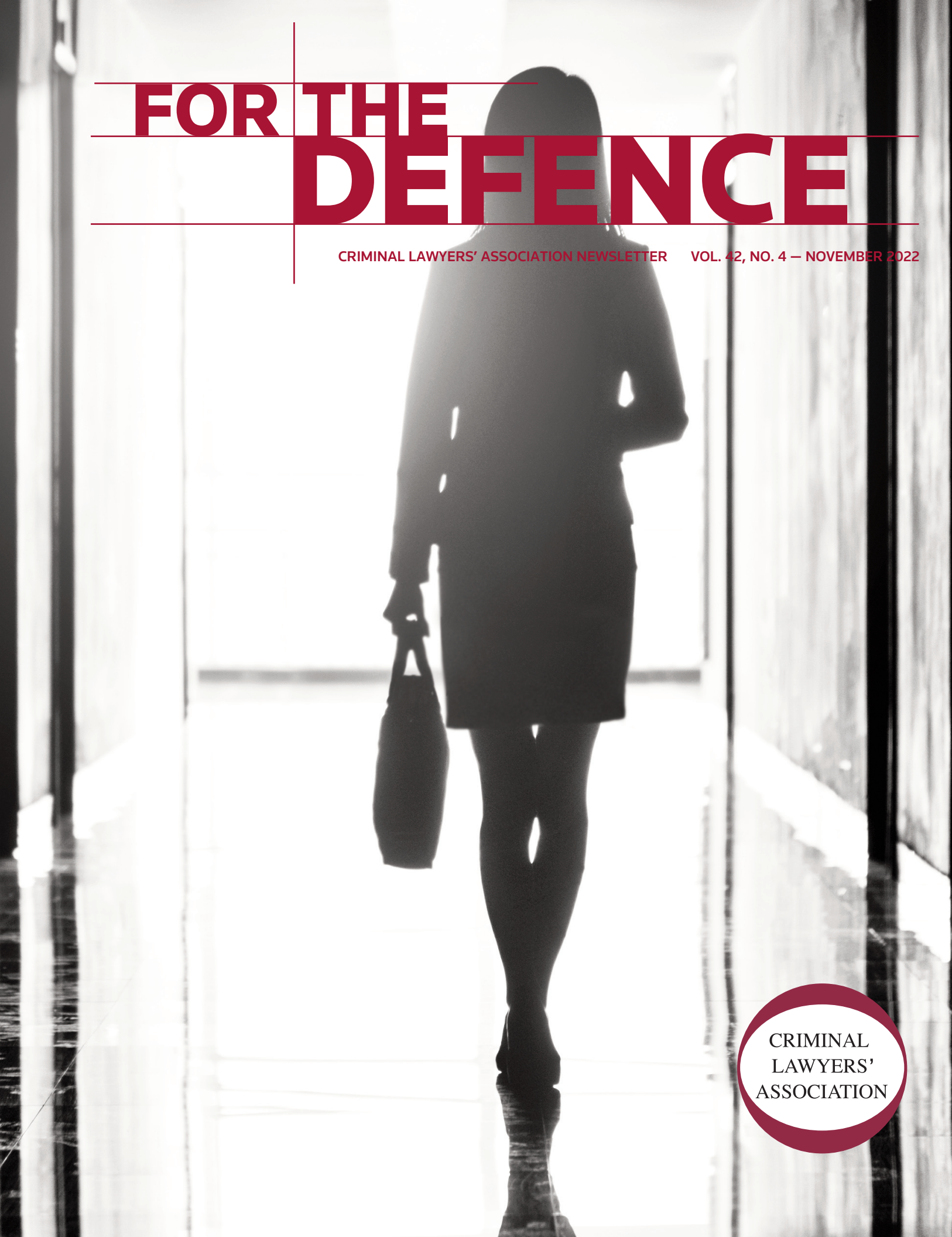
FOR THE DEFENCE

CRIMINAL LAWYERS' ASSOCIATION NEWSLETTER VOL. 42, NO. 4 — NOVEMBER 2022



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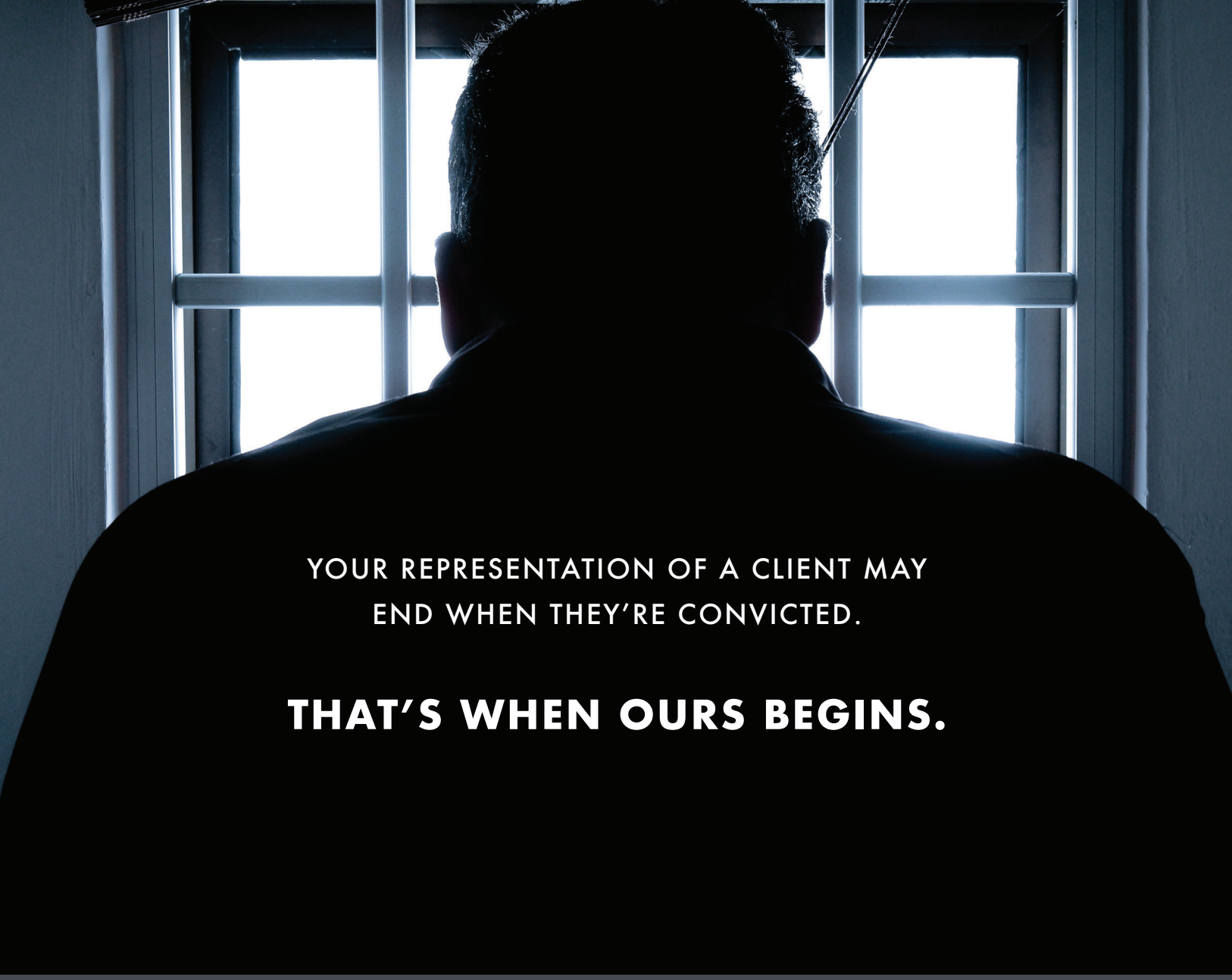

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IN THIS ISSUE

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PRESIDENT'S MESSAGE

Daniel Brown

On October 3, 2022, I attended the annual opening of the courts ceremony.

The Chief Justices for the Superior and Ontario courts, as well as the Associate Chief Justice of Ontario, provided remarks, and all reflected on modernization emerging from the COVID-19 pandemic.

Superior Court Chief Justice Geoffrey Morawetz recognized that there is no going back: virtual hearings have been transformational for the courts and have become a permanent fixture for court proceedings. However, he added that a return to in-person hearings, especially for complex cases, is an integral part of the justice system.

Ontario's Associate Chief Justice, Michal Fairburn is encouraging parties to attend court in person though she says that for the time being, the Court of Appeal for Ontario will continue providing parties with the flexibility to attend remotely if required.

Ontario Court Chief Justice Lise Maisonneuve outlined her vision for a hybrid model of justice that can accommodate virtual, in-person and dual proceedings, with the ability to seamlessly transition from video to in-person, across all regions.

The Criminal Lawyers' Association has been working alongside the judiciary and the Ministry of the Attorney General to help address our vision of modernization on behalf of the membership and we will continue to encourage the government and the court system to continue investing in technology to ensure that we have the best tools and support to provide efficient and effective access to justice. We must ensure our courts remain accessible to everyone, not just those equipped with laptops, cellphones, and high-speed Internet, but also vulnerable clients who may lack the tools or the abilities to use them.

I am also delighted to welcome Neha Chugh who practices in Cornwall, Ontario as one of our new co-editors of the For the Defence magazine. Neha was recognized at the opening of the courts for her civility and professionalism when she was awarded the prestigious Catzman Award. When Neha approached me with the topic of this issue, I shared her concerns about the loss of defence lawyers in active practice across Ontario. She delivered a powerful acceptance speech for the Catzman Award, and, with her permission, I have asked to reprint an excerpt from it here with the hopes that it brings you encouragement to keep pushing on to do the work that is essential to our clients and the justice system as a whole.

You are Enough

Neha Chugh 2022 Catzman Award Speech

I have laid awake so many nights worried that I am not enough for my kids. That I am not enough for my clients. That I am not enough for other lawyers and this profession.

When I think about civility and professionalism, I wonder about how to balance traditional notions of civility with our collective need to challenge systemic issues plaguing our justice system and the status quo. I wonder if I am enough for this task.

Civility goes beyond diplomacy and just being nice to one another. It doesn't mean avoiding conflict. This new generation of lawyers has been tasked with undoing so many historical wrongs, the weight of which can be unbearable. We work in a system where so many individuals are reminded that we don't belong, on a daily basis, and within the pressures of an adversarial system. The great privilege of being able to advocate for clients, to wade into conflict with humour and grace has saved me time and time again.

Dear young lawyers. You are enough for this job. You belong. Your advocacy matters. To the young lawyers, the black lawyers, the Indigenous lawyers, the brown lawyers in rural Ontario – there will be so many days where you will be reminded that you do not belong. It is uncomfortable. It is exhausting. It is ok to be tired. It is ok to be angry. But don't dwell in that space. You may not feel like you are resilient, strong, or tough, but give yourself grace first because that is what Justice Catzman would have given you. You are enough and you will be able to navigate these situations to make our whole profession more equitable and inclusive.

And the kids are going to be alright.

EDITOR'S NOTEBOOK

I am excited to introduce myself as one of the new editors of the Criminal Lawyers' Association's beloved *For the Defence* magazine. My co-editor Margaret Bojanowska and I have big shoes to fill, and we are express our gratitude on behalf of the association to Jill Makepeace and Lindsay Daviau who continued to provide high quality content to us over the past years. We wish them the very best in their upcoming endeavours.

I love the *For the Defence* magazine. I have been a member of the Criminal Lawyers' Association since 2008, and when every issue arrives in the mail, I open the wrapper, take in the beautiful cover art, crack the spine, and then carefully read each article. I am looking forward to changing my relationship with the magazine, being responsible for curation, and the delivery of quality content that we want to share with our colleagues in the bar.

During my interview for the editor position, I was asked about ideas I had for themes for upcoming editions of the magazine. Immediately, an issue that has been weighing on my heart came to mind. We have seen a great departure of defence lawyers. Why are defence lawyers leaving the profession? Is being a defence lawyer a sustainable profession, financially and emotionally? What factors inform our young defence counsels' decisions to stay in the profession? The major theme that has emerged in this edition's articles can be summed up in one word: courage.

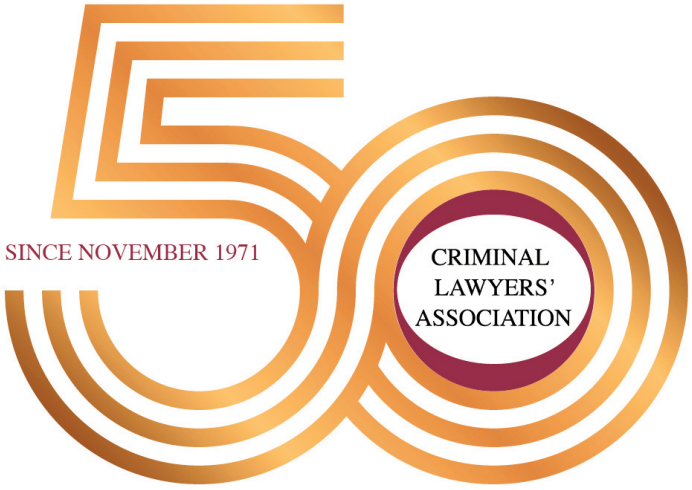
We start with Steve Skurka's creative memoire of his fearless representation of Toronto Raptor Dee Brown. When faced with great resistance from the bench, Skurka continued to courageously advocate for his client and to identify important issues of racial profiling in policing. We then move to west, where Sarah Rankin gives us insight into Alberta defence counsels' collective action against Legal Aid Alberta. Back to Ontario, Hamna Anwar and Tonya Kent reflect on their personal commitments to stay in the defence bar.

Then moving to brass tacks, we move to the dreaded topic of ineffective assistance of counsel, the topic that keeps defence lawyers up at night. The issue that makes us sweat over our files, question our decisions on a file over and over again, wondering if the choice to be a defence lawyer is the right one. Nadia Liva from the defence bar provides invaluable insights for defence counsel, and Katie James from LawPRO provides equally invaluable and reassuring advice from our insurer. Understanding the "ineffective assistance of counsel" process from both sides is the best way to get through.

I am also starting my new friendship with the magazine's regular columnists – Lynda Morgan, Hussein Aly, Lauren Wilhelm, and Craig Bottomley, who continue to impress me with their commitment to our bar through their writing.

Overall, getting through this first issue as editor for me: courage. But, like most things as defence counsel, getting through it has made me excited to be a part of this magazine and the Criminal Lawyers' Association.

Neha Chugh



It was a magnificent sunny day on Saturday October 22nd, 2022 in downtown Toronto. No rain, no wind and most importantly no snow. The temperature was surprisingly warm for this time of the year. It was the perfect weather to hold the CLA's 8th Annual Recent Call Conference.

After two years of holding virtual events due to the pandemic, the CLA is finally starting to host in person events. This was the first in person event for recent calls, articling students and students since 2020. For many students and new lawyers, this was probably their first in person event.

Another first for this conference is that it was offered for the first time in a hybrid format. Recent calls and students who live outside of Toronto or Ontario but who still wished to attend the conference had the opportunity to do so via Zoom this year.

What was clear from this year's instalment of the conference is that there is a new generation of lawyers who are eager and hungry to connect with their fellow criminal lawyers. The recent call conference was very well attended both in person and virtually. The speakers who presented at the conference are among the best criminal lawyers in the province. The conference provided a great opportunity for so many new lawyers to meet senior members of the bar they only knew by name or through a Zoom screen.

The conference was then followed by a social event at the Elephant and Castle on King Street in downtown Toronto. The social was just as successful as the conference itself. The place was packed. Really packed. Special guests were invited to attend and network with recent calls and students including the CLA's current president Daniel Brown.

Both the conference and the social are the result of the hard work of the recent call committee and directors. The organizing members of this year's conference are :

- Rubaina Singh
- James Bray
- Myles Anevich
- Justin Yuen
- Sandra Kimberg
- Emily Dyer

The Recent Call Directors are:

- Tonya Kent (Toronto region)
- Maya Shukairy (Outside of Toronto)

Fearless Lawyering

by Steve Skurka

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As I reach the twilight of my career as a criminal defence lawyer, I've reflected on the ideal qualities needed in the courtroom. Knowledge of the law and its constant reshaping is important. Advocacy skills running the gamut of examination and cross-examination of witnesses and the variety of submissions are essential. But even with that bedrock of foundation, there is one overarching quality that truly defines the great advocate: fearless lawyering.

Fearless lawyering manifests itself in many ways: interrupting opposing to make a forceful objection, standing up to an unruly judge, withstanding the specious claims of an unethical former client, defending the unpopular client, being unwavering in the pursuit of ethical advocacy and resisting any attempt to diminish the lawyer. Fearless as a lawyer to stand unreservedly for the majesty of difference and the rich and diverse contributions of lawyers of diverse backgrounds and cultures.

I confronted the need for fearless advocacy in the landmark racial profiling case of the former Toronto Raptor, Dee Brown. It was the first appellate decision in Canada to recognize racial profiling and its feature of systemic racism by the police. I encountered a trial judge, Justice David Fairgrieve, who resisted my *Charter* motion from the first moment of the trial. I was very unsettled by the treatment I received from the judge and embarrassed for my client.

Part way through the first morning of the trial, Justice Fairgrieve said that he "was a little curious about why a case like this had been set for two days". I was accused by the judge to have made "a clear cut, serious, quite offensive allegation with

respect to an officer" and masking it at the end of the day by quoting from the Parks judgment. The trial judge characterized my application as "quite offensive" three times during the trial.

In his argument before the Supreme Court of Canada in the Groia appeal, Frank Addario pointed out that defence counsel was excoriated by the trial judge in the Dee Brown trial for raising for the very first time the concept of racial profiling and the judge said that what the lawyer did was rude and nasty and uncalled for. The judgment of the Ontario Court of Appeal in *R. v. Brown* highlighted that I was admonished by the trial judge for raising very serious allegations and that at times his intervention reflected a misunderstanding of the object of cross-examination and appeared on the side of the police officer. The judge's tone to me during the two-day trial was foreboding. But I never flinched or wavered from the task of vigorously defending my client. I wanted to engage with the judge, but didn't, remaining calm and respectful – and eventually, that is what won the day for my client and vindication for me.

The judge's tone to me during the two-day trial was foreboding. But I never flinched or wavered from the task of vigorously defending my client. I wanted to engage with the judge, but didn't, remaining calm and respectful – and eventually, that is what won the day for my client and vindication for me.

The Court of Appeal noted that my cross-examination of the police officer continued with its momentum despite the judge's interference. In relation to the withering attacks against me, the Court held "that the open indication of distaste or, to use a synonym, aversion, during the presentation of a case is utterly inconsistent with the duty of a judge to listen dispassionately with an open mind".

I recall that James Stewart, the senior prosecutor from the Crown Law Office arguing the Brown appeal, approached me at the counsel table at Osgoode Hall to tell me how much he admired my work at the trial.

Fearless advocacy in the face of adversity was the hallmark of defending Dee Brown. Let me share a few examples taken from the transcript of the trial:

The Court: "Can I just ask, Mr. Skurka, why are you using that tone? This is just a trial in a courtroom, there is no need to be so outraged and to use that kind of tone with the evidence."

Mr. Skurka: "It's not outrage, Your Honour, with respect. It's simply the way I conduct my cross-examination."

The Court: "Well tone it down because I do not think it is appropriate. I think you should treat the witness with some courtesy and stay calm."

Note that I was accusing the officer in my cross-examination of deliberately creating a false set of second notes to explain his stop of Dee Brown once he realized that he was a professional athlete. My tone was justifiably forceful. But the trial judge's criticism of my tone didn't lessen my focus or lead me to weaken. The Court of Appeal commented that the trial judge's intervention "had no inhibiting effect on counsel pursuing the line of questioning on which he was embarked".

During submissions I encountered the most heated challenge from the trial judge. Early in the argument the following exchange took place:

The Court: "Well, I guess the question –"

Mr. Skurka: "Harrassing is –"

The Court: "– that arises then what evidence is there of any improper purpose on the part of the officer. Surely the fact that the driver who is speeding happens to be black does not provide any evidence that the officer stopped him."

Mr. Skurka: "I haven't said that, Your Honour, with respect."

The Court: "Well, all right. Well, I am asking you what evidence is there of any improper purpose?"

Fearless lawyering requires counsel to challenge a judge who mischaracterizes her position. It must always be done firmly and with respect, but never surly or intemperate. Counsel must remember that a record is kept that may be favourably scrutinized by an appellate court one day.

Note the excerpt of the Court of Appeal judgment that followed the previous exchange with the judge:

"At this time the trial judge had heard evidence that the officer had pulled beside the respondent's car, looked toward the respondent, fell back and requested a Mobile Data Terminal check, signalled the respondent over and written a separate, undisclosed set of notes about the encounter. As counsel submitted, pulling over a person who 'happens to be black' had never been the basis of the application. These words, at that stage of the case, could well have been understood as trivializing the application and indicating the trial judge's resistance to it."

Perhaps the most difficult time for a lawyer to be fearless is the occasion when the judge becomes ornery with a raised voice directed at counsel. I confronted this at the outset of my submissions in the Dee Brown trial:

Mr. Skurka: "What I would ask to be permitted, is to give you the building blocks of the position I'm taking, that's all."

The Court: "I could be anxious if you did because. . ."

Mr. Skurka: "Thank you."

Perhaps the most difficult time for a lawyer to be fearless is the occasion when the judge becomes ornery with a raised voice directed at counsel.

The Court: ". . .and I think. . .if you want me to be frank with you so you know what my concerns are."

Mr. Skurka: "I do want you to be frank."

The Court: "But it does concern me that you made such serious allegations, really quite nasty, malicious potentially, accusations based on, it seems to me, nothing and you are going to have to persuade me that there is some appropriate basis on which to make this kind of accusation about an alleged racist motivation on the part of the officer. . ."

The legacy of the seminal judgment on racial profiling includes a recitation that the trial judge described my accusations of racial profiling at trial as nasty and based on nothing. I did not permit the judge's disparagement of my position to distract me from continuing my argument. I merely said, "may I continue Your Honour," received his acquiescence and proceeded. Fearless advocacy requires a steely strength and the conviction that a robust defence of the client's rights and liberty is paramount.

During the sentencing of my client, Dee Brown, the trial judge spoke to my client directly, noting that that there was nothing inherently reprehensible about his conduct "which is not to say that it would not be nice if perhaps you might extend an apology to the officer because, I am satisfied, the allegations were completely unwarranted".

The primal voice inside me called on me to inform the trial judge that he should be apologizing to my client for the misguided manner he conducted the trial. However, I made the sensible decision to indicate there would be no apology. I didn't acquiesce to the request for contrition to placate the trial judge. Indeed, it is significant that I maintained this position as the apology became a central part of the Court of Appeal's judgment. The law is now clear that no defendant or counsel need apologize to anyone for bringing an application at trial that is of arguable merit, even if it does not succeed at trial.

One final comment about the request for Dee Brown to apologize. After the Ontario Court of Appeal released its judgment, I received a letter from Justice Fairgrieve. He indicated that he'd read the judgment and it was clear to him that I'd raised a legal argument that had significant merit and that he'd failed in his role to judge it fairly. He apologized to me and asked me to convey his apology to my client. I wrote back to the judge and commended him for his exemplary letter.

The law is now clear that no defendant or counsel need apologize to anyone for bringing an application at trial that is of arguable merit, even if it does not succeed at trial.

Fearless lawyering had won the day.

Steve Skurka - Senior Counsel, RH Criminal Defence

Mr. Skurka presenting on racial profiling to the Criminal Lawyers Association. Reproduced with the permission of Steve Skurka.

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The View from Alberta – The Legal Aid Alberta Defence Counsel Job Action

by Sarah Rankin

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On September 26, criminal defence lawyers in Alberta stopped accepting any work through Legal Aid Alberta. This total withdrawal of services followed weeks of escalating job action by members of the professional associations representing defence counsel in Alberta.[1]

Every criminal defence lawyer in Canada will be familiar with what motivates the ongoing Alberta job action. Counsel have grave concerns about:

- how few people are eligible for Legal Aid;
- how little of the time spent on a client's defence is compensated; and
- the low hourly rate Legal Aid pays for those tasks.

Alberta turns down more applicants for Legal Aid than any other English-speaking province.[2] While the eligibility guidelines got a bump a few years ago (after the public became aware that even a person on income support for a disability would make too much money to qualify), huge numbers of Albertans with extremely low incomes are still ineligible for Legal Aid assistance. An income over $20,000 would make a person living alone ineligible. A parent in a family of five earning a total of $41,000 would not qualify.

If a person is financially eligible for Legal Aid, then the lawyer who receives their file faces the prospect of representing them despite an allotment of hours that is markedly lower than the time actually necessary to do so. The result is that the work is vastly underpaid, especially given the skill level required. A bail hearing (inclusive of preparation) would earn you an hour's worth of fees under the

current tariff - $ 92.40. Alberta has no tariffs for junior counsel to second chair on serious files, and requests to fund second chairs are routinely denied.

These rates are costing the Alberta justice system decades of experience through the loss of senior counsel from the roster. Alberta mirrors many other provinces in its certificate-based legal aid system – if a person qualifies for coverage, a certificate for their file goes out to someone on the roster of counsel who have agreed to take files

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of that kind. The roster has been in trouble for quite some time, but reached a breaking point this year. Many senior defence counsel have stopped taking Legal Aid, or have reduced their Legal Aid practice to rare occasions where they have an existing relationship with a client or the matter is extremely serious. Earlier this year, a new take-it-or-leave-it contract for Roster lawyers came into place. To remain on the roster, it required them to agree to termination from it at any time, for any reason, without notice. This raised the possibility that counsel would be terminated by Legal Aid after becoming counsel of record and committing to trial dates which they may or may not be released from by the Court. Many counsel simply refused.

Losing senior counsel is serious. One of the most frustrating parts of the Alberta situation is that this is not a new or unpredictable problem. Ontario lawyers will know that Professor Trebilcock's 2008 review of their Legal Aid system found that the most "pressing and urgent issue" was the accelerating exit from legal aid work by senior members of the bar.[3] The Review of the Large and Complex Case Committee, completed the same year, identified the same issue.[4] Senior police "forcefully submitted" they preferred complex trials be run by experienced counsel because inefficiently run trials cost them senior detectives for longer periods of time, as those detectives became tasked with witness wrangling, preparation, and facilitating the unpredictable with the Crown.

Beyond hollowing out the "top", a stagnant tariff also thins out the defence bar from the bottom by making it harder to attract or retain junior lawyers in criminal law. Articling positions are harder and harder to come by when lawyers are running closer to the break-even line. The difficulty of sustaining a Legal Aid practice presses junior lawyers to consider taking on more serious files earlier. This has costs for the system, but also contributes to burnout and loss of those junior lawyers.

COVID-19 turned these pressures into a death spiral for the Alberta defence bar. When Scott Fenton opened the National Criminal Law Program in Victoria this summer by noting COVID-19 hit the ranks of the defence bar harder than anyone else working in the justice system, the ripple of emotion through the room was palpable. By the time the Courts had returned to more or less full functioning, the Alberta bar had lost a huge number of lawyers who simply could not afford to continue in private practice. The overwhelming majority of our members are self-employed, running a small business with few, if any employees. For two years, they tried to persist without a consistent salary, benefits, or leave coverage, all while trying to take care of their people. On top of the file work and challenges for childcare, schooling and family that affected everyone during the pandemic, defence counsel picked up more unpaid tasks. They attended weekly meetings to manage the

Losing senior counsel is serious. One of the most frustrating parts of the Alberta situation is that this is not a new or unpredictable problem.

evolving response to the pandemic and keep the system functioning. They were the only participants in those meetings who were not paid for their time. They organized triage systems to limit the exposure of colleagues to the virus, to keep an eye on prison responses, to ensure the poor and those without housing could stay connected to an increasingly virtual process, and to get work to colleagues who were struggling financially. Staying above water was simply impossible for many. In the last two years we have watched again and again as our colleagues have become Crown prosecutors, have left criminal law, or have left Alberta entirely. At the very moment the Courts are faced with rescheduling

huge numbers of backlogged cases, the ranks of the experienced criminal defence bar in Alberta are thinner than ever.

Alberta lawyers watched these changes with alarm. We had grave concerns about a bar under siege providing a defence on the uneven playing field caused by the funding situation. Multiple wrongful conviction inquiries in Canada have emphasized that under-resourcing defence counsel has played a role in wrongfully convicting people and costing them years of their lives. The unevenness in Alberta caused by legal aid funding failures is extraordinary, ranging from the available hours on files, to a tariff rate for defence experts that is significantly lower notably lower than what the Crown is permitted to offer to their witnesses – if a Legal Aid expert is approved at all.

Still, counsel pushed on. There was rumour of a light at the end of the tunnel: in summer 2022, there was to be a full-scale review of the Legal Aid tariff *including funding*. In Calgary, we assembled a group of experienced Legal Aid lawyers who were willing to donate time to this process, and make themselves available at the expense of time with their families.

Then the last straw took the camel down. Defence counsel learned in early meetings on the review that it now would *not* include a review of the overall funding for Legal Aid. It would be a zero-sum look at redistributing the existing and inadequate funds. The most that could be accomplished would be deciding how to underfund Legal Aid work in novel ways – pushing the same piece of the pie around the plate and leaving new gaps in services and funding. Given the province is already approximately $80 million dollars behind on funding they committed to Legal Aid in 2018 but have never delivered, this news was unbelievable. It also raised the prospect that boosting hours on criminal files would mean robbing funds from other areas of coverage, like family, immigration, and child protection.

A request for an urgent meeting with the Minister of Justice, who has control over the tariff, went unanswered by the deadline set in the letter. When a response did come, it was to confirm no new funding would be available. This was in stark contrast to what happened when Crown prosecutors expressed concerns earlier in the year – they got swift meetings and raises.

The unfairness could not be ignored. Shortly afterwards, and for the first time in Alberta history, all Alberta defence associations voted overwhelmingly to withdraw from the review process and to begin job action. This began with a limited scope, but members have consistently voted to withdraw more services – starting with courtroom duty counsel (who appear in docket courts and assist unrepresented accused people), bail office duty counsel (who perform the same service in Alberta's 7 day/week, 16-hour/day telephone Justice of the Peace bail offices), advice for complainants statutorily entitled to it on sexual offence files, and culminating in refusing new Certificates on serious offences, like murder, and appeals.

While initially (and inexplicably) undermining the job action, Legal Aid Alberta has now come out in support of a review to the financial eligibility guidelines, and the lawyer tariff,[5] as have our colleagues at the provincial and federal Crown's office. They recognize that having qualified and experienced defence counsel in criminal courtrooms protects everyone's interests. No Crown or decision-maker seeks to convict the innocent, and those in courtrooms every day know skilled defence counsel are the primary safeguard against this. They also know the research confirms what anyone in a Courtroom with a self-represented person already knows: funding that makes representation available pays for itself, and then some.

On October 5, 2022, the Alberta government informed defence counsel organizations they were prepared to temporarily increase the tariff and financial eligibility guidelines by approximately 8%. This was a reversal of their previous position that there was absolutely no possibility of funding changes until the 2023 budget. They have explained this by saying these are federal, not provincial funds. The logistics are not totally clear at this point, but it appears these funds were allocated by the federal government months ago in their budget and the province may have intended to use them to offset their contribution to this year's Legal Aid budget. Members will vote on October 12 about whether to continue job action in some form in light of this news.

I will be voting to continue job action. The announcement comes with no long-term plans to continue even this increase in funding past this fiscal year. Though the announcement refers to examining financial eligibility guidelines and tariffs, this will apparently follow information from the tariff review process whose terms were so inadequate it *caused* the job action in the first place. Defence associations have not participated in that process and it is hard to understand what insights could come without them. Beyond that, the United Conservative Party elected their new leader on October 6th, , meaning the province has a new premier. Nothing binds the incoming leader, any changed Cabinet or anyone else to the vague plans for further review or improvement. The problems are too deep and too widespread for this non-committal step to solve them.

My vote to continue job action does not come lightly. No step in this process has been undertaken without deep discussion and reflection within our bar. Indeed, every defence lawyer I know has agonized over the steps we are taking. As much as despair

drove the defence bar to take this step, coordinating with the bar on this action has been deeply inspiring. I expected our members to have financial worries about taking this step but over and over, this is not the first hesitation our colleagues voice. Instead, they worry most about their clients. Or about whether their junior peers will survive a job action. They have shown themselves to be at heart exactly who we know takes up defence work: those dedicated to advocacy driven by compassion and the desire to be of service.

We spend our lives in criminal courtrooms and we can tell you, the system is in trouble. What pushed us over the edge in Alberta was reaching the point where no amount of individual dedication was enough to halt a crisis. A system-level solution is the only thing that can halt the slide into a two-tier justice system. We are acting because it is intolerable that some of the most marginalized individuals, with some of the most complex circumstances, do not have access to counsel with the skills and experience necessary to competently assist them. We are concerned about those left to fend for themselves in the system because Legal Aid is only available to those in the absolute deepest poverty. It has been heartbreaking to discover how much fighting is necessary to get what is needed, but I am so proud to stand with our bar in this work.

NOTES:

[1] The Criminal Defence Lawyers Association (Calgary), the Criminal Trial Lawyers Association (Edmonton), the Southern Alberta Defence Lawyers Association, and the Red Deer Defence Lawyers Association.

[2] Department of Justice Canada, "Legal Aid in Canada 2020-21" at p. 31, online at: https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/2021/docs/rsd_rr2022_legal-aid-in-canada-2020-21-eng.pdf.

[3] Ministry of the Attorney General of Ontario, Report of the Legal Aid Review 2008, Trebilcock, Michael. Online at: https://wayback.archive-it.org/16312/20210402061121/http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/.

[4] Ministry of the Attorney General of Ontario, Report of the Large and Complex Criminal Case Procedures, Justice Patrick Lesage & Professor Michael Code. Online at: https://wayback.archive-it.org/16312/20210402060921/http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/.

[5] See: https://calgaryherald.com/opinion/columnists/opinion-legal-aid-alberta%E2%80%AFis-still-here-and-always-will-be-available.

Our commitment to the defence bar: Staying the Course

by Tonya Kent and Hamna Anwar

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Staying the Course

Tonya Kent

After a partial lifetime growing up watching American Justice and the old school Law and Order franchises that warped my mind about the true state of the criminal justice system, I went to law school thinking I would be a Crown at the end of it. Thankfully though, fate would not have it and I have been a defence lawyer since the day I was called to the bar in 2016. During my time in law school, during my articling term, and working at my first law firm, I learned much more about the many inequities embedded in the system. As a Black woman, I was of course aware of the racial disparities against individuals in the system and that marginalized people were more likely to be harassed by police thereby run into conflict with the criminal justice system more often than those that

do not fit into these groups, however, at first, was not necessarily aware of the way the unfairness of the system manifested itself in different forms against those that are addicted to substances, those living in poverty, and those that simply cannot afford a lawyer, but also do not qualify for legal aid. The latter, being left in an awful limbo and navigating a system alone they know nothing about without any real guidance.

Knowing what I did at the time and learning even more while practicing, staying in the bar became especially important to me because the power of the state coming down on one person is overwhelming and confusing for them as well as unfair a lot of the

My determination to help my clients is what keeps me going in defence practice, even if at times it can be a struggle.

times. It is even more overwhelming when we consider the grand number of resources that the police and the Crowns offices have to charge and prosecute our clients compared to the meager resources of the defence bar to defend them due to the chronic underfunding of Legal Aid across the country. Staying in the defence bar means I can help the most marginalized people and hold the state to task in regard to their obligation to uphold the *Charter* in their dealings with our clients and defend the legal rights of all members of our society by upholding the principle of innocent until proven guilty in our criminal justice system with my advocacy.

For many young lawyers, it may feel as though it is not financially lucrative or sustainable to stay in the defence bar, but I believe I have an obligation to marginalized folks – to folks that look like me to receive the best defence possible in their matter or obtain the best result possible. Many of our clients have the deck stacked against them that stem from poverty, addiction, abuse, and a plethora of other issues. The last thing clients need is a criminal record that hampers future employment and travel prospects or time in jail for problems that are not solved by throwing someone in jail for an amount of time deemed appropriate. Our clients are usually facing the worst time in their lives and need a lawyer that is attentive to the legal issues in their case and actually care what happens to them, as the impact can be detrimental to their lives and result in wrongful convictions.

My decision to stay in the defence bar means I have chosen to help people in conflict with the system, that I have chosen to work within our communities, and that I have chosen to advocate for those that society has turned their back on in most senses. My determination to help my clients is what keeps me going in defence practice, even if at times it can be a struggle. Although it can be difficult to be a sole practitioner, especially as a young lawyer, it is not impossible, especially with the supportive bar that we have and the many senior mentors available to help us with not only legal strategy, but also with tips on managing our practices.

Staying in the defence bar to me feels like a calling and even on those tough days with difficult clients, unreasonable Crowns, stressful trials, and going back and forth with Legal Aid for funding for our clients, it is still worth the fight. There are of course bad days that make me enraged and frustrated, but I go home at the end of the day proud of what I do for my clients and proud that I give it my all to fight the good fight everyday.

Staying the Course

Hamna Anwar

As an articling student in criminal defence, I naively created a group called "Young Women in Criminal Defence". I had quickly encountered the "boys' club" of the defence bar and wanted to carve out a space for women. But, one by one, most of my colleagues left. Some left because the compensation was unbearably low, others could no longer tolerate being mistreated by their bosses, Judges, Crowns, Court staff and their clients. Regardless of a pre-requisite of being "tough" to survive in this profession there is a level of respect we all expect and deserve.

I have stayed because all my life I have constantly been reminded of being an outsider, the "Other", a brown woman from an immigrant Pakistani family growing up in Scarborough under humble circumstances.

But, I stayed. I have stayed because all my life I have constantly been reminded of being an outsider, the "Other", a brown woman from an immigrant Pakistani family growing up in Scarborough under humble circumstances. This sense of familiarity with the Other makes me an empathetic lawyer – when my client doesn't even have enough money to take the bus to my office to prepare for their trial, I get where they're coming from. Despite the challenging nature of our job, I continue to do it for its gratifying moments, like when my presence

makes a difference to my fearful Black client who asks me to go to the police station with them because the police have done them wrong too many times. Or when I get my client with special needs out on bail and hear the gratitude in their mother's voice. Or when I get serious charges withdrawn for a client and they are consequently not deported to a country where they would be persecuted. Or when I use my trauma-informed training to help women who get charged after seeking state protection from violence. The reality is that in criminal defence our focus isn't on billable hours; instead it's on our clients, who are real humans facing serious jeopardy on their liberties.

I still remember the first time someone asked me to be their lawyer. I felt excited yet overwhelmed. The trust they put in me amidst their vulnerability was an honour. Criminal law is at the intersectionality of marginalization, poverty, addiction, mental health and often trauma, victimization, family break down and precarious immigration status. Every client has unique circumstances. Despite their efforts many people remain stuck in their vicious cycles. Rather than taking a paternalistic, simplistic, or judgmental approach criminal lawyers learn to appreciate the complexities of people's lives.

As a racialized woman, I don't have the benefit of the inherent respect and authority that comes with a certain skin tone and gender. Many times, I am the only woman in the courtroom. And, majority of the time, I am the only racialized person. People always doubt young women – especially racialized women. This dynamic is magnified for us in the courtroom and in encounters with Crowns, Judges and even clients. People have the audacity to say things to us that they would never say to a man - especially a White man. While entering the lawyer's lounge at a courthouse – *in a suit and holding an access card* – I was told that the lounge was "only for lawyers." This time it was another lawyer policing me. Well, what is it about my appearance that would make you think otherwise? Judges have called me XYZ's assistant on the record. Police officers are always double checking if I am, in fact, a lawyer. In my earlier days this hostility, coupled with the imposter syndrome, would disorient me. But, I now have the maturity to know that it is not my duty to make *others* comfortable with my presence. I do not need constant permission to take up space. And, it's not my responsibility to endlessly educate people, I have tried that approach and it's exhausting. I also refuse to internalize the white gaze. I am me: a Brown woman. A lawyer. I don't come from privilege. I have learned to draw boundaries and stay professional, even in the face of ignorance. I keep my focus on my clients, and for them I work extremely hard.

The work we do is demanding and complex. The day one of my clients told me that above all they appreciated my kindness the most was the day I realized that I can just be *me*. I stopped trying to be a cookie cutter version of a White male lawyer. I embraced my own style. I stayed, because even in 2022 the criminal defence bar needs people like me to evolve the idea of what a lawyer looks like. I am hopeful that other young, racialized women can join me.

Competently Defending Yourself Against Allegations of Incompetence[1]

by Nadia Liva

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In recent years, I am seeing more Law Society investigations into the competency of counsel – in particular within the context of findings of ineffective assistance of counsel. Such findings are not limited to appeals where a protocol for such applications has been established. Allegations of ineffective assistance may arise in the course of a trial when new counsel takes carriage of a matter and there are delay issues that appear to fall at the feet of former counsel. They may arise when new counsel wants to bring an application which had not previously been considered. Regardless of the forum and whether there is a formal protocol in place, in my opinion, adhering to the Court of Appeal's protocol in such matters is best practice.

Raising an Allegation of Ineffective Assistance of Counsel

Alleging a colleague has engaged in incompetent or ineffective representation is a serious allegation. Care should be taken when bringing such an application. I believe it is vital that we take into consideration the impact of our decisions to bring such applications may have on our colleagues. By no means am I suggesting those considerations should outweigh our duties to our clients, but rather, I am suggesting there should be a balanced approach as recommended by the protocol set out by the Court of Appeal,[2] followed by the Superior Court,[3] and informally applied by the Ontario Court of Justice in many instances.

Bringing such an application requires a factual basis. Those facts more often than not come from your client. For instance, the client advises you they never instructed their former counsel to do X. The client tells you they insisted former counsel not do Y, but counsel did it anyway. You are told

that former counsel never informed the client about Z. In other instances, your review of the court record suggests that a certain application should have been brought and the client offers no explanation as to why it wasn't. The court record may reveal what appears to be a strange change in tactics and your client is adamant they were not consulted. Such facts may support the consideration of an application alleging ineffective assistance.

The first step in preparing for such an application is to interview your client – thoroughly. Don't just accept what they say at face value – test their recollections as you would when preparing them to testify in their own defence. Be skeptical, be thorough, be careful. Ask for corroborating evidence such as texts or emails, instructions, closing letters, even accounts to help create a chronology of events.

The first step in preparing for such an application is to interview your client – thoroughly. Don't just accept what they say at face value – test their recollections as you would when preparing them to testify in their own defence. Be skeptical, be thorough, be careful.

Explain to your client that to bring such an application, you will require them to **waive solicitor-client privilege** as between them and their former counsel in order for you to speak to former counsel and to gain access to their file. Ensure that your client is fully informed of the potential impact the application may have on previously protected communications with former counsel and on potential disclosure to the prosecution of parts of their former counsel's file.

Clients may be concerned that former counsel will not hand over the file or will seek to undermine the application because accounts remain outstanding or because they had a bad falling out. If there is hesitation to waive privilege, explain the impact of a refusal to waive privilege may have on the application and the ability of former counsel to still rely on the file and privileged information to defend themselves. If you bring an application without knowing what is in former counsel's file – or what discussions or instructions your client has not shared with you, you are essentially walking into a dark room without knowing where the furniture is – you could end up falling flat on your face tripping over a set of instructions your client never told you about.

Give notice to former counsel that you are bringing an application. You can provide a general outline of the allegations being made by your client; a draft of the Notice of Application or a draft of the affidavit your client will be swearing. Counsel should be given a reasonable opportunity to reply to the allegations. Securing former counsel's reply BEFORE you file the application will avoid potential misrepresentations, misunderstandings and reputational damage – not only to the reputation of former counsel, but to your own reputation as well.

To fully respond to allegations, counsel will often need to reveal solicitor/client privileged communications. If you don't provide a waiver from your client it, be prepared for counsel to request it. If it is not provided, former counsel may take the position that the allegations made by your client are an implicit waiver and may proceed to disclose communications your client had not shared with you. This leaves the application, and you, vulnerable. The Court may have to decide whether there is an implicit waiver based on your client's affidavit; may canvas the issue with your client in court; may have to consider whether redactions in materials are required, etc. You will have to consider the merits of the application under these circumstances and obtain written instructions confirming that your client understands the risks their position not to waive privilege leaves them in. For example, through an implicit waiver, information your client hoped would not be revealed, may be shared by former counsel in defence of their strategy. If your client does provide a waiver, you should file it as part of your application record so that the Court is aware the privilege has been waived.

Former counsel may reach out to you out of an ongoing duty of loyalty to the client, and advise you of problems with the client's position. Former counsel may reveal instructions your client never mentioned; share emails containing confirmation of a discussion that was had regarding verbal instructions, or may explain why a tactic was not taken, for example, a witness who was interviewed, yet never ultimately called at trial. Former counsel may send over a draft of their responding affidavit. Carefully review and consider the information provided by former counsel – and consider the potential ramifications of releasing privileged information into the litigation. **Be prepared to reassess your position on the application and to provide advice and obtain written instructions from your client.**

If you decide to proceed with the application, **provide a copy** of the Notice of Application/Appeal, your factum and evidence which you intend to rely on to former counsel.

Before the application is argued, the matter may benefit from a **judicial pre-trial** to establish the ground rules for the application, including how to deal with a failure to provide a waiver; the redaction of privileged information which may have been includ-

ed beyond the scope of the waiver, etc.

Your client and their former counsel may be examined on their affidavits – whether before the Court of outside the court. Transcripts of the examinations will be filed as part of the application. Former counsel may request that your client's transcript be provided so that they may fully prepare for their own examination – and answer all allegations made by your client. When examining former counsel, be civil, in keeping with the *Rules of Professional Conduct*. There is no need for sarcasm or incivility. You may one day find yourself the subject of such an application. Treat others as you expect to be treated.

Defending Yourself Against An Allegation of Ineffective Assistance of Counsel

If you are the recipient of notice that an application is being brought against you, I would recommend:

1. **Advise LawPRO**. LawPRO has roster counsel with experience handling allegations of ineffective assistance. Counsel can review your matter with objectivity and can assist you in preparing your affidavit. See Katie James' article in this edition for further information as to how LawPRO can assist.
2. If you choose not to seek the advice of LawPRO and want to handle this on your own (which I would not recommend), **review your file carefully** – that includes texts and emails, file notes and research. While you may not have formal written instructions, you may have confirmed your advice in an email. You may have a file note confirming you reviewed the issue and obtained instructions. You may have sought advice of other counsel who may confirm why you adopted the strategy at issue – provide a letter from them.
3. **Get a waiver of solicitor-client privilege**. If you have not been provided a waiver from the client, ask for it. If it is not given, consider noting in your affidavit that you asked for a waiver and your former client did not provide it.
4. **Get as much information as you can**. Consider asking your client's new counsel questions about the proceedings so that you understand the issues at play. Carefully review your former client's affidavit and consider the merits of responding to all the allegations made against you. You may want to ask for a copy of your former client's examination on their affidavit as additional allegations may be revealed and you want an opportunity to address them before the Court considers the application.
5. **Do not just rely on your memory**. These applications may be brought months after you had carriage of your matter. Take the time to fully review the file, get copies of the court file if that would help refresh your memory – new counsel may already have copies. Prepare yourself to defend yourself as you would a client.
6. **Keep your emotions out of your response**. Receiving such an application can feel like a betrayal or an attack on your reputation, or a failure to appreciate all you have not done for your former client. Your responding affidavit or the testimony you give in response is NOT the place to vent your feelings. Sarcasm, or worse, trying to cast your client in a negative light by emphasizing their criminal antecedents may not advance your position – and may, in fact, backfire.
7. **Use your file** to corroborate your version of events. Consider attaching documents from your file as exhibits to your affidavit.
8. **Get an unbiased review.** Have someone review your draft affidavit to ensure that you have only revealed what you need to reveal and to check the tone. Your duty of loyalty continues regardless of your client's attack on your reputation.
9. **Getting information from litigation counsel.** Reach out to counsel – whether defence or Crown counsel to coordinate the logistics of setting dates for court appearances, discoveries or case management conferences. Find out if the Crown intends to call you as a witness.
10. **Prepare yourself to testify.** You can be cross examined on your affidavit. Prepare yourself to testify before the Court. Do not just rely on your memory. Review the file, bring and even file copies of materials to corroborate your position.

How to Deal with the Law Society

If you receive notice of a Law Society investigation into allegations of ineffective assistance or incompetency, you will likely be asked to provide written representations and you may be interviewed by the Law Society.

If the investigation is not closed, possible non-disciplinary outcomes may include advice from the investigator or an Invitation to Attend before the Proceedings Authorization Committee. While these outcomes are not public, another non-disciplinary outcome – one which in my experience is most often considered by investigators as it addresses the concerns that arise from the public nature of the decision - is a Regulatory Meeting. Regulatory Meetings involve a meeting with the Proceedings Authorization Committee, but also include a notice which is posted once in the Ontario Reports and is on the Law Society's website[4] announcing that you were the subject of such a meeting and setting out the facts involved. As of today, there is no way of having that notice removed. Finally, your conduct may be of such concern that it becomes the subject of a disciplinary hearing

In order to address the Law Society's concerns regarding your competency, take control of the narrative. The

Court's judgment and the materials before the Court are only part of the story. While your representations in court may have been limited by solicitor-client privilege and your duty to your client, such limitations do not prohibit you from sharing with the Law Society the full story of your interactions with your client during its investigation.

Such applications can trigger deep emotional responses. It can take months (even years) for the Law Society to complete its investigation. Living with such stress is something others can help you manage. Do not under-estimate the process or the impact it may have on you.

Consider providing the Law Society with details of your professional background and expertise to demonstrate your level of competency. You can provide the Law Society with information that sets out the history of your relationship with your client and prior issues that may impact your client's credibility. Develop the narrative of how the litigation unfolded in order to explain the strategic decisions you made. Provide supporting materials from your file. You may consider obtaining an opinion from senior counsel regarding the strategic decisions you made. If you were ineffective and fell below the standard of reasonable professional assistance, you may choose to acknowledge your conduct and show the Law Society how you used this opportunity to improve your skills and knowledge to ensure such errors are not repeated. Consider seeking the advice of counsel experienced with the Law Society to provide you with guidance through the investigative process.

Such applications can trigger deep emotional responses. It can take months (even years) for the Law Society to complete its investigation. Living with such stress is something others can help you manage. Do not under-estimate the process or the impact it may have on you. Support is available from other colleagues and trained professionals – including through the CLA and the LSO's Members Assistance Program.

Nadia Liva, Barrister & Solicitor
Courtyard Chambers

NOTES:

[1] The material in this article is provided for informational purposes only and is not legal advice. No person should act or refrain from acting based on any of the information contained in this article.

[2] *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35, 1995 CarswellOnt 960 (Ont. CA), leave to appeal refused (1997), 111 C.C.C. (3d) vi (note) (S.C.C.) and *R. v. Bayliss*, 2015 ONCA 477, 2015 CarswellOnt 9644 (Ont. C.A.).

[3] See https://laws-lois.justice.gc.ca/eng/regulations/si-2012-7/page-14.html.

[4] See https://lso.ca/protecting-the-public/regulatory-meetings.

LAWPRO is a partner in Your Defence

by Katie James

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You defend your clients by advancing the best defence possible. But sometimes in the course of your practice you may become the accused. Criminal lawyers are finding themselves subject to various allegations by their former (and current) clients. LAWPRO has seen a steady increase in the number of reports from criminal lawyers on a wide range of issues. It's no longer uncommon for criminal lawyers to be on the receiving end of allegations made by former and current clients. LAWPRO is there to provide the best defence possible.

It's impossible to prevent a client or another lawyer making an allegation against you, but you can take steps to protect yourself and to make it difficult for the former client or new counsel to have the allegations stick. Here are a few tips to assist you when you find yourself being questioned about your retainer or when allegations are being made against you.

It's impossible to prevent a client or another lawyer making an allegation against you, but you can take steps to protect yourself and to make it difficult for the former client or new counsel to have the allegations stick

1. Report to LAWPRO

If you become aware of a situation that could result in a client or other lawyer making an allegation against you, report the matter to LAWPRO. There are a range of situations where reporting immediately would help, even if there are no specific allegations of negligence being made. For example, reporting would help when:

- a client starts blaming you for an outcome that didn't go their way;
- you think you might have missed a diary/court date or misunderstood the law or procedural step
- you get a call from other counsel who says they are not considering ineffective assistance of counsel but want to talk about your file handling and decisions
- a client threatens to sue you or report you to the Law Society;
- an appeal lawyer inquires as to why you did or did not take certain steps at trial;
- an appeal or other lawyer asks for your file; or
- you are served with a summons, production order or Statement of Claim.

It's easy to report a claim online at lawpro.ca/claims.

One of the best defences for you is to report. Putting LAWPRO on notice of a situation will allow us to help you. The sooner we know about your matter the sooner we can partner with you to respond to the situation.

Our Claims Counsel regularly see claims against criminal lawyers and can help manage the situation. LAWPRO may retain counsel to investigate and/or respond to the allegations or circumstances that you are facing. This could include assisting you in responding to a client email or phone call received from another lawyer asking questions about what you did on a file for a client to defending you in Court around allegations of inadequate investigation of counsel or negligence.

2. Do not take steps on your own prior to reporting to LAWPRO

Responding to the allegation prior to notifying LAWPRO often exacerbates problems. For example, once a written response is sent, even in the form of an email, it cannot be redacted or taken back. It could form or enhance the grounds of the appeal if ineffective assistance of counsel is being alleged.

Not reporting to LAWPRO immediately and responding to the assertions being made against you could put you the uncomfortable position of a late report or other potential coverage issues.

It is also not a good idea to talk to a colleague or to try and handle things with the help of a senior member of the bar. LAWPRO understands the criminal bar is tightknit and that you are willing to help each other out. In a case where an inquiry into steps or decisions you took could turn into allegations being made against you, it is in your best interests (not to mention a contractual term of your policy) to report to LAWPRO when questions or inquiries come your way.

3. Do not make admissions

It is natural to want to immediately respond to an allegation or question about your file handling when you sense you are being scrutinized or challenged. This usually ends up not being beneficial and once reported to LAWPRO we are unable to retract from any admission whether made intentionally or not. In an attempt to explain your reasoning, the situation usually gets worse and by the time it is reported to LAWPRO it may be too late to repair your own attempt to justify your position. It is also a contractual term of your policy to not make admissions.

4. Put it in writing-file maintenance is essential

We know that criminal law practice is fast paced and demanding and a lot of what occurs in your practice takes place in court. LAWPRO recognizes that it is not practical to document everything on every file you have. With this in mind, we can advise that papering your file goes a long way in responding to allegations made by your client or another counsel. Strive to document as much as you can in some contemporaneous manner.

The starting place of any assertions or allegations made against Insureds is their own file. At some point your entire file will likely be produced. Most assertions made against Insureds are fact based: for example, you did not meet with the client to review disclosure, you did not prepare the client for examination, you did not advise the client of their choice of election and what that means. Assertions and allegations made by former clients can be rebutted if you have a well-documented file.

Consider a detailed retainer letter as it can go a long way in establishing the key terms of engagement and what you are retained to do. It also allows the opportunity to set client expectations and informs both you and the client how instructions can be received (i.e. by text or email). The retainer letter allows you to set out the key terms of the engagement for the matter. It should identify who the client is and what you are retained to do, and any limitations on the scope of the retainer: like immigration and/or family consequences or implications of addressing a criminal matter.

Use docketing as one way to chronologically set out your steps on the file. Consider using the docket for a brief description (to the extent that you can keep details in the docket). Take notes: LAWPRO has been successful in defending allegations

against Insured because the Insured had contemporaneous notes of a discussion or confirmed the instructions in writing. Appeal Courts have referenced note taking and letters in their decisions and the absence of same tends to result in the trier of fact/Appeal Court having potentially less confidence in you. Work product that is contemporaneous is incredibly useful in responding to allegations.

Send final reporting letters to the client summarizing the engagement, the instructions given and the outcome as well as any responsibilities that the client is responsible for.

It has been my experience as a Claims Counsel that once the matter is reported Insureds have a sense of relief and are appreciative of the guidance and support they receive from LAWPRO and its preferred counsel as matters are addressed.

5. Mistakes Happen

Criminal practice is tough, demanding, and quick paced and LAWPRO understands that. What is important is how you respond to a potential error.

Sometimes once LAWPRO is involved it can be determined that you did not make an error. In other cases, where there is an error, LAWPRO can assist to try and resolve the matter as quickly as possible to put the client back in the position they ought to be in.

Reporting to LAWPRO should be an automatic step taken when you are dealing with a potential error or any uncertainty as to if an issue has arisen. LAWPRO has a very good success rate in responding to potential claims and being able to 'repair' the situation for you and your client. It has been my experience as a Claims Counsel that once the matter is reported Insureds have a sense of relief and are appreciative of the guidance and support they receive from LAWPRO and its preferred counsel as matters are addressed. LAWPRO is part of your practice and a resource to utilize.

6. Sign up for LAWPRO and practicePro resources

Learning about the types of claims that are occurring in the area of criminal law as well as other areas can educate you to potential exposure on your own matters. Visit our websites to review and download precedents, tip sheets, retainer letters, checklists and other materials which can enhance your practice. Review our podcasts, articles and videos for tips on practice management. Sign up for emails and broadcasts.

Here is a list of related articles:

- Criminal-Claims-Fact-Sheet.pdf (practicepro.ca)
- Ineffective Assistance of Counsel Claims – LAWPRO is here to help – PracticePro
- Putting the fire out: Dealing with the stress of a malpractice claims
- Facts vs Myths: LAWPRO is not like your auto insurer

Katie James is a Claims Counsel at LAWPRO in the New Claims Unit.

Search Solutions and Techno Tricks –

Challenging the Use of Social Media Evidence

by Lynda Morgan

Photo courtesy of Jennifer Houghton.

In *R. v. Marakah*,[1] the Court confirmed that control is not a prerequisite to establishing a reasonable expectation of privacy. Nonetheless, while an individual may retain a reasonable expectation of privacy in sent text messages, not all electronic communications attract a reasonable expectation of privacy (and therefore standing). In particular, McLachlin C.J. (as she then was) noted that *Marakah* did not address messages posted on social media or conversations occurring in a crowded Internet chat room.[2]

A handful of cases post-*Marakah* have considered whether an individual can establish standing to challenge prosecutorial use of social media posts collected by police. Courts have been reluctant to grant standing. For instance, in *R. v. Ansah*,[3] the Applicant challenged the admissibility of contents of his private Instagram account. The Crown sought to rely on videos and photographs linking the Applicant to a loaded handgun. The Applicant argued that police had only been able to access the account by using a fake profile designed to look like the one of the Applicant's acquaintances. The question for the court was whether the Applicant's subjective expectation of privacy in his Instagram account was objectively reasonable.

The Applicant relied on the Supreme Court's analysis in *R. v. Mills*,[4] arguing that he accepted that his expectation of privacy could not be reasonable if he had knowingly allowed a stranger to view his private Instagram account.[5] However, the Applicant argued that the officer had gained access to the account by "usurping the identity" of a real person the applicant knew. By doing so, the officer tricked the applicant into waiving his expectation of privacy.[6] The Court rejected the Applicant's argument because the evi-

dentiary record failed to establish the requisite underlying facts: that the officer had impersonated a friend or that the officer had used an account belonging to one of the Applicant's followers. Justice Baltman found that the Applicant had no standing because he had been "negligent" in "communicating online with a person he had never met before."[7] Importing the concept of negligence into the standing framework is conceptually problematic given the courts' rejection of risk analysis. Nonetheless, where a state agent usurps or impersonates your client's real-life friend, a *Charter* applicant can argue that his or her reasonable expectation of privacy was objectively reasonable.

While challenging, establishing an evidentiary record showing how police obtained social media posts is important. In *R. v. Adan et al.*,[8] the Applicants sought excision from an ITO of information police had obtained from various private Instagram accounts. Unlike in *Ansah,* there was no allegation that the police had impersonated any of the account holders' friends. Instead, the police had created fictitious Instagram profiles and requested access to the applicants' accounts. Each of the account holders granted access.[9] The Court found that the Applicants did not have standing to challenge the police use of their social media posts for multiple reasons, including:

1. It was unclear whether police obtained evidence from at least one of the accounts when it was "public";
2. There was no evidence that the undercover officers had "preyed on any human weakness or used unfair subterfuges" to get access to the private accounts;[10]
3. The fact that a social media account is private does not lead inextricably to the inference that the account holder had a reasonable expectation of privacy;[11]
4. There was no evidence that the applicants asked their followers to keep private videos and images that they posted on Instagram;[12] and
5. The Applicants were using their social media accounts to advertise their gang status; they did not intend the posts to remain private.[13]

Justice Bawden identified the criteria that he thought would need to be met in order to establish a reasonable expectation of privacy in the social media space, including:

1. The account could only be accessed by a small number of followers;
2. The account holder would have to identify prospective followers by reliable means before permitting them to access the account;
3. The account holder would have to have the assurance of anyone who followed the account that the contents would be kept strictly private and not shared with anyone outside of the group; and
4. There would have to be evidence of a relationship of trust between the account holder and the followers such that the account holder could reasonably rely on the followers not to share the content.[14]

While the presence of these four factors could establish standing, describing the fact scenario as a "test" ignores that establishing a reasonable expectation of privacy depends on the "totality of the circumstances".[15] That test must remain fluid and able to accommodate varying social media platforms and communication with followers or friends. Creating sub-categories of standing tests within a particular form of electronic communications risks diluting the standing analysis.

NOTES:

[1] 2017 SCC 59, 2017 CarswellOnt 19341 [*Marakah*].

[2] *Ibid.*, *Marakah*, at para. 55.

[3] 2021 ONSC 225, 2021 CarswellOnt 20368 [*Ansah*].

[4] 2019 SCC 22, 2019 CarswellNfld 161 [*Mills*].

[5] See also the recent decision of *R. v. Campbell,* 2022 ONCA 666, 2022 CarswellOnt 13763 for a discussion of the applicability of *Mills* and *Marakah* more generally.

[6] *Ansah*, *supra*, footnote 3, at para. 144.

[7] *Ibid.*, at para. 148.

[8] 2021 ONSC 7150, 2021 CarswellOnt 15299 [*Adan*].

[9] *Ibid.,* at para. 115.

[10] *Ibid.,* at para. 118.

[11] *Ibid.,* at paras. 119-120.

[12] *Ibid.,* at para. 129.

[13] *Ibid.,* at para. 139.

[14] *Ibid.,* at para. 132.

[15] *R. v. Spencer,* 2014 SCC 43, 2014 CarswellSask 342; *R. v. Jones,* 2017 SCC 60, 2017 CarswellOnt 19343; and *R. v. Cole,* 2012 SCC 53, 2012 CarswellOnt 12684.

WRENCHES FOR THE TRENCHES

You get the "Gist" of It

The Admissibility of Overheard Statements Post *Schneider*[1]

by Hussein Aly

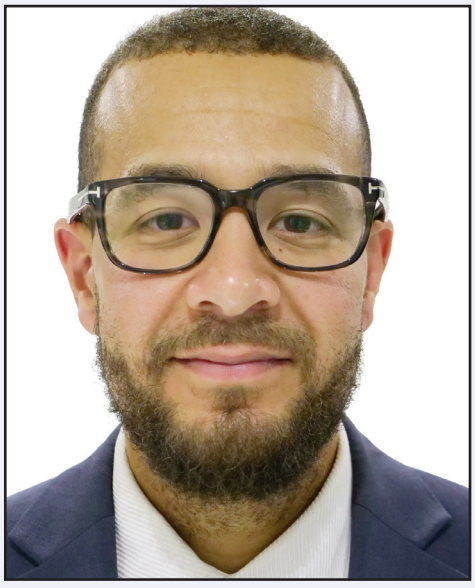

Photo courtesy of Albussein Abdelazim.

The right to silence is an indispensable right for an accused. However, it is one that many accused often throw away. To avoid this, defence counsel use yelling, profanity, and threats of violence to urge clients to do the one thing that will help their situation: shut up!

Most defence lawyers are familiar with the agony of listening to a client's statement. We anxiously watch these statements fearing that it will contain lies, and general stupidity. We pray it doesn't contain the epic fail: a confession. Indeed, courts have concluded "that juries are likely to give significant weight to confession-like evidence".[2]

Admissions made to third parties also cause grief to defence counsel. However, often the witness would not have an accurate recollection of what was said, and/or have only overheard portions of the what the client said. Relying on the Supreme Court decision of *Ferris*,[3] these situations opened the door for an argument that the confession should be excluded because there was insufficient context to decipher what the accused said. In short, there could be no probative value in any utterance when it cannot be determined what was actually said without speculation.

In *Schneider,* the Supreme Court of Canada recently revisited a *Ferris*[4] type factual scenario. The likely consequence of the ruling for defence counsel is that incomplete statements made by an accused are more likely to be admitted accompanied with a strong instruction regarding factors the weight that should be given to the statement.

The Facts

In *Schneider,* the accused was charged with second degree murder.

The main witness against him was his brother. The brother testified that he had gone to speak to the accused after seeing a picture of a police broadcast showing the accused and victim together before her disappearance. He spoke to the accused who admitted he had gone on three dates with the victim. He added that the accused said that on the third date they used medication, and that he appeared remorseful when he spoke, and that he said, "it's true". The accused told his brother that they should speak about it again in the morning. The next morning the accused told his brother that he intended to purchase heroin and use the drug to commit suicide. He wanted his brother to be with him when he died. The brothers purchased alcohol, and the accused also purchased heroin. The men ended up at a park were the accused told his brother where the body was and instructed him to inform the police of the information after he died. The accused then injected himself, but the suicide attempt failed. After the failed suicide attempt, the accused borrowed his brother's phone and called his wife. The brother was ten feet away and not actively trying to listen but he overhead portions of the conversation. The brother testified that the accused began the conversation by saying "did you see the news of the missing Japanese woman, student?". He also testified that later the accused said, "I did it" and/or "I killed her". The brother could not remember the exact words used, so he could only say that the gist of the call was that the accused admitted to killing the victim. The brother acknowledged that he only heard one side of the 13-minute conversation; that he did not know what the phrases were in response to; that he was not trying to listen to the conversation; that he was under immense stress; that he had consumed alcohol before and after the call; and that the accused was under the influence of intoxicants so his speech was impacted by the heroin he had taken. At trial the statements were admitted, and the accused was convicted. The British Columbia Court of Appeal quashed the conviction ruling that the trial judge had erred in admitting the alleged confession(s) concluding that because the brother could not recall "what was said before or after the overheard words[,] no properly instructed jury could conclude that the overheard fragment was an admission".

The Supreme Court of Canada restored the conviction ruling that the statements were properly admitted at trial because they were relevant and probative value was not outweighed by its prejudicial effect. The Court stated: "party admissions, like other evidence, are not rendered inadmissible because the witness is equivocal in their testimony"[5] so "the fact that a witness cannot recall the exact words used does not mean that such evidence has no relevance".[6] The equivocal nature of a witnesses evidence "is a factor for consideration when weighing the probative value against the prejudicial effect"[7] and "it also relates to ultimate reliability and believability; but those are for the trier of fact in weighing the evidence, rather than the judge in the relevance analysis".[8] This being the case, overheard statements require a trial judge "to determine whether, on the basis of all the evidence, the jury could give meaning (in a way that was not speculative)" to what the witness testifies was overheard. If there is enough context to give meaning to the overheard statements, they are relevant; any shortcomings in the evidence can only play a role in the residual discretion to exclude and the trier of facts determination on ultimate believability and weight. On the other hand, words that are "incapable of meaning" cannot not be probative of any issue, and, therefore, are not relevant.[9]

In addition, the Court ruled that it was an error for the Court of Appeal to conclude that "only the micro context, i.e. the words said before and after the overheard admission, were pertinent in determining whether the admission had meaning." The Court stated that when considering if a statement had meaning "trial judges can consider relevance having regard to evidence that parties have adduced, as well as evidence that a party indicates that they *intend* to adduce. The judge can admit the evidence at issue conditional on counsel's undertaking as to evidence to be adduced".[10] Overall, the Court emphasised "that *Ferris* should not be understood as standing for the proposition that incomplete recollection of a party admission leads to exclusion of such evidence or that it is only "micro context" that can inform meaning and, thus, relevance".

The Takeaways

Schneider will pose problems for defence counsel. The problems with the confession in *Schneider* were extensive but that did not render the statement inadmissible. Indeed, the dissent in *Schneider* viewed the statement as so problematic that "it was impossible to know what Schneider said to his wife during the overheard phone call"[11] and that "assessing the relevance of Schneider's brother's testimony (including the Crown's own interpretive gloss thereon) is an exercise in pure speculation".[12] They concluded that the problems were so extensive that "it would be difficult to conceive of anything Schneider might have said (or might be felt to have said), howsoever partial, oblique or indistinct, that would *not* be relevant". It is unlikely that subsequent cases will have as many problems surrounding a confession as *Schneider*.

Going forward, given the extensive problems that existed with the confession in *Schneider,* the best argument against admission will focus on the lack of other evidence that may give meaning to the statement. It is unlikely that subsequent cases will have a context where an accused is already admitting compelling facts that impli-

cate him/her in a crime, was trying to end their life, and having a conversation with their partner after a failed suicide attempt. In short, Schneider was already confessing, highly emotional, and in a situation where he had nothing more to lose when he was speaking to his wife so the likelihood that he did confess to her was much more likely. The absence of this type of context might be the key to having future confessions excluded.

It is also important to note that even though the trial judge is not limited to the words said before and after the overheard admission when deciding admissibility "the Crown may not argue that *any* evidence pointing towards the accused's guilt provides relevant context. The focus should remain on whether the jury can give meaning to the witness's testimony in a manner that is non-speculative, not the overall strength of the Crown's case."[13]

If the admissibility battle is lost, *Schneider* makes it clear that a powerful jury instruction is required to ameliorate the potential prejudice of the trier of fact unnecessarily placing too much weight on the alleged confession. Like the trial judge did in *Schneider,* defence counsel should insist that their trial judge "methodically addressed the weaknesses"[14] in the witness' testimony in the jury instructions, and that the jury be told that they "could ignore the admission if they were uncertain as to what was said or what it meant".[15]

Overall, *Schneider* will pose many problems for defence counsel, more than can be listed, but you get the gist of it.

NOTES:

[1] *R. v. Schneider*, 2022 SCC 34, 2022 CarswellBC 2747.
[2] *Ibid.,* at para. 81.
[3] *R. v. Ferris*, [1994] 3 S.C.R. 756, 1994 CarswellAlta 328.
[4] *Ibid.*
[5] *Ibid.,* at para. 43.
[6] *Ibid.*
[7] *Ibid.,* at para. 63.
[8] *Ibid.*
[9] *Ibid.,* at para. 67.
[10] *Ibid.,* at para. 41.
[11] *Ibid.,* at para. 90.
[12] *Ibid.,* at para. 92.
[13] *Ibid.,* at para. 44.
[14] *Ibid.,* at para. 82.
[15] *Ibid.*

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THE DOCKET

by Lauren Wilhelm

Jury deliberations – secrecy – jury inquiry – mistrial

Crown appeal from an acquittal for second degree murder – after receiving a note from the jury indicating they could not reach a unanimous verdict the standard exhortation was given and deliberations continued – the following day another note indicated they remained deadlocked and a court services officer advised the trial judge that one juror was threatening the others – the trial judge decided to conduct an inquiry and questioned the foreman, six other jurors and juror #11 (the perceived problem) – in the course of the inquiry it became clear that juror 11 had threatened the others – unfortunately information about juror votes was also revealed – the Crown sought a mistrial arguing that the inquiry had violated the jury secrecy rule and undermined trial fairness – defence asked that juror 11 be discharged, which is what the judge did – he then re-charged the jury, told them juror 11 was discharged for impeding the process and they should not infer anything about the court's view of his position therefrom – they resumed deliberations and returned a not guilty verdict a day and a half later

The Court held that a breach of jury secrecy does not necessarily amount to a miscarriage of justice and a mistrial is not an automatic remedy – if a juror is discharged on proper grounds, the revelation of their vote during an inquiry does not inevitably undermine trial fairness – juror 11 was discharged because of his conduct, there was no reason to believe the remaining jurors were influenced in their deliberations by his discharge – it was sufficient for the trial judge to instruct the jurors as he did that the discharge of juror 11 was not to be seen as a disapproval of his position

R. v. Wise, 2022 CarswellOnt 11827, 2022 ONCA 586; George J.A. (Strathy C.J.O. & Coroza JJ.A. concurring)

Crown appeal – threshold to allow – test for substituting a conviction

Crown appeal from an acquittal for sexual assault – the acquittal was premised on the trial judge's inability to conclude that the complainant was unconscious or incapable at the relevant time – the Court held that the trial judge made a material finding of fact for which there was no evidence, specifically that contrary to the video evidence, the complainant was moving of her own volition – moreover, the trial judge failed to consider all of the evidence on the issue of capacity to consent, specifically, she did not consider the video evidence which depicted problems with the complainant's ability to control her own movements and the absence of movement for a significant period of time – these errors were material and "might be reasonably thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal", thus the appeal was allowed

The question was whether the court should substitute a conviction, as requested by the Crown, or order a new trial – in order to substitute a conviction, the court must be satisfied that but for the error of law, the verdict would not have been the same and the accused would have been found guilty – all findings necessary to support a guilty verdict must have been made by the trial judge or not be in issue – the test must be strictly applied - because of her finding that the Crown had not proven beyond a reasonable doubt that the complainant was incapable of consenting, the trial judge did not make any findings of fact about, or even address the issue of *mens rea* – the court was not persuaded that the video evidence was determinative of the issue of *mens rea* -accordingly it was not appropriate to substitute a conviction and a new trial was ordered

R. v. Tubongbanua, 2022 CarswellOnt 11828, 2022 ONCA 601; Pepall J.A. (Tulloch & Huscroft JJ.A. concurring)

Driving prohibition – criminal negligence causing death – dangerous driving – lesser included offence – legislative gaps

The appellant plead guilty to criminal negligence causing death via motor vehicle – a 38-month driving prohibition was imposed pursuant to s. 320.24 of the *Criminal Code* – section 320.24, which replaced s. 259, was the applicable provision, but it did not enumerate criminal negligence causing death as an offence for which a driving prohibition could be imposed – the issue on appeal was whether s. 320.24 provided authority for the prohibition – the court held it did not

The trial judge held that since s. 320.24 provided for a prohibition for the offence of dangerous driving, an included offence to criminal negligence causing death by means of a motor vehicle, it followed that the section

authorized a prohibition for the latter – the Crown argued that this conclusion was supported by the use of the language "found guilty of" in s. 320.24 instead of "convicted or discharged of" in s. 259 – the argument being that a conviction for criminal negligence causing death, necessarily meant an offender had been "found guilty" of dangerous driving

Parliament almost certainly intended that criminal negligence causing death amongst the offences for which a prohibition could be ordered - the inability to impose a prohibition for criminal negligence causing death where it is available for lesser offences is an absurdity – however, to find that s. 320.24 authorized a prohibition for an offence that was not enumerated would be to create a punishment for a crime for which the offender had not been charged, convicted or even discharged - a person cannot be punished for a crime on the basis of its inclusion in the one for which they were convicted

The language of "found guilty of" instead of "convicted or discharged of" does not support an intention to extend the sentencing regime to crimes embedded within the crimes – rather it preserves the ability of courts to impose prohibitions for both convictions and discharges and permits the imposition of a prohibition before the registration of a conviction - the absence of criminal negligence causing death from s. 320.24 is almost certainly a drafting error but it would be inappropriate to fill the legislative gap as it would amount to a full amendment of the provision and would create a punishment

R. v. Boily, 2022 CarswellOnt 11980, 2022 ONCA 611; Fairburn A.C.J.O.; (MacPherson & Harvison Young JJ.A. concurring)

Charter breaches – failure of judge to conduct s. 24(2) analysis – third Grant factor – guns and drugs

Appeal of convictions for drug and weapons offences on basis that trial judge had erred in his s. 24(2) analysis to admit the evidence – the appellant was stopped by police on the basis of the smell of burnt marihuana – the officer demanded he show him the contents of his fanny pack - when he refused, he was told he'd be arrested and he was – a search of the appellant revealed a knife, and small bags of cocaine and fentanyl – he was seen to throw his fanny pack into the nearby bushes – it contained a loaded handgun

The trial judge found breaches of ss. 7, 8 and 10(b) – the initial detention and demand for ID were lawful but the attempt to search the fanny pack prior to arrest was not and the appellant was not told the reason for his detention or given his right to counsel – the arrest itself was lawful – the trial judge did not do a s. 24(2) analysis as he held the discovery of evidence was not a result of the breaches – this was erroneous as s. 24(2) does not require a causal link and therefore the court did the s. 24(2) analysis

The court agreed that the breaches were serious but disagreed that the impact of the breaches were significant – there was no connection between the breaches and the discovery of the evidence, which although not a requirement to engage s. 24(2), does factor into the analysis – the evidence would have been discovered in any event – finally on the third factor, the court noted the "scourge" of guns and drugs on society and held that the offences were so serious that when the three factors are balanced, the evidence must be admitted – the court held the most significant issue was the importance of the evidence to the administration of justice given the loaded firearm in a public place and the fentanyl, itself a "public enemy" – a trial on the merits was required

R. v. Mengesha, 2022 CarswellOnt 13309, 2022 ONCA 654; Benotto J.A. (Miller & Coroza JJ.A. concurring)

Burden of proof – WD analysis – Step two – Crown evidence

The appellant was convicted of a sexual assault on his girlfriend – he testified to two incidents of sexual intercourse on the day in question both of which he said were consensual and ended when consent was revoked – the complainant testified to one incident of non-consensual intercourse and adamantly denied the second – the trial found that there were two incidents of sexual intercourse – she accepted that the appellant stopped when consent was revoked during the first incident but went on to convict him of the second (the event the complainant denied had taken place)

The trial judge found that the appellant's evidence did not raise a reasonable doubt on the issue of consent, but failed to consider whether the complainant's evidence could have – specifically she failed to consider why her rejection of the complainant's denial of a second incident was not capable of raising doubt as to whether she consented – the WD analysis is not limited to examining the impact of the evidence of the accused – it must be applied to all evidence, including that of the Crown, even when it contradicts with the accused's narrative – having found the second incident occurred, the trial judge was required to directly address how the complainant's denial may have impacted on whether the Crown had met its burden on the issue of consent – she erred in her application of the second step of WD

R. v. N.P., 2022 CarswellOnt 11711, 2022 ONCA 597; Trotter, Harvison Young and Thorburn JJ.A.

BOOK REVIEW

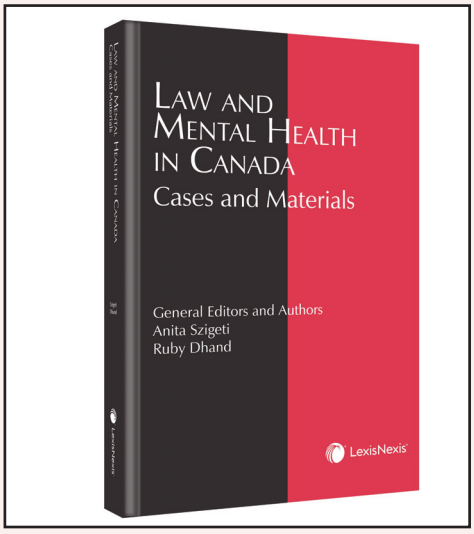
Law and Mental Health in Canada

Cases and Materials

By Ruby Dhand and Anita Szigeti

(LexisNexis)

Review by: Jeff Marshman



Mental health law is a complex beast. Its objectives are straightforward from a bird's eye perspective. The mental health system "involv[es] multiple statutes working hand in hand to achieve an outcome that strikes the right balance between the needs of the patient and those of the public," Justice O'Bonsawin observes in her foreword to *Law and Mental Health in Canada: Cases and Materials*. Yet as our Supreme Court's newest Justice also notes, mental health law "is a difficult area to grasp, let alone to practice and adjudicate in."

Part of the difficulty is that "mental health law" is less a well-defined practice area than it is a crucible where societal values, legal regimes, philosophies, institutions, vulnerable populations, social problems, and scientific disciplines collide. In spite of sometimes ill-defined boundaries, however, mental health law *is* a distinct field, requiring equally distinctive expertise. The inter-disciplinary character of mental health law presents a profound challenge to textbook authors: How can one fashion a readable, comprehensive, and authoritative text on an area of practice which requires the varied expertise of a polymath to fully appreciate?

Fortunately, I don't have to solve that problem. Instead, I get to enjoy the fruits of others' labour in the forthcoming: *Law and Mental Health in Canada: Cases and Materials*. Led by Dr. Ruby Dhand and well-known expert in the field, Anita Szigeti, the team of authors undertake the Herculean task of clarifying, critiquing, and illuminating the various heads of the hydra that is mental health law in Canada.

With contributions from authors from across the country (Jennifer Chambers, Cassandra DeMelo, Carter Martell, Jacqueline Petrie, Sarah Rankin, Naomi Sayers, and Amy Shoemaker) this text provides the reader with comprehensive information and analysis on all aspects of mental health law. It covers specific legal and ethical issues as well as the blackletter law that is of immediate interest to practitioners. It covers the evolution of the law and underlying policies that continue to inform decision-making at a judicial and legislative level. It does so while deftly avoiding the pitfalls of similarly broad endeavours – ensuring that substantive content and in-depth analysis don't come at the expense of clarity or accessibility.

A distinguishing feature of the book is its consistent attention to client perspectives and mental health law's impacts on autonomy. The opening chapter illuminates challenges people with mental health issues face in the legal system. Chapters on civil mental health law's various aspects follow: consent to treatment, civil commitment, guardianship, and personal health information. *For the Defence* readers will be particularly interested in nine chapters dedicated to aspects of criminal law: fitness, criminal responsibility, Part XX.1 of the *Criminal Code*, the Review Board system, dangerous and long-term offender proceedings, bail, sentencing, mental health courts, and the unique issues facing Indigenous peoples in Canada. Criminal practitioners will also benefit from the chapters on Coroner's Inquests in Ontario. Discussions of inquests into police killings and deaths in both prisons and forensic institutions explore the starkest impacts of state power on individuals with mental health issues. The book closes out at the individual level, dealing with practice issues and strategies for representing people with mental health issues in a manner that is empathetic and effective.

Law and Mental Health: Cases and Materials is an ambitious text that manages to achieve its lofty aims. It will serve as a valuable resource for working professionals and students alike.

2024
2023
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UPCOMING EVENTS

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November 18-19, 2022 - 50th Annual Fall Conference

November 17-18, 2023 - 51st Annual Fall Conference

November 15-16, 2024 - 52nd Annual Fall Conference

November 21-22, 2025 - 53rd Annual Fall Conference

November 20-21, 2026 - 54th Annual Fall Conference

November 19-20, 2027 - 55th Annual Fall Conference

MEMBER PROFILE

Reproduced with the permission of Nabeel Sheiban.

Nabeel Sheiban

by Craig Bottomley

City/Town: Toronto

Year of Call: 2017

This guy. Nabeel. He's smart. He cares about his clients and he works his butt off to help them. He has the wildest answers to the Member Profile Questions ever. Let's get to it.

QUESTIONS

Finish the Sentence

1. If I never went to law school, I would have become . . . a nomad following Willy the Wanderer. *I know Nabeel so I Googled this to make sure it wasn't something dirty. We're clear. Please continue to question 2.*

2. If I could change careers tomorrow – write my Hit CBC TV show called Ahmed in the Arctic – a Syrian immigrant comes to Canada but accidently checks the "Nunavut" box on the form. A world of hilarity ensues . . . *You're gonna love Northern Exposure.*

3. If I win 10 million dollars, I will . . . tell absolutely nobody. *He probably already won. Everyone ask him for money.*

4. If I could appoint the next Chief Justice of Canada it would be . . . (not a lawyer or judge) – my buddy Matt. *Good Old Chief Justice Matt.*

5. Joe Rogan . . . will play me in the movie based on my life. *I can't wait until you ask everyone you know if they've tried TRT or seen a UFO.*

6. Jordan Peterson . . . will play my love interest in the movie. *It's going to be a one-sided love story.*

7. Prime Minister Trudeau is. . .part of people kind.

8. Canada's next Prime Minister is . . . my buddy Matt. *I would like to meet this busy fellow.*

9. If I could pick one injustice to undo it would be . . . being allowed to wear white pants before labour day.

10. If I could solve one issue it would be . . . the rubik's cube my parents got me when I was 8. *It bothers me that my nephews solve them without looking.*

11. If I could represent/defend a historical figure it would be . . . me, when I got blamed for 9/11 in grade 7 by my classmates.

12. If I was to be executed, my last meal would be . . . I wouldn't eat- if my government is going to kill me, I am not giving them the satisfaction of "doing me a solid". *A man of principle.*

13. My greatest regret in life is . . . I was downtown Toronto in my early 20s, there was a dowdy male with a poster adorned with "Pussy Cat Dolls" paraphernalia. Wouldn't you know it, some bodacious females appeared out of nowhere. I saw them sign his poster. I watched in disbelief. To this day I cannot believe I gave up the chance to get the signatures of the Pussy Cat Dolls.

14. Boy I really screwed up when . . . I decided to buy a motorcycle in Alaska and ride it back to Toronto - it was a Ducati, with no wind shield, no rain gear and cool guy boots in a rain-drenched September. If you know you know. *You are a lot cooler than me.*

15. My hero is . . . Wendy Williams – I wish I had her unabashed sense of self.

16. My favourite section of the *Criminal Code* is . . . that Driftwood section. *Ha!*

17. If I could legalize an activity it would be . . . being allowed to slowly push the car in front of me into traffic on a left hand turn if they do not creep up to allow two cars to go because they stay behind the line until the yellow light.

18. If I could criminalize an activity it would be . . . telling me I am wrong in the middle of a trial if you are a colleague with an aggravating feature if I already litigated something. I got

taught by excellent mentors that you put up the pompoms and stay in your lane especially if you don't know what the hell you are talking about.

19. Most people don't know that I . . . write parking tickets for officers on scrap paper when they park their car like doofuses around the city - Signed. Craig Bottomley. *I'm fine with this!*

20. The strangest thing I have eaten is . . . brain. It was ok, except I later found out it was stupid.

21. I really embarrassed myself when I . . . I took a kinesiology class in undergrad because I thought it would be cool. Some dork beside me was cheating off of me on the midterm. A proctor told him to stop. I then told the proctor; I have no idea what I'm doing and he should let him cheat off me as punishment. The proctor publicly shamed me in the middle of the test for encouraging cheating; needless to say, I was not lying to the multiple-choice fuzz – I sucked, the worst mark I ever received. In fairness who cares what or where a pisiform is.

22. My pet peeve is. . .people who wear ties with jeans. *But . . . Covid zoom appearances demand it!*

23. The toughest challenge in my life has been . . . I was fortunate enough to hike the Annapurna circuit – when I passed Throng-la pass I started getting blisters everywhere on my body. Turns out my body betrayed me and let hand foot and mouth disease enter and quickly ravish my skin. I had six more days of hiking with this deplorable ailment in desolate hiking all by myself. Each step, each leg swing, every time I sat down would be followed by popped blisters. I could not grip anything due to blisters on my hands. Somehow, I lost all my fingernails and toenails. It was gnarly. So probably that or listening to a crown cry in a bail hearing one time during submissions. *Golly.*

24. If I could be reincarnated, I would come back as . . . I have to come back? Once is enough. *Given what happened on the Annapurna circuit, I'm not surprised!*

25. I am afraid . . . I would have to kill someone to win a noble peace prize.

26. I believe . . . when a bus gets back to the station it reaches terminal velocity.

27. In high school I was . . . short sighted.

28. In undergrad I was . . . long sighted.

29. In law school I was . . . bifocal.

30. If my dog could speak s/he would say . . . funny you should ask – my dog can speak. Just the other week I went to a bar with Barkley and the bartender told me I had to leave. I told the bar tender listen; my dog *can* talk. He said get out of here Nabeel, no he can't. I said – 5000 dollars he can talk. Bar tender says ok, if he doesn't talk you owe me 5000 and I'm throwing both of you out of here. I said, Barkley what's on top of the house - "roof", what's on top of your mouth, - "roof" I ask him who is the best baseball player of all time - "ruth" – the bar tender threw us through the window. On the floor, cut to hell, picking the shards of glass out of my body after Barkley's failed performance he comes up and says "you think I should have said Ohtani?" No matter how much I woodshed Barkley – he always fails under pressure. *I have clients like this.*

31. Legal Aid Ontario . . . St. Peter welcomes a defence lawyer and two crowns at the gates of heaven and says you all have been accepted here to live in eternal glory. St Peter tells the trio, let me show you to your new homes. They begin to walk. St Peter tells the defence lawyer, here is your home. It's a mansion with multiple acres, a lush forest, a garden that would be the envy of all your suburban neighbours and a vista that cannot be beat. The Defence lawyer, looks at the Crowns in disbelief. The Defence lawyer slowly enters his new home in pure ecstasy. St. Peter tells the duo to follow him, as the Crowns walk away they start to speak to one another. They gab about how they were servants of God - teaching, living and upholding the very principles Moses found in the bush. They both agreed if that scuzzy defence lawyer received this mansion, they would surely get a compound that would rival the ones seen in those television shows that glamorize criminal enterprises. As the walk continued their illusions of grandeur grew. St Peter stops and shows them an overcrowded apartment complex – and says here is where you both will be living and tosses them a key. "But you only gave us one key" cries one of the Crowns with his voice raised in with familiar moral indignity twang one often hears in submissions. St Peter tells them – you will be sharing. The Other crown breaks his character and demands to St. Peter – "What is this shit. I was a servant for you my whole life, I gave God everything – I made sure bad people had to repent. All I did was uphold the tenants of society- how did that scum bag defence lawyer get that beautiful mansion and me this lowly apartment to be *shared*!" St Peter looks at them and says, he was a legal aid lawyer and as is scripted in Proverbs 11:28 – Whoever trusts in his riches will fall, but the righteous will flourish like a green leaf, and you both know with LAO you cannot gain riches let alone trust in them. Also, you two suck.

Choices

1. Guiness or Molson Canadian? Labatt 50. *I'm starting to see why you suck at multiple choice tests.*

2. Grilled Rib Eye or Grilled Tofu? Pasta. *I hope you don't hurt your pisiform forking it up.*

3. Alfa Romeo or Mercedes Benz? Bicycle. *You see, Nabeel, you're supposed to pick one of the choices. . .*

4. Romantic or Hunter/Provider? Jester. *Not sure you're getting the core concept here.*

5. Out late and sleep in or in bed by 10 and up at 6? Bed by 9 pm. *I'm going to hurt you when I see you.*

6. Armani or Old Navy? Chester W. Nimitz

7. James Bond or Lara Croft? Michael Scarn

8. Hockey or Soccer? Basketball

9. Classical music or classic rock? Alternative Future

10. Superman or Wonder Woman? Mr. Incredible

11. Blended or Single Malt? Maltesers

12. Manolo or Crocs? Shoeless

13. Mac or PC? Linux. *Now you're just being obstinate.*

14. Globe and Mail or The National Post? The Sun

15. Starbucks or Tim Horton's? Local coffee only.

16. Yoga or Treadmill? Cycle Class

17. 30 days jail or two year conditional sentence? Intermittent with TAP. *I'm going to get life.*

18. Dog or Cat? Doja Cat.

19. Canoe or Speedboat? Never ate at Speedboat before but Canoe is overrated.

20. Muskoka cottage or condo in Florida? Camping

21. Star Wars or Star Trek? Nerds

22. Prime Minister Doug Ford or 5 years of recession? What's the difference? *Fair.*

23. Cash paying drunk driving case or legal aid murder? Cash Paying Murder

24. Flowers or chocolate? Coffee

25. Pinot Noir or Chardonnay? Sounds like someone cooked the peanuts too long

26. Android or iPhone? Slow Mail

27. Drunk or stoned? I think I would rather be dunked than stoned

28. Naughty or nice? Apathetic

Favourites:

Craig. Have you not tortured me enough? *I'm just getting started!!*

1. Guitarist- Eddie Joe Shaver

2. Poet – Dennis Lee

3. Author (Fiction) – Affiant on the last ITO I read. *HA!!!*

4. Author (Non-Fiction) – Paris Hilton

5. Prime Minister – Liz Truss – she seems to be doing a bang up job

6. City – Bradford, Ontario

7. Lawyer – Sapiano. *Correct*

8. Judge – Grateful for all of them, especially the ones that I like

9. Journalist - Andrew Callaghan

10. Chef/Restaurant. – Mexicanada, Bradford

11. Hotel – whatever is cheapest

12. Theme park – Adam Weisberg's pool when he is on vacation

13. Park – Struthers' Bay

14. Canadian – Norm Macdonald

15. Sports team – Andre De Grasse

16. Travel destination – Democratic Republic of the Congo

17. Thrill seeking activity – cycling in Toronto

18. Police force – when they exercise their discretion and don't use any

19. Movie – Planes, Trains and Automobiles

20. Actor – Robert Blake

21. Band – Waylon Jennings

22. Song – Wet Sand RHCP

23. Intoxicant – What are you? Some kind of CI?

24. Supreme Court of Canada decision – *R. v. Hart*

25. Hobby – going to hobby stores

26. Political party – Rhinoceros Party of Canada

27. Ontario Premier – Bob Rae because he united this province with hate

28. Historical figure – Franz Ferdinand

29. Attorney General – Jody Wilson-Raybould real fun how she ruined many procedural rights and then realized how terrible it is when your procedural rights get thwarted

30. Crown Attorney - Hev McLando. *I know who you mean, young man. Go to your room.*