett*, 2015 ONCA 110, 124 O.R. (3d) 523, at para. 23.

21 Insufficient reasons necessitate a new trial where the appellate court is unable to salvage the decision based on the available record. On what basis is that determination made?

22 In *Sheppard*, Binnie J. wrote, at para. 55: "Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial" (emphasis added).[1] But the converse is also true. To paraphrase: Where the trial decision is deficient in explaining the result to the parties, and the appeal court does not consider itself able to do so, a new trial may be needed. This is a case-specific assessment.

23 In assessing the trial judge's reasons for sufficiency, "the reviewing court must examine the evidence and determine whether the reasons [for judgment] are, in fact, patent on the record": *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 32, *per* Charron J., who ordered a new trial. An appellate court must review the record to determine whether the trial decision can be rendered more comprehensible when read in the context of the record: see *Maple Ridge Community Management Ltd. v. Peel Condominium Corporation*, 2015 ONCA 520, 389 D.L.R. (4th) 711, at para. 30, *per* Hourigan J.A., citing *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 101.

24 However, there are limits on the appellate court's ability to fairly and justly salvage a trial decision: "Where the trial judge's reasoning is not apparent from the reasons or the record ... the appeal court ought not to substitute its own analysis for that of the trial judge": *Dinardo*, *per* Charron J., at para. 32. She added that the need to review the record is "not an invitation to appellate courts to engage in a reassessment of aspects of the case not resolved by the trial judge."

25 This court usually declines to dig into the record in order to salvage a decision where the trial decision turns on instances of conflicting evidence, evaluations of credibility and reliability, and exercises of discretion that are properly within the purview of a trial judge. I discuss each situation in turn.

(a) Conflicting Evidence

26 This court does not attempt to reconcile critical conflicting evidence that could affect the outcome. In *R. v. Prokofiew*, 2008 ONCA 585, Borins J.A. reviewed the reasons of a trial judge following a trial for conspiracy, fraud, and theft over $5,000. The trial had taken place intermittently over seven months. Nearly one year later, the trial judge released very extensive reasons for conviction. Borins J.A. noted, at para. 30: "My main problem with the trial judge's reasons is that she made so few findings of fact on her way to the conclusory finding that each appellant was guilty as charged." He added: "Because reasons for conviction were not patent on the record, I am unable to determine the analytical path she followed in convicting the appellants."

27 Similarly, *R. v. Capano*, 2014 ONCA 599 concerned a trial judge's consideration of the test for finding an

accused to be "not criminally responsible" ("NCR"). The trial judge had not specifically articulated whether the accused's mental disorder rendered the accused incapable of appreciating the nature and quality of the criminal act, on the one hand, or whether it rendered the accused incapable of knowing that the act was wrong, on the other hand. Faced with conflicting evidence in the trial record and the trial judge's failure to expressly resolve this conflict in the evidence, this court ordered a new trial. Epstein J.A. noted, at para. 73: "Given the two possible ways in which Mr. Capano's mental disorder may have affected his ability to understand that failing to report to CAMH was wrong, it was critical that the trial judge analyze and resolve how he found Mr. Capano NCR." She stated, at para. 74, relying on *Dinardo*, that "it is not appropriate for this court to attempt to discern that route and explain it."

(b) Credibility and Reliability

28 This same appellate reluctance applies to critical determinations of credibility and reliability. A trial judge's failure to "sufficiently articulate how credibility and reliability concerns are resolved may constitute reversible error": *R. v. A.M.*, *2014 ONCA 769*, *123 O.R. (3d) 536*, at para. 18, citing *R. v. Vuradin*, *2013 SCC 38*, *[2013] 2 SCR 639*, at para. 11, and *Dinardo*, at para. 26.

29 In *R. v. Slatter*, *2019 ONCA 807*, *148 O.R. (3d) 81*, Trotter J.A. commented on a trial judge's reliability findings, at para. 66:

> Although the trial judge relied on Dr. Jones' evidence in this context, he failed to mention her evidence concerning J.M.'s suggestibility. The issue was clearly grounded in the evidentiary record. It was emphasized in defence counsel's closing submissions. Yet, because there is no attempt to address or reconcile this evidence in the trial judge's reasons, we are left to speculate whether the trial judge appreciated the significance of this evidence and the role (if any) that it played in his ultimate findings. [Emphasis added.]

(c) Discretionary Decisions

30 Finally, this court is reluctant to make discretionary decisions that are properly within the purview of the trial judge. In *R. v. Sahdev*, *2017 ONCA 900*, *356 C.C.C. (3d) 137*, *per* Trotter J.A., the trial judge did not provide adequate reasons for refusing to sever counts in a criminal indictment. This court rejected the Crown's request to decide the issue. The severance issue was complicated by a similar fact issue and required a trial judge's exercise of discretion in a new trial.

31 I now turn to apply these governing principles to the trial judge's reasons.

(3) Application

32 To provide context for the application of these principles, I will address the first issue raised by the Crown, which is that "[t]he Trial Judge conflated the concepts of direct and vicarious liability, and erred by finding that institution-level conduct could ground liability." In doing so I do not mean to suggest that the trial judge's reasons on the other issues were otherwise pristine and free of error; they were mostly conclusory.

(a) The Law on Liability for Inmate Assaults [1]

33 With respect to harm to an inmate, the applicable law is that Ontario can only be held liable for the negligent acts or omissions of an individual correctional officer who, in the course of employment by Ontario, did or failed to do something, thereby creating a foreseeable risk of harm to the inmate: *Proceedings Against the Crown Act*, R.S.O. 1990 c. P.27, ss. 5(1)(a) and 5(2); *MacLean v. R.*, *[1973] S.C.R. 2*; *Timm v. R.*, *[1965] 1 Ex. C.R. 174*; *Walters v. Ontario*, *2017 ONCA 53*, at para. 34; *Iwanicki v. Ontario*, *[2000] O.T.C. 181*, O.J. No. 955 at para. 15. In *Walters*, this court held, at para. 34:

> Generally, the provincial Crown can be liable in tort to inmates of correctional facilities only in the form of vicarious liability for torts that specific Crown employees or agents commit, and only if the plaintiff could have sued the employee or agent for that tort ... [Citations omitted.]

34 In inmate assault cases, "Ontario's liability, if any, must derive from actionable negligence of specific [correctional officers]" under subsections 5(1)(a) and 5(2) of the *Proceedings Against the Crown Act*: *Walters*, at para. 34. The federal law is to the same effect: see the federal *Crown Liability and Proceedings Act,* R.S.C., 1985 c. C-50, and *Hinse v. Canada (Attorney General)*, *2015 SCC 35*, *[2015] 2 S.C.R. 621*, where the trial judge found liability based on "institutional inertia and indifference." The Supreme Court held, at para. 92 of *Hinse*, that the trial judge "should instead have analyzed the individual conduct of each of the successive Ministers acting in his or her capacity as a servant of the federal Crown."

(b) The Crown's Argument Regarding the Trial Judge's Reasoning

35 The appellant Crown points out that the trial judge did not identify any specific negligent acts or omissions by any specific correctional officer or other NDC employee. The Crown submits that the trial judge erred by expressing the issue before him in general terms only, namely "whether the Ministry is liable to ***Bruno*** because correctional officers ("COs") failed to take reasonable steps to protect him." The Crown argues that the trial judge maintained this generic approach throughout his reasons, failed to address the conduct of any individual employee, and instead used institution-level references to the conduct of the "NDC", "the Ministry", "NDC staff", and "the COs." The Crown points to the following examples in the trial judge's reasons:

> NDC had knowledge of the history of Ashenden, Empey, and Gibson. (Para. 34)
>
> Although Dr. Weinrath acknowledged that Empey, Ashenden, and Gibson were appropriately in protective custody on the basis that they requested protective custody, in my view, that does not relieve the Ministry of appropriately monitoring of the placement of these inmates in the institution to address the issue of the worrisome assaults occurring in 3-Wing. (Para. 47)
>
> NDC was aware that ***Bruno*** was not wanted in the general population F-Dorm. NDC was also aware that his peers rejected him in 2-Wing. He had been involved in assaults on his prior stays at NDC. ***Bruno***'s vulnerability included the fact that his father had been a police officer. Tom Dykstra, during discovery, confirmed that NDC knew this fact. (Para. 51)
>
> NDC had a history of communicating with inmates about issues that arose. [...] The COs of NDC fell below the applicable standard of care. (Para. 52)
>
> Had the COs separated Empey and Gibson and Ashenden or any of them, I am satisfied that the gang assault would not have occurred. But for the NDC's breach of duty, Gibson, Empey, and Ashenden would not have been together and could not have acted in concert. [...] NDC staff was aware [...] (Para. 53)
>
> Had the COs made any inquiries of the inmates in 3-Wing [...] (Para. 54)
>
> Given NDC's knowledge of ***Bruno***'s vulnerability [...] (Para. 57)
>
> In the result, I find that the Ministry fell below the standard of care. (Para. 62) [Emphasis added by the appellant.]

(c) The Respondents' Argument Regarding the Trial Judge's Reasoning

36 The respondents submit that, read fairly, the trial judge's liability findings were not grounded on institution-level conduct. Instead, the trial judge found liability to have "flowed through the negligence of Ontario's employees, whose conduct breached the standard of care." The respondents name specifically as negligent employees: NDC Superintendent Barry McDonnell, Operational Manager Dennis Dutkus, other Operational Managers ("OM"), and correctional officer ("CO") Alison Sorley.

37 The respondents submit that the reasons must be "read holistically." So read, the trial judge must be seen to

have found negligence by NDC employees for whose conduct Ontario is vicariously liable. The respondents pick out language in the reasons that supports their preferred reading:

> The issue I must determine is whether the Ministry is liable to ***Bruno*** because correctional officers ("COs") failed to take reasonable steps to protect him. (Para. 2)
>
> The Plaintiff says the Ministry personnel fell below
>
> the appropriate standard of care in two ways ... (Para. 3)
>
> Dr. Weinrath posited two breaches of the standard of care ... and the COs should have consulted with the 3-Wing inmates before placing ***Bruno*** there. (Para. 45)
>
> The COs of NDC fell below the applicable standard of care. (Para. 52)
>
> Had the COs separated Empey, Gibson and Ashenden or any of them, I am satisfied that the gang assault would not have occurred. (Para. 53)
>
> NDC staff was aware Empey had acted with other inmates in assaults and that he had assaulted an inmate out of loyalty to Gibson. Notwithstanding this information, the COs of NDC placed Gibson and Empey in the same cell in 3-Wing. (Para. 53)
>
> Had the COs made any enquiries of the inmates in 3-Wing prior to placing ***Bruno*** there, I am satisfied the assault would not have occurred. (Para. 54)
>
> Either the inmates would have rejected ***Bruno***, or if not ... he would likely be closely monitored by the COs. (Para. 54) [Emphasis added by the respondents.]

38 The respondents point out that the trial judge did not base his liability finding on institution level conduct such as a negligent policy or the lack of a procedure. They point to individual instances of negligence that "flowed through the conduct of Ontario's employees." The first claimed negligence is that staff "chose to allow these problematic inmates to remain housed together and not to move any of them" out of 3-Wing on the day of the assault. Second, staff "chose not to consult with the 3-Wing inmates" before ***Bruno***, a particularly vulnerable inmate, was placed there. These decisions were made by individual staff members, "not at an institutional level."

39 The respondents acknowledge that the trial judge did not identify the employees who were at fault by name but argue that his failure to do so is not a reviewable error and it is not required by the legislation. The basis of this submission is that the staff at fault can be identified from the evidentiary record, and the trial judge, consistent with *Housen v. Nikolaisen*, *2002 SCC 33*, *[2002] 2 S.C.R. 235*, at para. 72, "should be presumed to have based his conclusions on a review of the entirety of the evidence."

40 The respondents undertake a deep excavation of the evidence to substantiate this argument, which they urge this court to adopt. They assert that the responsibility to separate Ashenden, Empey and Gibson rested on Superintendent Barry McDonnell and the Operating Managers working under him. In his evidence, Dr. Serin referred to an OM16 as being the acting Superintendent at the relevant time. This, the respondents argue, would be consistent with the Superintendent's legislated authority to delegate his duties.

41 The Superintendent and the OMs were responsible for inmate discipline, which included transferring problematic inmates to other areas of the NDC or to another institution. Superintendent McDonnell was statutorily responsible for the administration of the institution and for the custody, supervision, care and safety of every inmate.

42 Further, the respondents point out that Superintendent McDonnell's ongoing responsibility for the placement and management of inmates is reflected in NDC's internal documentation, the Adult Institutions Policy and Procedures manual, and the legislation. Occurrence Reports and Misconduct Reports were all to be addressed and forwarded to the Superintendent or his designate. The Superintendent or his designate was obliged to interview inmates being investigated for misconduct, determine whether a misconduct had been committed, and decide on a

penalty if appropriate. The Superintendent was required to monitor misconduct dispositions made by designated employees. Only the Superintendent could order an inmate to be held in segregation. A Protective Custody Decision or Review required the Superintendent's or his designate's signature. The transfer of an inmate to another institution required the Superintendent's or his designate's authorization.

43 Moving down a level, the respondents explain that the placement of inmates, including their internal placement within the facility, was a continuous process to be adjusted as the need arose. The relocation of an inmate to a different cell or unit required an OM's authorization. The OM or Shift Supervisor on duty managed the shift and was effectively in charge of the NDC. All employees reported to him or her. The respondents argue that the names of the individuals on duty at the relevant time are in the record. It is noteworthy that none of these named individuals were called to testify at trial.

44 The second claimed breach of the standard of care was the failure to consult with 3-Wing inmates about possible incompatibilities before ***Bruno*** was placed there. According to the respondents, this was the responsibility of OM Dutkus and CO Sorley. OM Dutkus made the final decision to place ***Bruno*** in 3-Wing on August 25, 2006, upon CO Sorley's recommendation. OM Dutkus was required to affix his signature, the date, and any relevant notations on ***Bruno***'s Unit Notification Card ("UNC"), which contained extracts from ***Bruno***'s file in the computerized Offender Tracking Information System. OM Dutkus made no notations in ***Bruno***'s UNC or in his Protective Custody Decision/Review, also signed by OM Dutkus, that 3-Wing inmates had been consulted about ***Bruno***. He made no notation that there were any institutional or resource issues that prevented ***Bruno*** from being placed anywhere else, and he did not indicate that ***Bruno***'s father was a retired police officer, which the respondents assert made ***Bruno*** a target within the facility and which OM Dutkus knew at the time.

45 Accordingly, the respondent argues, each of the claimed breaches of the standard of care can in fact be traced to named individuals on the evidence before the trial judge. The respondents urge this court to find that the evidentiary omissions in the trial judge's reasons can be filled by evidence that is patent on the record, and to make those findings.

46 The respondents characterize the trial judge's use of the terms "Ministry" and "NDC" as the type of loose "short forms" talk that comes to be used during trials, not an indication of fundamental error. The respondents state that even the Crown's expert, Dr. Serin, used the same language in his report when he wrote: "in my opinion, *the Crown* met the standard of care..." (emphasis in original). The respondents urge the court to give no weight to this use of language.

(d) Discussion

47 There is ample support for the arguments of both the appellant and the respondents in the loose language used by the trial judge in his reasons. Seen one way, the reasons can be read as the trial judge focusing on institution-level liability, contrary to the legal test set by this court's decision in *Walters*. Seen another way, the reasons can be read as the trial judge recognizing the legal necessity of finding negligence on the part of individual employees despite his failure to identify them by name or their negligent actions by description.

48 I am left with genuine uncertainty about whether the trial judge fully understood and properly applied the correct legal test for liability. The reasons do not record his self-instruction. His reference to *Walters* was not in the body of his liability discussion but only in his discussion of the contributory negligence claim. He did not refer to this court's specification of the legal test for liability in *Walters* but only to the *Walters* trial judge's figure for contributory negligence.

49 I note that the issues were fully joined in the parties' lengthy and pertinent written submissions (exceeding 130 pages each) filed with the trial judge along with the transcripts. The reasons, at a mere 14 pages, do not do justice to the record, nor to the arguments. The excessive delays in the case probably did not help the trial judge to remain engaged. Transcript preparation took about four months. The plaintiffs' written argument was followed by the

Crown's argument a month later, and the reply two weeks later. After cancelling a planned conference call to address questions arising from the arguments, the trial judge took four months to render judgment and provide his reasons.

50 In the parties' written arguments the legal test in *Walters* was plainly explicated, the responsible individuals were named, and the parties respective positions were fully and carefully contested. It is unfortunate that the trial judge gave the material such short shrift.

51 In this context the trial judge's reasons are not intelligible or transparent. Read as a whole, they do not adequately justify the result he reached. The trial judge did not clearly and consistently identify the key issues, find the relevant facts, assess credibility and reliability, or set out the chains of reasoning applicable to each issue free of gaps and assumptions.

52 It is not our function as an appellate court to undertake these tasks in order to salvage the judgment. Because the reasons do not provide the basis for meaningful appellate review, there must be a new trial.

C. SOME TRIAL PRACTICE NOTES

53 There were errors made in the admission and use of the joint document book that further frustrated appellate review and that should not happen in other cases. I laid out some elements of acceptable trial practice in *Girao v. Cunningham,* 2020 ONCA 260, at paras. 21-35. At paras. 33 and 34, I said:

> In my view, counsel and the court should have addressed the following questions, which arise in every case, in considering how the documents in the joint book of documents are to be treated for trial purposes:
>
> 1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?
> 2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?
> 3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?
> 4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?
> 5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?
> 6. Does any party object to a document in the document book, if it has not been prepared jointly?
>
> It would be preferable if a written agreement between counsel addressing these matters were attached to the book of documents in all civil cases. In addition, it would be preferable if the trial judge and counsel went through the agreement line by line on the record to ensure that there are no misunderstandings.

54 Even though *Girao* was released after the trial decision in this case, this situation presents an opportunity for further reflection on trial practice.

55 The most obvious point, which nonetheless bears emphasis, is that any agreement between counsel as to the admissibility of documents is not automatically binding on the trial judge, who remains at all times the gatekeeper of the evidence. I now turn to the problems experienced in this case.

56 At the opening of the trial, Mr. McKenna read the parties' initial agreement with respect to evidence into the record:

> The documents contained in the Joint Document Brief are relevant, authentic and the dates of the documents are accurately reflected on their face. Neither of the parties are to be considered as having accepted the truth of the contents of all of the documents. Further, both parties reserve their rights to challenge what is stated in the documents, lead further evidence which may or may not be inconsistent with the documents and argue as to the interpretation and weight to be given to the documents.

57 This agreement was not helpful to the trial judge because of its ambiguity, which he should have probed immediately and carefully with some obvious questions, among them: If a document is not challenged, is its hearsay content deemed to be admitted? If not "all" documents, then which?

58 The approach taken by counsel and permitted by the trial judge only invited further contention, which inevitably emerged. On the second day of trial, counsel for the Crown, Mr. MacLeod, attempted to enter a Niagara Regional Police Service Supplementary Report into evidence, leading to the following exchange:

> Mr. McKenna: Just maybe my friend can clear - is this going in as a business record, is that sort of the basis of the admissibility of it?
>
> Mr. MacLeod: Your Honour, this is one our productions. I don't intend to have this marked as, and go in as, a business record as an exception to the hearsay rule. It is a document. I don't think there's any issue between the parties as to its authenticity. I don't think there's any issue as to its relevance. The witness has been questioned about these events, but it does provide evidence of some objective things that were happening at this time.
>
> Mr. McKenna: ... It's the officer's document, it's not Mr. ***Bruno***'s document. It probably sounds like I'm trying to be difficult, but if we're going to deal with this piece by piece and lead to a bigger problem later on, then I'd like to deal with this issue, you know, as a whole if we can. I just don't want to be seen to be agreeing to letting records just go in and then I'm going to be faced with some argument that I didn't dispute it at this time and I'm going to be faced with the opposite argument with their actual Ministry documents. [Emphasis added.]

59 After seven days of trial, and at the beginning of the Crown's evidence, Mr. MacLeod stated that the parties wished to make a "further stipulation with respect to some documents" and that this new stipulation would be "in addition to what was already stipulated as the agreement between the parties." Mr. MacLeod then read the following statement into the record:

> The parties agree that the records of the Ministry of Community Safety and Correctional Services contained in the joint document brief (Exhibit 1), as well as exhibits A, B, C, F, and G are business records pursuant to Section 35 of the *Evidence Act*. However there is no agreement that statements recorded in these records are admissible for the truth of their contents. [...] For example, for an occurrence report that states that inmate X said Y, is evidence of the fact that the statement Y made was made by inmate X, [but it is not evidence that it is true.] The standing orders of the ***Niagara Detention Centre*** and the adult institutions policies and procedures are not technically business records, but are in evidence and can be referred to by the parties when examining witnesses and in argument.

60 This agreement is more specific than the first, but it raises problems of its own concerning the proper application and reach of s. 35 of the *Evidence Act*, *R.S.O. 1990, c. E.23*, which should have been canvassed and resolved at the outset of the trial. This last agreement came too late; it implies that the statements had to be proved by other means but, by this point, the plaintiffs had referenced and relied on numerous documents involving various degrees of hearsay.

61 A party properly invoking s. 35 of the *Evidence Act* is entitled to introduce certain limited forms of double hearsay contained in business records, such as statements made and recorded by two people who are each acting in the ordinary course of business, even if those statements are ultimately accorded little weight: *Evidence Act*, s. 35(4); *Parliament et. al. v. Conley and Park*, *2019 ONSC 2951*, at para. 36; *Setak Computer Services Corporation*

Ltd. v. Burroughs Business Machines Ltd., et. al., [1977] 15 O.R. (2d) 750; [1977] O.J. No. 2226, at para. 63. In dealing with police reports and occurrence reports, however, trial judges have generally refused to admit business records in which a person, acting in the course of their duty, records unreliable third-party statements or other forms of hearsay: see for example *DeGiorgio v. DeGiorgio*, 2020 ONSC 1674, at paras. 50 and 54. The parties' agreement simply stipulated that double hearsay is not admissible for the truth of its content. In my view this issue required argument and an evidentiary ruling.

62 I add an observation about the respondents' s. 35 *Evidence Act* notice. It seriously overreached and, in so doing, created the uncertainty that set the context for uncertainty about the permissible use of documents. The s. 35 notice, a copy of which this court requested after oral argument, ends with the following description under the heading "Liability Documentation": "All other business and medical records listed in the parties' affidavits of documents and produced subsequently in this proceeding in response to undertaking or production requests"'. The idea seems to have been to extend the s. 35 cloak to other documents as yet unidentified. As convenient as this might be, it is unacceptable trial practice and invites contention at trial over the status of individual documents, as transpired here. The rigorous approach set out in *Girao* as modified in these reasons is a good way to avoid such problems.

63 As a matter of ordinary trial practice, the parties' agreement should be entered with the joint book of documents at the earliest opportunity. In this case, the need for a timely agreement or resolution of the issues regarding documentary evidence was greater because of the unusually heavy role played by the documents. The fact that the parties felt the need to clarify their agreement so late in the game simply illustrates the inadequacy of the initial agreement and the effect of the absence of judicial scrutiny.

64 This was a case of far too little, far too late, which left the trial judge in a quandary about the admissibility and use of the business records. This became apparent when he dealt with the factual issue of who assaulted ***Bruno***. The appellant takes issue with the trial judge's factual finding on the assault, at para. 36 of the decision, where he stated: "Having reviewed all the evidence including the photos of the other inmates, the video, and the records of the NDC including the report prepared by CO Tom Bradley, I am satisfied that DaCosta, Gibson, Ashenden and Empey undertook the assault." Despite the parties' reservation in their agreement on the hearsay value of statements in the documents, the trial judge effectively accepted the hearsay content of what was known in the trial as the "Bradley Report," which the Crown produced. CO Bradley did not testify.

65 This case highlights the deplorable tendency in civil cases of admitting evidence subject only to the weight to be afforded by the trial judge: "Seduced by this trend towards [evidentiary] flexibility, some judges in various jurisdictions have been tempted to rule all relevant evidence as admissible, subject to their later assessment of weight": *Teva Canada Ltd. v. Pfizer Canada Inc.*, 2016 FCA 161, *per* Stratas J.A. at para. 83. This is legal heresy, as Stratas J.A. noted, citing *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 59. I agree with his trenchant comments.

66 Finally, as I noted in *Girao*, at para. 22: "The goal of a trial judge in supervising the assembly of a trial record is completeness and accuracy, so that the panel of this court sitting on the appeal can discern without difficulty exactly what was before [the trial judge] at any moment in the course of the trial." In this case it was necessary for this court to look at the written closing submissions of counsel to the trial judge, but they were not in the trial record. They were sent after oral argument on the appeal at our request. In my view, good trial practice is to include any written arguments in the trial record as lettered exhibits to which the appeal court can have access if necessary.

D. DISPOSITION

67 I would allow the appeal on the basis that the reasons for decision are insufficient to permit meaningful appellate review and remit the case to the Superior Court for trial by another judge. In the circumstances, I would not address the other grounds of appeal. This is truly a regrettable outcome, particularly for the respondent who lacks the resources of the state.

68 The court will accept written costs submissions of no more than five pages in length relating to the appeal costs and the trial costs in view of this disposition, beginning with the appellant. These submissions are to be served and filed with the court at coa.e-file@ontario.ca within two weeks of the release of this decision, followed one week later by the respondent's submissions, and any reply within another week.

P.D. LAUWERS J.A.
D.M. BROWN J.A.
I.V.B. NORDHEIMER J.A.

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CORRECTION

Released: October 5, 2020

A typographical correction has been made to para. [1] which now reads:

[1] On August 25, 2006,

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1 While many cases dealing with insufficient reasons have come out of the criminal context, this Court has had no difficulty applying them in the civil context. See *Canadian Broadcasting Corporation Pension Plan v. BF Realty Holdings (2002), 214 D.L.R. (4th) 121*, at para. 64. The same applies, albeit with different considerations, to the overlap between civil and administrative law. Indeed Binnie J. relied on *Baker* in formulating his reasons in *Sheppard*.

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