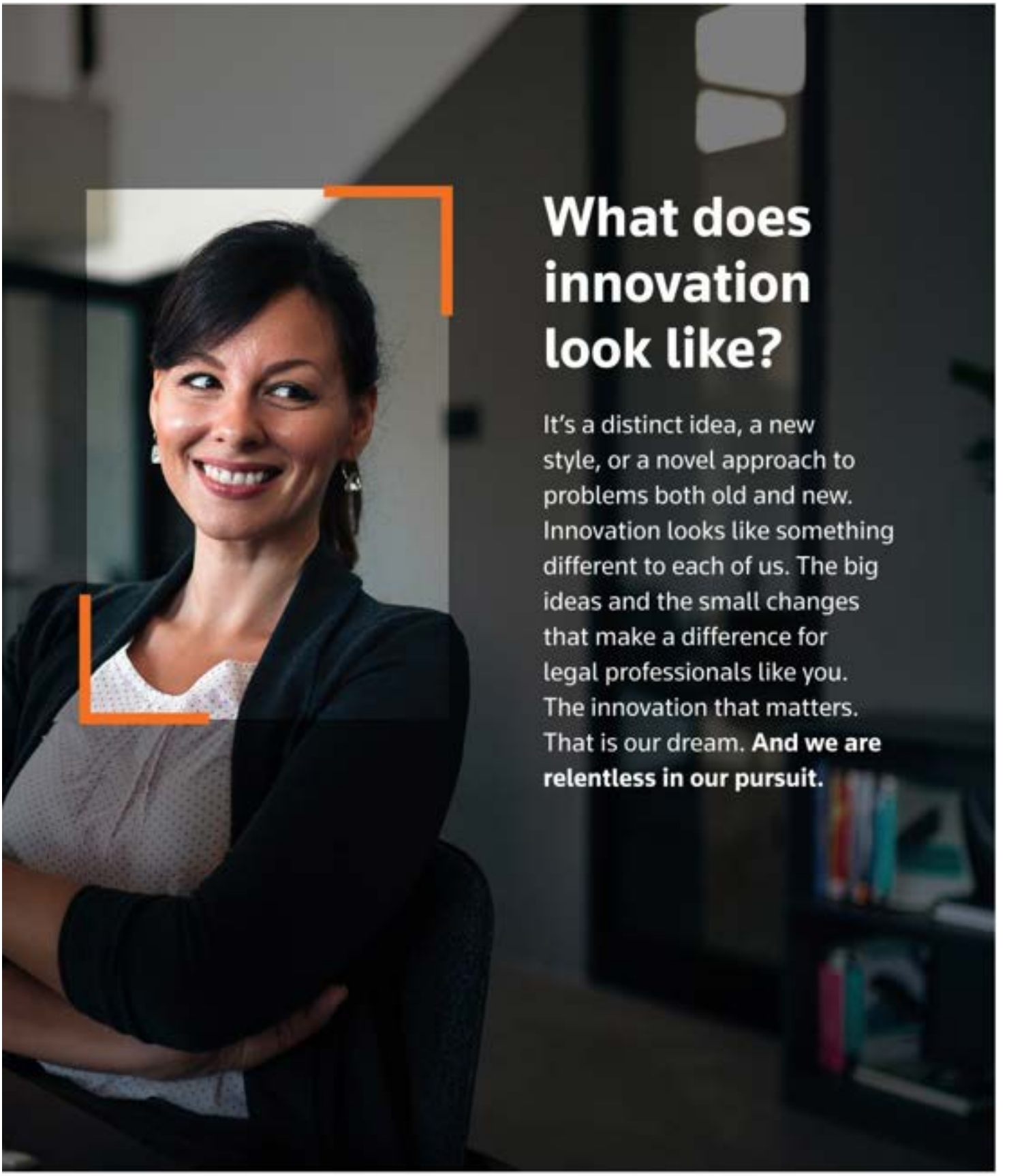
FOR THE DEFENCE

CRIMINAL LAWYERS' ASSOCIATION NEWSLETTER VOL. 44, NO. 1 — FEBRUARY 2024

CRIMINAL LAWYERS' ASSOCIATION



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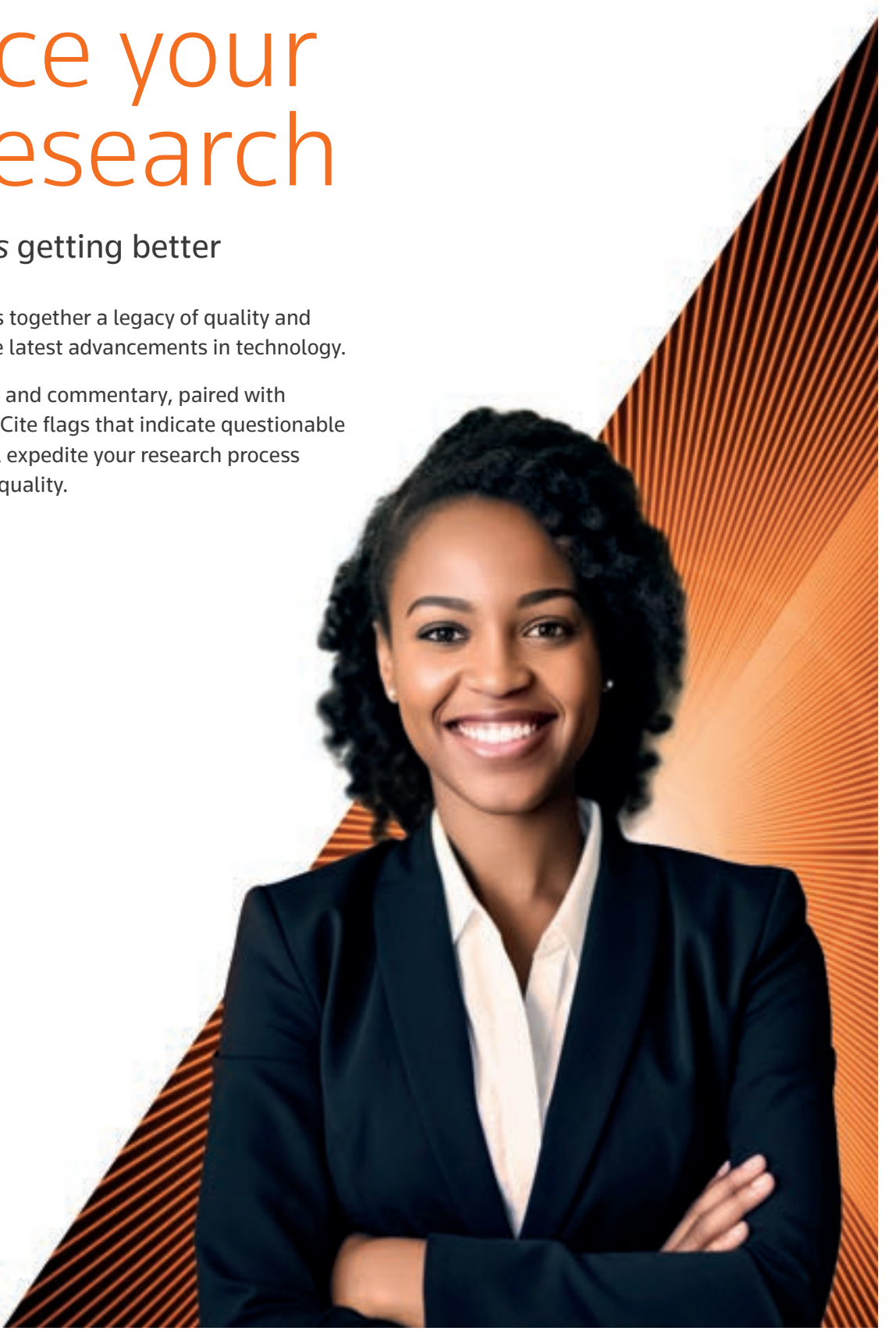

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PRESIDENT'S MESSAGE

Boris Bytensky

Friends,

I have always found our annual fall conferences to be invigorating and motivating. Leaving aside the obviously important and invaluable educational component, conferences have always been a chance to reconnect with friends and colleagues. Each year, outstanding lawyers have addressed us in the annual Sopinka lectures and Martin Medal ceremonies and re-affirmed the value and importance of our work, and re-energized us to get through the 12 months to come until the next annual conference. The pandemic took much of that from us for three years, even when we had a hybrid option. It was really good to be back in person this year. I am motivated and re-invigorated.

This year's conference was also particularly significant for me, as it fell on the 30th anniversary of my call to the Bar, a period that honestly seems much closer to 30 minutes than 30 years. So, for my first President's message, allow me to blend nostalgia, motivation and re-invigoration, and to share some thoughts about our upcoming two years.

I didn't initially plan to become a criminal lawyer. I *did* plan, from about my third year in law school, to *marry* a criminal lawyer (as my then-future-wife saw no other area of law for herself). I was going to be a rich Bay Street lawyer, and that was that. However, when I came home each night, it was crystal clear that her days were much more interesting and rewarding than mine. So, drawing on my high school's motto – *Carpe Diem* – I decided to seize the day and took the plunge. I soon learned – as every single member of the CLA has come to realize at some point in their career – there is simply nothing as uplifting and rewarding as criminal law, and there's nothing like being a criminal lawyer. All of us are in this profession for the right reasons.

Despite that, as every single member of the CLA has also come to realize at some point, a career in criminal defence isn't full of rainbows and unicorns. Defending the impoverished should not bring us closer to poverty, especially in relation to those who prosecute the impoverished or preside over their cases. Simply put, the practice of criminal law can be so much better. It *should* be so much better.

I joined the CLA nearly 30 years ago, near the end of the golden age of legal aid. This organization gave me an opportunity to learn skills and to develop as an advocate. Perhaps more importantly, it made me realize that I made the right decision to become a criminal lawyer; that I belonged and was part of a real legal community. The CLA introduced me to career-long friends and mentors, who were there to celebrate the victories, and to help deal with the stinging disappointments.

Through the stellar leadership of my predecessors and the commitment of many who served on our governing body over the years, the CLA has justly come to be recognized by all other justice system participants as the true *voice of the defence Bar*, our motto. As we approach the fourth anniversary of the start of the pandemic, and with a return to "normal" no longer "two years away from being two years away", now is the time to use our voice. Responsibly. Respectfully. Sternly and forcefully.

As examples, practice directions and policies have to be fair to the defence Bar, and not only to other stakeholders. Legal Aid must be meaningfully accessible to persons of limited means, and meaningfully funded so that lawyers are paid a reasonable rate and given an appropriate number of hours to permit us to give each and every client a robust defence. Junior counsel must be properly funded in appropriate cases to ensure that our recent calls develop their skills under proper guidance, and to demonstrate that justice sometimes requires a team effort to stand against the multiple lawyers sitting across the table in serious cases. While Legal Aid may never return to the halcyon days of the 90's, we can and we must do better. Additionally, we will strive to try to fix a badly broken bail system, and to fight for fairer and more timely bail – issues that have been dear to me for many years. While a rewrite to bail legislation is unlikely, we intend to firmly advocate for changes to bail practice and culture that will make us much *smarter* about bail, without any compromise to public safety.

Finally, just like the CLA always made me feel that I belonged and was supported, it is a high priority to make every present and future member of the CLA, in every part of Ontario, feel that the organization has their back. Our executive, Board of Directors and I are committed to meaningful outreach, to mentorship and to continued excellence in education. All of us want to see every member feel the warmth and strength of our organization and to benefit from the mentorship of the more senior members. My door is always open, and I encourage any member to contact me and your other CLA representatives to address issues that might arise or if we can help in any other way.

I am deeply honoured to become the 20th President of this organization. We have an energetic and extremely capable group of women and men who have been elected to the executive and to our Board. Our willingness to make a difference is motivating and infectious. We will lead by example. While there is much to be accomplished in the next two years, we have intentionally set the bar high. In the words of the previous General Manager of the Toronto Maple Leafs, "we can and we will".

It's time to seize the day. *Carpe Diem*!

EDITOR'S NOTEBOOK

It is with excitement that we prepared this Conference Edition of For the Defence Magazine for you to start off the New Year. Undoubtedly, the buzz in the air at the annual conference is infectious. Each year we wait with anticipation for the end of year event, with its exciting and informative content and the opportunity to catch up with colleagues. There is excitement in our eyes, as we ride down the long escalator at the Toronto Marriott knowing that friends, many of us have not seen for a while, are all waiting at the bottom. Attendees from across the country, legal icons, members of the judiciary, students, exhibitors, and of course, the dedicated Board and staff of the Criminal Lawyers Association flock together. By the end of the lunch on Saturday our voices are hoarse from chatter, and our brains are full of newly acquired knowledge. The annual conference has once again fulfilled, no we dare say exceeded, its mandate.

Marie Henein captures the cover of this edition, honoured by the Criminal Lawyers Association as the Martin Medal recipient for her magnificence as a trial lawyer and leader of the criminal defence bar. By the end of the G. Arthur Martin Medal luncheon, as the conference drew to an end, we left with feelings of inspiration, happy exhaustion and a strong desire to get back to the hard work of advocacy. Not just in the courtroom but in the profession too. Marie Henein accepted the award with grace, a fierce indignation and a message to criminal lawyers: female defence counsel need to be seen and recognized for the contributions we bring to the table. In her brilliance, she reminded us that while the public and our politicians continue to wage war on the defence bar and the legitimacy of our work, we have our own internal problem: we too often forget the women in criminal defence. We all chuckled at Marie's response to Dan Brown when he called to tell her the news that she had won the award, "Did the CLA run out of men to give it to?" A transcript of Marie's powerful acceptance speech can be found in this issue.

Donald Bayne presented the annual Sopinka Lecture on the topic of advocacy, reminding us that advocacy takes place both inside the courtroom where we display our important trial advocacy skills and outside the courtroom where defence counsel challenge how laws are drafted, injustices in our institutions and systemic inequalities in our communities.

Robin Parker's first-hand account of her experience as complainant in the justice system was also memorable. As senior defence counsel and as former crown counsel, her experience took us outside of the typical constraints of a sexual assault prosecution and into the constructive approach that restorative justice offers. Her account is inspiring and gives a sense of alternatives to the otherwise blunt approaches of the justice system.

Just when we were enjoying our departure from the traditional criminal law sphere, Emily Dyer brings us back to brass tacks, taking us through the update, especially post *R. v. Ndhlovu*, 2022 SCC 38. The sex offender registry looms as a concern for our clients charged with sexual assault and as an ancillary order feels harsh, long and at times, draconian. *Ndhlovu* provided some reprieve, but the courts are still mixed in terms of application. Emily Dyer provides some clarity in these muddied waters.

Finally, a foray into the creative parts of our brains. Well known criminal defence counsel and published author Robert Rotenberg has contributed a wonderful piece entitled "Writing and Lawyering" to explain how his criminal law career and writing have intermingled. Robert Rotenberg has published six novels and his seventh, entitled "What we Buried", is about to be released in February. He has agreed to give us a sneak peak of his soon to be released novel, with an excerpt of the first chapter for your reading pleasure and enjoyment. We hope to bring you additional exciting excerpts from Robert's novels in future issues. As criminal lawyers, we love digging our teeth into a good fact scenario, filled with intrigue and drama. Robert Rotenberg delights us with how he manifested this passion, by literally putting pen to paper.

Most of our columnists are back for another year: Hussein Aly in *Wrenches for the Trenches* and Lauren Wilhelm in *The Docket* as well as Craig Bottomley's always lively and entertaining *Members Profile*. We are so grateful to Lynda Morgan for all her contributions to the *For the Defence Magazine*. She is passing the torch for her column *Search Solutions and Techno Tricks* to Wes Dutcher-Walls. Please join us in thanking Lynda and welcoming Wes to the *For the Defence* team.

We hope the momentum from the conference continues until the 2024 Annual Conference, that you keep advocating, inside and outside the courtroom, that you take creative approaches, and most importantly: that you keep recognizing the hard work and contributions of the women in criminal defence.

Margaret Bojanowska

Neha Chugh

Legal Titan accepts the G. Arthur Martin Medal

by Marie Henein

Photo courtesy of Gabe Ramos.

The following is a transcript of Marie Henein's acceptance speech at the Martin Medal Awards Ceremony, delivered on November 18, 2023. Transcription courtesy of Kim Fess - VP Transcription and Reporting Service.

Thank you very much. Thank you, Dan, Danielle, Michal, the judges of the Court of Appeal, the Superior Court, and the Court of Justice, and truly all of you who took time out of your Saturday, to be here with me. And, of course, thank you to the committee, which was, as Dan said, comprised of Dan, Justice Zarnett, Jack Gallant and Professor Lisa Kerr. I have to say, I didn't know who would be here today. And so before we came in, I was struck and deeply moved by some people that were particularly meaningful to me in my career. And they were meaningful to me because throughout the last 32 years, they treated me as not only a colleague, but an equal. And so John Rosen, Brian Greenspan, Mark Sandler, Eleanore Cronk, David Watt, Gary Trotter, Alison Wheeler, for reasons that I don't have time to explain today, you hold a special place in my heart, and when I think back about my career. The Martin medal, is named, of course, after the legendary G. Arthur Martin, a legal titan of criminal law. And the existence of this award is the ultimate recognition, not of a particular criminal defence lawyer's work, but more importantly, the essential role that we criminal lawyers hold in the justice system. The truth is that this is an inconvenient profession. Personally, as Dan mentioned, it does not accommodate much of your life. And the type of work that we do, what we are constantly immersed in day in and day out, causes permanent incursions and

grooves in your personality that, over time, simply change the landscape of who you are. But it's also an inconvenient profession because what we do is unsettling to many. And in this moment in our work, we are in an acute era of distrust of the justice system, and importantly, justice actors, lawyers and judges in particular. There is a growing presumption of amorality or worse still, immorality in our work. And there's the creeping view that there is a lack of legitimacy in the judiciary, that it is not elected and disconnected from the will of the majority. This persistent hum that I began to notice about 10 years ago has, unfortunately, gotten louder and louder. No longer is the common question that I'm asked, how could you defend someone you know who is guilty? Now the question is, how can you sleep at night doing what you do? How can you morally do what you do? Now, we all are in the business of asking questions and understand the import of a question. And that particular question tells you that there isn't confusion about the job that we do. It is a question about our very legitimacy. Our response to the public's erosion of trust has been misguided, thinking that if we just tweet a little more, take courts on traveling roadshows, relate more, that this will somehow connect us with the public and restore our waning legitimacy. But that is not the problem, not even close. We are seeking to cure the wrong ailment. The attack on the legitimacy of the justice system on our legitimacy is far more existential than that. The root is based on an erosion of democratic values, or the rise, as one author puts it, of illiberal democracy. Or worse still, an increasing tolerance, indeed, yearning for autocracy in leadership. This is the shifting democratic foundation that has caused the public to question the institutions, the checks and balances that we mistakenly have assumed are unassailable. We are in an area of something far more dangerous than merely the run of the mill crime control policies. Waging war on the justice system, and in particular, justice actors, isn't new. History demonstrates that this is a common reframe for those who are seeking to consolidate their own power. And consolidation of power requires that you silence your opponents. And one way to do that very effectively is to remove any forum where you, as a leader, can be challenged. The autocratization of a government is a slow and deliberate process, and requires the erosion of institutions and actors that frustrate this march. And there can be no greater obstruction to autocratization than an independent bar and an independent judiciary. And we cannot disengage the growing intensity of this attack on democratic institutions on our justice system from the time that we're living in. The fight now has been taken to a forum that the legal system is quite frankly ill-equipped to deal with. We don't speak to each other anymore. Reports about judges and judgments and lawyers are not provided by or even predominantly by experienced journalists. They are tweeted by anyone with a phone. There are no credentials required to express an opinion, and the reach is immediate and widespread. We've seen political leaders in this country change criminal laws in response to a swell of social media. And we've seen political leaders harness social media to reach audiences immediately. To not see that the justice system is caught in the political crosshairs is naive. To not see that our voices are being delegitimized and marginalized is a fatal mistake. Social media echo chambers have the effect of creating alternate realities. It used to be that if you wanted to join a conspiracy group or a mob, you'd have to find them, get out of your pyjamas, go to the location and engage with an actual human being. But now you don't even have to leave your couch. And now we are directed to the echo chamber so that you are never subjected to opposing views or those who challenge you because being challenged means you will be triggered. So we just listen to what we agree with, and we've given up on the idea that opposing ideas and expression of opposing ideas and interaction have value. The result is that for the public, the line between truth and fiction about what is a real danger and what is a politically manufactured danger is blurred because everyone, as we know, has their own truth. And if there is no truth, only your truth, facts cease to exist because the concept of truth is entirely a relative one. Writer Hannah Arendt in her book, The Origins of Totalitarianism, warned that the ideal subject of totalitarian rule is not the convinced Nazi or the dedicated communist, but people for whom the distinction between fact and fiction, true and false, no longer exists. Now, I am not Chicken Little. The sky really is falling. If you thought our core democratic principles are on solid ground, well, then you cannot have been reading or watching the news over the last several years, with stolen elections, rampant misinformation, stormings of the capital, trucker convoys in Ottawa, invocations of the emergency act, Legislative curtailing of judicial oversight. And if you do not see our role in all of this, not only as lawyers, but particularly as criminal lawyers, then you are missing who is and always has been at the forefront of these fights in every single courtroom in the world. Defining how we live as a society and fighting to hang on to foundational values, even when we do so on the backs of the unpopular. But then again, I know that being principled and resolute comes with such a price for all of you here today. As I was preparing the speech, I was reminded of one of Aesop's fables, and I want to read it to you. It's called the frogs who wished for a king. The frogs were tired of governing themselves. They had so much freedom that it had spoiled them, and they did nothing but sit around croaking in a bored

manner, and wishing for a government that could entertain them with pomp and display of royalty, and rule them in a way to make them know they were being ruled. No milk and water government for them, they declared. So they sent a petition to Jupiter asking for a king. Jupiter saw what simple and foolish creatures they were, but to keep them quiet and make them think that they had a king, he threw down a huge log, which fell into the water with a great splash. The frogs hid themselves among the reeds and grasses thinking the new king to be a fearful giant, but they soon discovered how tame and peaceable King Log was. In a short time, the younger frogs were using him for a diving platform, while the older frogs made him a meeting place where they complained loudly to Jupiter about the government. To teach the frogs a lesson, the ruler of the gods now sent a crane to be king of Frogland. The crane proved to be a very different sort of king from old King Log. He gobbled up the poor frogs right and left, and they soon saw what fools they had been. In mournful croaks, they begged Jupiter to take away the cruel tyrant before they should all be destroyed. Are you not yet content, cried Jupiter? You have what you asked for, and so you have only yourselves to blame. There are cranes popping up all over the world, in this country to be sure, and they are looking to eat up us frogs. I will leave it to you to pick out who the cranes are in our midst, although I confess I may mention one or two along the way. When we think about this challenge, we need to think globally. We cannot navel-gaze and be so dazzled by our polite Canadian-ness that we ignore what is hurtling towards us. What is here and what is happening in the discourse already. What is being fed to the public by sound byte politicians who care more about re-election than governance and integrity and democracy. And to know what is next for us, there is no surprise here that if we do not focus on-, our energy on the real fight, then what happens in the rest of the world will happen here. And let me give you a few examples. The citizens of Italy elected Giorgio Maloni, the leader of the Brothers of Italy, to head the first right wing government since the Italian constitution, which was an antifascist document in 1948. You should know her party descended from the Italian social movement by fascist politicians who had played a significant role in the Republic of Salò, a pro-Nazi regime that governed the northern half of Italy. The party's symbol is green, white, and red, and it's allegedly designed to express loyalty to Mussolini. In June of last year, she made a speech in Spain and she said the following. Today, the secularism of the left and radical Islam threaten our roots. Compromise with such opponents is unthinkable. Parties to the right need to say a clear no to the LGBQT lobby, to gender ideology and to mass immigration. Now, whether she'll be able to stay in government is not the point. The fact that she can get there is what is frightening. Because it says to you that there was a country of frogs just begging up to be eaten by a crane. It tells you that her message, one that should sound eerily familiar and have resonance to you in North America, is a message that has power no matter what country you live in. And these arguments, fighting immigrants, LGBTQ-, QT rights, making the streets safe from criminals, these arguments always land you in a court. These in terrorem arguments that don't only terrorize are designed to create a common enemy and consolidate power around the self-proclaimed voice of the people. And anyone who challenges these tropes is viewed as soft on crime, out of touch, undemocratic and amoral in their work. These types of voices have taken over all over the world, in Poland, in Hungary, and in France. So why on earth do we think that we're just so special? That we are so smart that the rest of the world will suffer this way and we won't? It happened in the US. It's happening right now in Canada. It is the focus of

Marie Henein accepting the G. Arthur Martin Criminal Justice Medal from Dan Brown

the dialogue or ideologue that should be alarming to us because there has been a deliberate decision to pitch the battle on a field that is about morality, humanity, who is better, and who is worse. And I can tell you this for certain, the one thing that each and every party always has widespread agreement on is get tough on crime policies, because that creates a mythical enemy, the criminal, and it consolidates people around fear. That is what is at the heart of all of these cranes that have entered the political sphere. It's just that every side is picking what crane they would like to be eaten by. But you know what they say, a rose by any other name. So

I can tell you is that no amount of tweeting can restore and respect the value of the justice system. We will have lost our legitimacy and it will be too late because the moment we lose our legitimacy in the eyes of the public, we lose our voice, because there will be nowhere to go, no court to turn to, and no one to speak to you.

whether you like red cranes or you like brook blue cranes, make no mistake, it's still a crane through and through, and you will be eaten. What you may-, what you ask-, what you may ask is what does this have to do with us? Because if the role of the justice system and lawyers is delegitimized in the eyes of the public, what I can tell you is that no amount of tweeting can restore and respect the value of the justice system. We will have lost our legitimacy and it will be too late because the moment we lose our legitimacy in the eyes of the public, we lose our voice, because there will be nowhere to go, no court to turn to, and no one to speak to you. This dangerous dialogue has everything to do with you. Because when these things start to happen, the justice system, and everyone who works in it, is target number one. Take Hungary for example. There has been a methodical dismantling of an independent judiciary there for 10 years. Hungary's prime minister Orbán has waged a decade-long war to erode the independence of the judiciary, and to move Hungary further and further away from democracy. Most recently, he appointed his own supporter as the president of the Supreme Court to an extraordinary nine-year term. Notwithstanding the National Judicial Counsel's objection that this was an unqualified person, and I pause here to note that former president Trump similarly appointed a number of judges who various non-political bar associations concluded we're wholly unqualified. The European Commission 2020 Rule of Law Report found that judicial independence in Hungary was, quote, a source of concern. In addition, the report found that judges and lawyers are subject to negative narrat-, narratives in the media. In several press statements since January 2020, the government and pro-government media outlets have criticized judicial decision-, decisions, particularly those about releasing convicts on parole and ruling in favour of inmates complaining about their detention conditions, because if there is a way to attempt to show that a judge is unfit or that the criminal law is an immoral profession, then demonstrating they are soft on crime is always a sure fire hit. In England, the influx of migrant workers has been a hot button issue for years. Members of Parliament have chosen to call lawyers and law firms amoral for their representation of such individuals because lawyers have had the audacity to bring challenges to immigration laws. In early September of 2020, the dialogue became so vicious that a member of the public tried to attack an immigration law firm. Now, he didn't come up with this idea all on his own. He was handed this theory by the home secretary who days earlier, before the intended attack, had tweeted that immigration removals continue to be frustrated by activist lawyers. Philip Rodney, a former member of the IBA Senior Lawyers Committee Advisory Board said, quote, I can't recall, in more than 40 years of practice, seeing that sort of language being used by government in an attempt to discredit lawyers who are just doing their jobs. He said that it was breathtaking that a government channel should seek to disparage as activists, lawyers who work within the limits of the law to uphold the rights of those whom they represent. The ability to scrutinize executive power and protect the interests of our clients is an essential part of the rule of law. Undeterred, the home secretary gave a speech again in which she denounced lefty lawyers working in the asylum system. And she was supported by then Prime Minister Boris Johnson who accused lefty human rights lawyers of causing the immigration system to be broken. The system is broken, should sound like a familiar refrain to you. And the system that they are often talking about is the justice system. The result of this conduct was that law firms working on immigration cases received threats by the members of the public. It was so bad that members of the International Bar Association issued a statement cautioning, cautioning the UK, in, in in this century, it is stunning to me, and this is what they said, we remind the United Kingdom of the UN basic principles obligations for governments to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference. Recently, British lawyers, challenging government sanctions against Russians in response to the Russian invasion, have been named and shamed as being immoral by Members of Parliament in Parliament. And in another important democracy that has faced this ideological shift, in January of this year, Israel's ruling majority sought

widespread judicial rem-, reforms in the appointment of judges, and the scope of judicial review over legislative action. The government's plan was to weaken Israel's Supreme Court by significantly limiting its power to review laws and strike them down. When he announced the reforms in early January, Justice Minister Yariv Levin said that the Supreme Court's, quote, growing intervention in cabinet decisions and Knesset legislation had ruined public trust in the legal system leading to severe damage to democracy. We go to the polls, vote, elect, and time after time, people we didn't elect choose for us, Levin said. Many sectors of the public look to the judicial system and do not find their voices heard. The reform would annis-, additionally diminish the ability of courts to conduct any judicial review of the basic laws, and it would change the makeup of the judicial selection committee. The astounding thing was citizens of Israel took to the streets for days protesting this change. And as I watched this incredible reaction, I thought to myself, if this happened here in Canada, could we get anyone to even get up off their couch? Despite these mass protests, that bill was forced through Parliament in July. And the Israeli Supreme Court held its first hearings on petitions challenging the judicial overhaul. It was so important they sat all 15 members of the court, and one of the central arguments advanced was that in a democracy, Parliament ought to be absolute and completely immune from judicial review. And during the course of the argument, Justice Amit said this, Democracy does not die with a few major blows, but rather with many small steps. And then there is the United States where the fault lines in democracy cannot be any more evident, where free elections are legit-, delegitimized, where a previously unthinkable coup becomes a reality, and where partisan politics are so strong a pull that undermining these essential values is just the price you pay to retain political power. Where Trump is now currently campaigning on a platform that involves a promise to politicize the Department of Justice. Just a month ago, the American College of Trial Lawyers issued a statement denouncing statements made against judges. In particular, they denounced California Governor Gavin Newsom who had attacked a US judge in a gun case. And he had tweeted that this judge was an extremist right wing zealot with no regard to human life, and suggested that he and other judges are NRA owned. The college, at the same time they issued that denunciation, denounced Donald Trump because he had posted that there was a deranged New York State judge doing the bidding of a completely biased and corrupt prosecutor, a highly politicized Democratic judge. And those tweets occurred in September of '22 and September 26. Here in Canada, we are gearing to follow suit. We've had emergency acts in trucker convoys. In our country, the dialogue, the fight is squarely pitched on criminal law. It is a means of showing who is tougher, who protects the public more and who's more in tune with the will of the majority. Leaders put out protecting our safety when our safety is not what is in jeopardy. They claim to be protecting us from drug addicts and criminals, when it is not the addicted and the marginalized who endanger our safety. Just look at the headlines in this country from a few months ago. Poilievre has made bail reform or what he likes to call catch and release, as though these are animals. He likes to call this a central platform of his campaign. And recently he said this, I quote, Trudeau and the NDP have brought in automatic bail for repeat offenders. The police will tell you that those offenders commit most of their crimes when they are out on bail for their previous crime. So they get arrested in the morning. They say to the police, because I have another engagement at noon. They get released. They commit another crime. They get arrested, and then they're out by dinnertime to commit their third crime of the day. They laugh at the police. We saw the spike in crime follow immediately after this policy came into effect. There was no spike. What we have is a catastrophe of mass incarceration of indigenous people, not lunchtime crimes. But, of course, our Tweeter-in-Chief responded quickly. We're taking action, Prime Minister said, to prevent gun crime and gang violence because you deserve to feel safe in our community. And then the new Liberal Justice Minister announced that $390,000,000 to help stop gun crimes and gang violence would be issued. The police, of course, heralded this. And I ask you to compare that promise and that contribution to our safety, to the fact that about a 180,000,000 a year is spent on bringing clean water to indigenous reserves, whereas we sit here today, there are 28 long term water advisories on reserves. And there are indigenous children who have grown up their entire life without clean water, and they have been unsafe in this country. Now, of course, bringing that sort of safety to people doesn't get you votes. Toughening bail does. In April 2023, a report was released by the special rapporteur on the independence of judges to the UN. In that report, the rapporteur noted that she was, quote, gravely concerned about persistent challenges to judicial independence. And the very first challenge to the independence of the judiciary and the rule of law, which she called a priority challenge, was this, the autocratization and democratic decay in the world. And the third, she noted, was the widespread attack on lawyers for their work. The second was social media and the widespread disinformation. This is where we are today. And this constellation of factors, autocratization, fault lines in democracy, the weaponization of social media as our main source of receiving and disseminating information makes this moment so much more than another round of getting tough on crime. And the only thing, the only thing that gives me a measure of comfort is knowing that you all are at the forefront fighting this fight and always have been, undeterred by taking on popular cases, calling out politicians, and challenging laws. And that's why this recognition is particularly meaningful because it's an acknowledgment by your peers that you are one of them, that you are in the same fight, that

you share the same values and are committed to those values. As you know, this award was created in 1989, and has been awarded 34 times since its inception. This is not an award that discriminates based on age. It has been awarded to people much younger than me, as young as 51 years old and as old as 89. This has not been an award that discriminates and limits itself to practitioners only. It has been awarded to judges, 12 to be exact. It has been awarded to academics. It's even been awarded to out of province criminal defence lawyers. And, yes, Martha, I did get your note to say thank you, but buckle up, my friend. We're going to go. This is an award that discriminates based on gender and colour. In the 34 years of the history of this profoundly auspicious award, it has been awarded to only three women. Two judges, Chief Justice MacLachlin and Louisa Arbour, neither of whom had ca-

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reers in criminal law, although their juridical contributions to criminal law are beyond question. And only one, one female criminal defence lawyer, the extraordinary Marlys Edwardh. Now, that statistic has to tell you something. The problem is I'm not quite sure what message I'm supposed to be getting. So you can appreciate that when Dan called me to tell me I would be the next recipient, I was shocked and alarmed and truly worried, to be honest, because as he said, I was worried it had finally happened. The CLA had finally run out of male lawyers, predominantly white, of course, to give the award to. It is stunning when you think about it. The Empire State Building was built in 1 year 45 days. The Eiffel Tower took two years to build. The ceiling of the Sistine Chapel, that only took four years for Michelangelo to create that masterpiece. And yet, it has taken two decades to find another female defence lawyer worthy of this honour. When I told my mom, when I told my mom that in 34 years of this award, only one female defence lawyer was considered worthy to receive it prior to me. She asked in classic Eve style, but why? She was not asking the question critically. She really wanted to know. And the truth is, I didn't have an answer. We know that women represent at least half of all law school graduates. We are present in force during the early years, and then something happens. But what? In 2013, the working group on women and criminal law of this association released their report. And the report suggested that large numbers of women leave the defence practice within the first 10 years and don't return. A review of the respondents identified the most pressing issues, in addition to the demands of work and personal life, to be building a successful practice, subtle sexism on the part of other justice participants and subtle sexism on the part of fellow defence counsel. But I wonder, if you can't find us, is it because we are not there to be seen or that you are not looking? Because I see, today, a room full of women. We are here. We are on committees. We are on the bench. We are standing shoulder to shoulder with you in courts, and we are doing the same work as you, as well as you. And if we are not there to be seen, ask yourself why is that? Maybe because sometimes we are here and we are not seen. Maybe because sometimes when you are here so long and the environment is so inhospitable that you figure you might as well just go, because sometimes it's awfully exhausting to have to fight for your client and for yourself as well. And sometimes, just sometimes, it's awfully lonely for women in this profession. In an article by Professors Alice Woolley and Elysa Darling entitled, Nasty Women and the Rule of Law, the professors had this to say about the unique burden of female lawyers: lawyers in general are labelled as morally troubling. Women lawyers risk being specifically and personally identified as morally transgressive, even when performing acts expected of a person in their role. I don't know what they're talking about. Women who take on law firm leader-

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ship, advocate in notorious trials, lead teams in complex corporate transactions, demonstrate political ambitions or political leadership, that is women who do things that lawyers might normally be expected to do, risk gendered and hostile forms of criticism. They risk being labelled unlikable, unattractive, unfeminine, unpleasant, and immoral, basically a bitch. Such attacks are not certain to occur, but they are more likely for some women than for others, and the form and tone that attack takes can vary with context. But a woman who chooses to enter the legal profession does not just risk generic unpopularity. She also risks being labelled a nasty woman. So women leave firms more often. They earn less than their male counterparts. They remain a small minority of equity partners, and in the legal profession are underrepresented, forced out and overlooked. And please, please make no mistake, none of you, none of this has a wit to do with work life balance. No one has spent seven years studying and succeeding and being validated in

their profession, but decided it was more fulfilling to give up a lifetime of work to do the 3:30 school pickup. So, sure, some of these extraordinarily talented women disappear from view because you are not looking or when you look, you overlook, because it is utterly exhausting for them, bobbing and weaving and trying to hit just the right note in the hope that one day, maybe, just maybe you will listen. These are the struggles of women who leave, women who have become judges, and women who hang around long enough to maybe, maybe every couple of decades, win an award. Awards are not important, not to me anyway, but what they represent is. They are a recognition, an acknowledgment, and a sign that you've made it. You've been allowed entry into the hallowed club. But this problem that we see here is not unique to law. I'll, I'll give you a brief smattering of articles that are out there. Why Oscar is Male, a data driven analysis of gender representation in 87 years of Academy awards. Why don't more women in science win Nobel prizes? Why don't women win lit-, literary awards? And that's a fascinating article demonstrating that not, that not only do women win less literary awards, they are even less likely to do so if their protagonist is a female. I guess no one wants to see us or read about us either. Why have so few women won the most important award in computing? Yet another article. You name the field, women are underrepresented in recognition. When women are recognized less, it is tangible evidence of where we are and the value you place on our work. And there are, of course, very tangible ways for all of you to rectify this besides recognition. You can show us a little love. You can lift us up. You can even refer a file to a female colleague. You can let us in the club like Mark Sandler and John Rosen and Brian Greenspan did for me. Maybe just include us a little bit. I'm going to be honest, I agonized about this. Not the speech. I love a captive audience. But accepting this award at all. Because I knew that in 34 years, it could not conceivably, conceivably be that there are only two of us worthy of this award. And, historically, whenever I've been struggling with that, and what the right move is, what the right thing to do is, I would pick up the phone, and I would speak to Eddie Greenspan or Mark Rosenberg. I was so lucky to have learned so much from these extraordinary lawyers, and that office truly was the perfect place for me to start my career. I was never treated as less than or as different by Eddie and Mark. It never occurred to them or to me. And so for the longest time, the delusion that I suffered under, blamed my parents, that I was the same, as good as, well, that feeling was continued working with Eddie and Mark. When I sought their advice, the funny thing was that Eddie and Mark, as different as they were, would always give me different rationales, but end up in the same place. That was also part of the magic for the way that they worked together. So I know that Eddie, right now, if I called him and complained and told him what I was going to talk about, would tell me to get over myself, to lighten up, to enjoy the day and the honour. I know that Mark would tell me to be gracious and think about the broader import of the award, and they would be right. As much as they helped me develop skills as a lawyer, their greatest contribution to me personally was the approach to lawyering. Get over yourself, enjoy the profession, and be gracious. I love this profession. I always have. But getting over myself and being gracious, those aren't necessarily my go-to moves. I will be forever grateful to Eddie and Mark for letting me learn for them. Mark was an incredible lawyer, profoundly reasonable, empathetic, and a serious intellect. And Eddie, well, I always thought, and I still do, he was, for me, the embodiment of what a lawyer should aspire to be, tough, unwavering in the protection of their client, and importantly, a fierce and fearless, fearless believer in the value and honour, the absolute honour of the work that we do. I know that even to this day in my most difficult and challenging moments, I've thought of them to find strength and unwavering commitment to my client, no matter how tough it felt. I've thought of them to try to find some empathy and grace. And I wish they were here and sincerely hope that at this moment, if they were sitting here today, that maybe, just maybe, they would think I turned out okay. I've had the luck to be surrounded by extraordinarily strong women as well. And contrary to what you see on TV, we do not spend our entire time crying on each other's shoulders, sharing cinematic moments of self-discovery. We do not spend all of our time talking about our children, our partners, our failures, our challenges. There is not an aspiring Disney princess in the lot of the women that I've been surrounded with throughout my life, and there isn't a one of them that would ever have aspired to being saved while wearing a princess gown. These are tough women as body and fabulously self-absorbed as, well, any male you could come across. Bosses, each and every one of them. Not do everything you can to be the perfect mom and housewife and professional type-bosses. These are women who are quite simply women who know their value. Thank you all who are here. There are too many to mention, but I must mention Rita(ph) and Laura(ph), my friends of 43 years. Thank you very much. About two decades ago, I flew my parents to Ottawa to watch me argue in the Supreme Court, and I figured they should see what I-, they had struggled and come to this country for and paid for. And after the argument, when I thought I'd absolutely killed it, my mom and dad came to the podium in Ottawa, and I said, well, what did you think? And without missing a beat, they said that lawyer arguing against you was absolutely brilliant. You, you were okay, but that lawyer was just incredible. That lawyer, of course, was

Michal Fairburn, and they were absolutely right. And today, she has made it worse because she has spoken perfect French in front of my French-speaking father, multilingual father, and I will never ever, ever, ever hear the end of it. Michal, thank you for speaking for me, thank you for speaking to me, hanging with me and being such an incredible friend whose kindness and strength is truly inspiring. I want to thank my colleagues, the associates and staff who work side by side with us under a pressure cooker in profoundly difficult moments. It used to be that when I drove to work, I had my standard calls. I, I always call my mom, and then I call my brother. But for the last couple of decades, my list of family calls has actually grown. So you'll usually find me on the phone in the morning or driving home calling my mom, my brother, Scott, and Danielle. Just saying hi, checking in, not about work, just because they are now so much a part of my life. My partners, the brilliant Scott Hutchison, I couldn't imagine being partners with anyone else. While we are so different in disposition, in a good way, we are so aligned and in sync about the work we do and how we do it. I remember the very first day that I walked into the office, and there he was, very tall, Scott Hutchison. And I thought it was really strange to see him sitting there. And I have to tell you, I cannot imagine a single day coming into the office and not seeing, seeing him sit there today. And, Danielle, thank you so much for your kind words, for your creativity, and for having my back. And for those of you who don't know, in some cases, literally having her hand on my back as we walk through crowds just trying to get to the courtroom door to do our job together. Your relentless patience, your empathy, your millennial whispering capabilities are almost as impressive, almost, as your skill as a lawyer. And you know how incredibly proud I am of you. Matt, thank you for taking a chance on an unknown law firm with no clients, no associates, and absolutely no plan. I appreciate it. No one makes me laugh so much, and I have to-, that I actually have to leave courtrooms other than Gary Trotter. It has been a pleasure working with you from cases in the Supreme Court to arguing for the lives of a dog in bylaw cases. La Juge Christine, we miss you terribly, and your empathy and kindness, and are quite frankly annoyed that we have had to share you at all with the rest of the world, but we are, of course, watching with such incredible pride. And to my newest partners, Alex, the sanguine, always reasonable Alex, the kind Ewa, the tough as nails Stephanie, and someone named Peter Henein, who I'm just beginning to know, you are all extraordinary lawyers. And to all of you, I'm so grateful, that you've been willing to come along with some crazy ideas, never constrained or restrained, and had confidence in me and in us. Mom and Dad, thank you for your unwavering support. Thank you for giving me the shot. When I told my dad that I'd won this award, I kid you not, he said, they wouldn't let a woman win this award in our country. I'm glad we came. Mom, thank you for always, always whenever I said to you that they say only a man should do this, only a man should do this case, for always asking, but why? You are right. No reason. No reason at all. To my husband, Glen, called the reasonable man on the Clapham omnibus, he is here. He is live, and I've been fortunately married to him for 30 years. Thank you for your calm, thank you for being grounded, and thank you for being profoundly annoyingly reasonable at all times. And finally, to my sons, Coulter and Ryder, who have had a lifetime deep, one on one, intensive advocacy course. Anyone who has worked with me knows how intense my intense is. I can tell you, I have subjected them to more cross-examination than any witness could survive. I know sometimes I have been more lawyer than mom, but you have not only withstood it, you are now excellent cross-examiners and point first advocates. Thank you for being proud of me, and thanks for being so tough. I know I happen to be your very first client, and that you've had to defend your mom more than most kids should ever have. I know you have my back, and I want you to know that if I ever, ever get in trouble again, you will always be my first call. On behalf of the over 650 women who are members of this organization, the women in this room, the women on the bench, the young and bright stars who I know are coming up, to the CLA, thank you so much for honouring all of us today, but maybe don't wait another two decades to find one of us, we're here, so that I can stop asking, but why? Thank you.

On behalf of the over 650 women who are members of this organization, the women in this room, the women on the bench, the young and bright stars who I know are coming up, to the CLA, thank you so much for honouring all of us today, but maybe don't wait another two decades to find one of us, we're here, so that I can stop asking, but why?

The Sopinka Lecture: Advocacy Outside the Courtroom, Taking on the Law of Extradition

By Donald Bayne

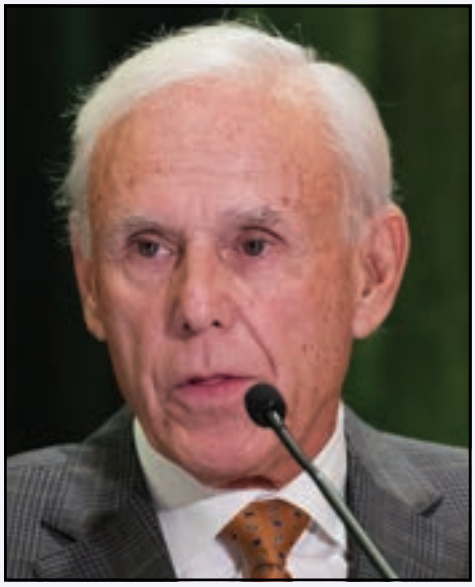

Photo courtesy of Gabe Ramos.

The following is a transcript of Donald Bayne presenting the Annual Advocacy Lecture, delivered on November 17, 2023. Transcription courtesy of Kim Fess - VP Transcription and Reporting Service.

Everybody hear me? I'm from the Canadian prairies. My dad was from Theodore, Saskatchewan. That was the Ukrainian side of the family. Farming people then, farming people still. My mom was from an equally small place on the prairies, Stony Mountain, Manitoba, the English side of the family, although there are indigenous influences on that side of the family, as one of my first cousins is a registered Métis. John Sopinka was from Broderick, Saskatchewan, down the road and across the province from Theodore, also from Saskatchewan, farming people, also, Ukrainian roots. John Sopinka played football at U of T, and then in the CFL while also starting his legal career. I played football at Queen's, and then very briefly in the CFL, before starting to practice as a criminal defence lawyer in Ottawa. John Sopinka was directly involved in his career with World War II issues and the Deschênes Commission. I've done two World War II cases, one in the Soviet Union as it then was, collapsing in 1989, traveling with and working under the nose of the KGB. The other in Eastern Ukraine, the Donetsk area that is now the scene of war between Russia and Ukraine. Maybe some or all of that is why Justice Sopinka called me up out of the blue, we'd never met, and asked me, would I work with him and other judges in a program he had created in Ottawa to train Eastern European judges in the fundamentals of the Canadian criminal justice system. I therefore had the pleasure of knowing and working with John Sopinka, even going to his house for

dinner. And so today, it's a very special honour and pleasure for me to be speaking at the John Sopinka Advocacy Lecture. As you know and as was just referred to, John Sopinka, before his appointment to the Supreme Court, by the way, where he penned the single most important judgment of that court in combating wrongful outcomes in criminal cases, John Sopinka was a formidable advocate. And this is an advocacy lecture, not a civility lecture or a judgeship lecture. And it's an advocacy lecture in the name of a formidable advocate. So I'm going to advocate in the time I've been allotted. And I'm going to give you a little background. Some few of you might be aware of the extradition case of Dr. Hassan Diab, a Carleton University Professor of Sociology, Canadian citizen, who was extradited to France in 2014, then sent back to Canada after more than three years of solitary confinement because French investigative judges had determined that there was no valid case against him whatsoever, that he was an innocent man. As advocates, we strive to make a difference. What is advocacy after all, but the art of trying earnestly to make a difference in outcomes, in human rights, legal rights, the dignity of individual people. But the advocates role, in my view, does not stop at the courthouse door, and isn't limited, even in the case of criminal defence lawyers, to responding to specific charges. It's also to advocate beyond individual cases against bad laws. And if we don't do it, there's nobody else who will. So that's what I'm going to do today for a few moments. My advocacy against the current *Extradition Act 1999* and the process it has produced, the jurisprudence too, is in the form of a letter, a letter to the Prime Minister. And I invite you to consider the following. Dear Prime Minister, Lewis Carroll's parody of Justice, Alice's Adventures in Wonderland, had the King of Hearts calling for a verdict before any evidence, only to have the Queen of Hearts outdo him, urging, no, no, sentence first, verdict afterwards. Canada's reigning parody of justice is *The Extradition Act 1999*, and the jurisprudence it's produced. Together, they unfairly threaten the liberty of every Canadian. The manifest injustice of the case of Dr. Hassan Diab is a pointed example, although we can all learn from it and make it an important turning point. What, sir, is so very wrong about *The Extradition Act*? What has caused the author of a leading Canadian legal text, Canadian extradition law practice, to state startlingly, at the outset of his book that, quote, this is the least fair statute ever to be passed into Canadian law. One, the act unfairly deprives liberty. Retired Chief Justice Beverley McLachlin recently stated in a public speech that liberty is at the heart of a democratic society's justice system. Her exact words were, quote, that most precious thing without which everything else is worthless, his liberty or her liberty. The current *Extradition Act* requires no sworn evidence at all to deprive a Canadian of, quote, that most precious thing. And because extradition is a poorly understood, seldom media reported backwater of Canadian law, that'll come as a shock to most Canadians and maybe, maybe not to an insignificant number of you because my experience is few Canadian lawyers have experience, criminal lawyers, with extradition. Few Canadian judges, in their practices, we'll have come across extradition. Liberty's at stake in all criminal proceedings, and loss of liberty in your own country is serious and severe, but extradition imperils liberty even more extremely. The subject of extradition is sent off to a foreign country, far from family, friends, a known culture. In Dr. Diab's case, the subject couldn't even speak the language of the foreign country, so imprisonment for three years and two months was crushing, mentally and spiritually. Under Canada's *Extradition Act*, no sworn evidence was required to take away Dr. Diab's liberty or that of any other Canadian. An unsworn allegation by a foreign official is all that's required. It's put into a document known as a record of the case. And even though extradition creates a more severe and punitive loss of liberty than domestic criminal law sanction, it hasn't the normal procedural protections of the domestic justice system, full disclosure of all evidence, for or against, sworn evidence, challenged through cross-examination. The foreign official who signed the record of the case can't even be questioned. Presentation of contradictory evidence by the accused showing innocence isn't permitted. The lawyers of the Department of Justice slash International Assistance Group who prosecute these cases argue, and Canadian courts have mostly gone along with this. There was a British Columbia Court of Appeal Judge-, Justice Donald, who thought the whole thing was wrong and unconstitutional, but his voice has really been silenced. That extradition, it is argued, must be a summary process, an expeditious one. This is wrong from the get-go. Liberty's at stake. The *Charter of Rights* should enable every Canadian to fight for his or her liberty with meaningful procedural protections in the process. Dr. Diab's case demonstrated that summary and expeditious approaches to denial of that most precious thing grease the grinding wheels of injustice. Consider the following, and num-

But the advocates role, in my view, does not stop at the courthouse door, and isn't limited, even in the case of criminal defence lawyers, to responding to specific charges. It's also to advocate beyond individual cases against bad laws. And if we don't do it, there's nobody else who will.

ber two in this letter. The unsworn allegation of the foreign official is presumed by Canadian law to be reliable evidence. The Diab case shows the folly of such a presumption. The record of a case against Dr. Diab alleged that there was no usable fingerprint on the critical hotel card the bomber completed in Paris in 1980. The unworn allegation was presumed to be true and reliable evidence. It was both untrue and unreliable. Two years before the record the case was signed by this foreign official, France had already obtained a usable fingerprint from the card, had compared it against a number of people's fingerprints including Dr. Diab, and determined that the, the comparison excluded, eliminated Dr. Diab. It was not him. And this was known to the foreign official two years before he signed the false record of the case. This was known in 2007, long before Dr. Diab was arrested and lost his liberty due to this presumably reliable, unsworn allegation. But none of this was disclosed to the Canadian extradition judge or to Dr. Diab's lawyers. It was revealed in 2018 in the report of French investigators that released Dr. Diab. The presumption of reliability cloaks the unsworn foreign allegation in a powerful and unjustified presumption that compels Canadian judges who rightfully feel like they're rubber stamps in this process to regard the allegation, whatever they actually think of it, as reliable evidence of participation in a foreign crime. Think about it for a minute. That presumption of reliability reverses the presumption of innocence at the heart of our legal system. It reverses the onus of proof in criminal cases where liberty's at stake. It vaults an unsworn allegation above even sworn evidence, which is never presumed to be reliable, but has to demonstrate its own reliability, and you all know that from your own practices. In the Diab case, when the def-, defence called multiple international handwriting experts to give evidence that the French handwriting allegation was biased and, quote, wholly unreliable, The International Assistance Group lawyer argued that the defence evidence had to be disregarded, that the presumption created under the act put a, quote, bulletproof vest of reliability around this allegation, and the judge therefore had to commit Dr. Diab for extradition. Reluctantly, the judge exceeded and Dr. Diab's liberty was lost. Ironically, three years, two months later, French investigators concluded that the handwriting allegation was totally and clearly unreliable. Canada presumed reliable what was clearly unreliable, and even the requesting state saw it as unreliable. The unjust presumption has to go. Three, jurisprudence under this act requires the accused person, the person sought in the language of extradition, to prove that the rec-, record of the case is, quote, manifestly unreliable. That's the bar. That's the so-called constitutional safeguard, but it's a false one. This is proved in practice to be all but impossible. The Diab case proves the point. Material the Canadian extradition judge found to be, quote, illogical, suspect, and that makes no sense, nevertheless, didn't meet the unrealistic and unattainable standard of manifestly unreliable. The judge held consistent with our developed jurisprudence. That's an extremely high standard. It's, it's like Joseph Heller's book, Catch 22, that was made into a movie. You can defend yourself, but not really. Four, there's no obligation on the foreign state to make full disclosure. The foreign state can cherry pick what suits the foreign official and omit even clear evidence of innocence, like the bomber's hotel card fingerprint isn't this man's. In Canada, the Supreme Court long ago ruled unanimously that full disclosure is required in all criminal cases. Thank you, John Sopinka. Extradition is a criminal proceeding yet Department of Justice International Assistance Group Lawyers withheld from the Canadian extradition judge, like the French withheld, and from Dr. Diab, evidence that they had directed the RCMP to obtain on Canadian soil, not in France. Evidence they described privately as, quote, very powerful, if not conclusive evidence. The evidence? Fingerprint comparisons of Dr. Diab with multiple fingerprints from the bomber's police statement in France. French police had actually arrested the culprit and then let him go without photographing him, but he'd signed a statement. All of the police fingerprints were eliminated. And the evidence was indeed conclusive. All four remaining prints on that bomber statement eliminated Dr. Diab. It was conclusive. It was powerful. A Canadian principle of law, innocence at stake, requires disclosure even of privileged information like the identity of a confidential informant. But Canadian DOJ lawyers felt entitled by our extradition system to ignore this principle and to suppress powerful evidence of innocence. That too is wrong and unjust. This is a stew of injustice. Five, extradition is supposedly justified on inter-nation comity. Comity is defined as the mutual recognition by nations of the laws and customs of each other. Canada extradited Dr. Diab, a Canadian citizen, to France on the wholly unreliable, untruthful allegation of a French official, and both nations suppressed important evidence of innocence. This was done based on the fiction, and if you ever argue these cases at whatever level, this is the kind of linchpin argument that always undermines your position, comity. Comity excuses all of this. The fiction is that there's mutual respect between Canada and the requesting country, in this case, France, of their respective legal regimes. Except that while Canadians are sent routinely at French request to France, trusting their legal system, France refuses to extradite French citizens to Canada. France doesn't trust the Canadian legal system, to trust, to, to judge its citizens. And you may recall seeing in the media within the last year that, Indigenous groups appealed, went to France because Canada sought a French priest who'd been in the north-

ern regions of Canada and was wanted for multiple sexual assaults on Indigenous children. And France simply replied no. No, we don't extradite Frenchmen to Canada. There is, in truth, no comity to justify extradition to France. Comity could not and did not justify what Canada did to Dr. Diab. As Dean La Forest, Anne La Forest, at the time, she was the Dean of Law at UNB and, of course, the daughter of Justice La Forest. As she wrote in 2002 when this ugly piece of legislation was first in, in play, she wrote that our *Extradition Act* creates an overstatement of the needs of comity and a consequent undervaluing of the liberty interest. She foresaw decades ago where we were headed. Six, extradition is supposed to be for trial, not foreign investigation. France never had a trial ready case against Dr. Diab. He was sent by Canadian courts for a protracted foreign investigation that concluded he wasn't even in France when the crime was committed. The promise by the justice minister when the *Act* was, enacted, Anne McLellan, was that no Canadian would be sent to languish in a foreign prison during a foreign investigation. And the Supreme Court Canada in *Ferris* in 2006 that supposedly saved as *constitutional* this system and act. The Supreme Court wrote unanimously the following quote: The whole purpose of the extradition is to send the person sought to the requesting country for trial. To send the person there to languish in prison without trial is antithetical to the principles upon which extradition and the comity that supports it are based. This was argued to the Ontario Court of Appeal in Dr. Diab's appeal. In a heartbreaking statement, that court said, quote, it's clear to us that the appellant, Dr. Diab, will not simply languish in a foreign jail. Three years and two months, 22-hour a day solitary confinement without trial isn't languishing? The Supreme Court, without reasons, dismissed Dr. Diab's application for leave to appeal, that Court of Appeal judgment. Canadian courts frankly failed Dr. Diab, and our extradition system fails repeatedly. Such is the legal culture in Canada toward extradition, the expectation that inevitably extradition will be granted. Seventh, and finally, Canadian ministers of justice have discretion to decline to surrender Canadians, whatever the court has decided, when the case is such that in the pi-, minister's opinion, it would be unjust or oppressive to surrender. And when it was submitted in 2014 that it would be unjust to surrender Dr. Diab on an allegation that, quote, didn't make sense at all, in the words of the extradition tradition judge, for foreign inve-, and for foreign investigation instead of for trial, he replied, Dr. Diab and his lawyers were being overly technical and subjecting the foreign allegation to finicky evaluations. There's nothing technical or finicky about unjustly losing three years of your life or being extradited based on an illogical, wholly unreliable, unsworn allegation. The problem is, 2014 and today, Mr. Prime Minister, that ministers of justice get their advice on extradition and surrender from the IAG people in the Department of Justice. Were overly technical and finicky words, written for the minister? The IAG people argued for committal, for extradition, and supported surrender even as they withheld the powerful fingerprint evidence eliminating Dr. Diab. Does no one see a conflict of interest in having the minister's discretion advised by one of the parties? The House of Commons standing committee, this year on justice has recommended extensive reforms to *The Extradition Act* and procedure, but the government, in its response, has resisted any change. The Canadian Prime Minister, on Dr. Diab's return to Canada in 2018, said what happened to Dr. Diab should never should have happened and should never happen again. Lewis Carroll and Joseph Heller are watching and chuckling. The Canadians are actually doing what we wrote in jest about. They're thinking. My respectful submission to all of you is that what's needed now is advocacy by this organization, by all of you as criminal advocates, urging meaningful reform of this bad law. In other words, advocacy that will try to make a difference. Thanks very much.

The House of Commons standing committee, this year on justice has recommended extensive reforms to The Extradition Act and procedure, but the government, in its response, has resisted any change. The Canadian Prime Minister, on Dr. Diab's return to Canada in 2018, said what happened to Dr. Diab should never should have happened and should never happen again.

Justice Outside the Courtroom: Alternative Models of Justice for Sexual Harm

by Robin Parker

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As part of the 2023 Fall Conference, Nneka MacGregor,[1] Jeff Carolin[2] and Robin Parker presented a panel, "Justice Outside the Courtroom: Alternative Models of Justice for Sexual Harm". Nneka MacGregor explained the difference between transformative and restorative justice, and described how the process, in her words, "wraps" care and support around both the person accused and the person harmed. Jeff Carolin described the impact of criminal defence work on his understanding of the concept of "justice." He described his involvement as counsel for Marlee Liss, a complainant who managed to have her case resolved by way of a restorative justice circle after the involvement of a brave and visionary prosecutor, Cara Sweeny.[3] Robin Parker spoke about her own experience as a former prosecutor, defence lawyer and lawyer for victims, who was assaulted herself in 2018, and wanted to find a different way to justice.

This is a transcript of Robin's talk, which has been edited for clarity.

What I find really striking listening to Nneka and Jeff, as someone who, I am amazed to say, has been working in the justice system coming up on 30 years now, is how precious and rare moments of true justice are. I hope that each of you has had one – a case where you are left with that innate human feeling that justice has been done. Because the justice system is a social agreement we have. We create it every time we show up in court, by how we show up, and what we say and do when we are there. This means that on any given day, at any given moment, any second, you can change what you are doing, bring a different energy into your working space and

start to change the system from the ground up.[4] That is what I believe.

The other thing that is so important is that they have both spoken in depth about community. We focus in our cases on a complainant and an accused. But they exist in community, and I guess I want to talk a little more about that.

When Walter[5] offered the opening prayer this morning, he asked the Creator the same question the mediator asked in Marlee Liss' case.[6] He said, "Creator, why are we here? Why am I here? Why am I here?" I am not exactly sure why I am here on this panel today. I mean, I know why: I spoke to[7] the Toronto Star last year about something that happened to me and Eric Neubauer asked us to come and talk about it today. But I am not really sure what message I am supposed to be bringing to you, so I am just going to speak to you from the heart and tell you a bit about what happened to me in the hope that maybe it changes something. I feel a responsibility as someone who has worked in the justice system for so long to advocate for change.

In 2018, I was sexually assaulted, and it wasn't the first time. I became a lawyer after having been sexually assaulted in 1988. I determined then not to report, and in 2018 I very quickly made the same decision again, thirty years later. But when I got home that afternoon, I couldn't make myself go inside my house. My daughter was there, she was seventeen at the time. I knew there was no way to go inside and pretend I hadn't just been harmed the way I had without doing graver harm to myself. But I also had no way to explain to her why I wouldn't report it to the police, without expressing bitterness or worse, the death of idealism, an idealism that has fueled my entire career. I had worked very hard to teach my daughter that our lives have meaning, and that what we do can make a difference. Giving up on the justice system I had sacrificed so much to be a part of seemed the antithesis of that.

I paced up and down the lane beside our house. I actually got back in my car and drove around for awhile, things you would probably cross-examine me about if I had ever testified. I decided that I had to report even though I knew I didn't want a trial because I had no way to face my daughter unless I did.

This is our justice system. We are its architects. I have had countless conversations, as I'm sure many of you have, about the question, "would you" or "did you" report? Some of those conversations I have had with people in this room today: judges, Crowns, defence lawyers. And the answer, with some very few exceptions, is always a resounding no.

I was not alone in my struggle to decide whether to report. In 2018 Stats Canada surveyed over 43,000 Canadians. Of the people who reported experiencing sexual assault in the prior year, only five percent had reported to police.[8] So when you think about the overwhelming number of sexual assault cases that are paralyzing our justice system because of the unavoidable collateral consequences, which make guilty pleas impossible, and the unwieldy, lengthy and impossible s.276 and 278.1 applications, just know: that's five percent.

In 2018 the DOJ asked sexual assault survivors to rate their level of confidence in the police, the court, and the criminal justice system. Two-thirds of participants said they were not confident in any of the institutions. The percent who felt very confident was two.

This is our justice system. We are its architects. I have had countless conversations, as I'm sure many of you have, about the question, "would you" or "did you" report? Some of those conversations I have had with people in this room today: judges, crowns, defence lawyers. And the answer, with some very few exceptions, is always a resounding no.

Thirty percent of women over the age of fifteen report experiencing sexual assault. Thirty percent of the women in this room, Thirty percent of the wives, daughters, sisters, colleagues of the men in this room. What does it mean when we, who know so much about the justice system, have so little confidence? What does it mean for us as practitioners, when we divide ourselves and experience incredible cognitive dissonance, doing what we have to defened our clients in an unfair system where there is no softness, no opportunity for what Jeff described.

At the same time, I was pretty sure if we had a trial, he would be convicted. Admittedly, I was not the most objective, but both the Crown and defense told me later that they felt the same.There was a breach of trust element. The Crown was asking for nine months on a plea. It would have been worth about twelve months after trial. I knew I did not want to perpetrate the violence he had perpetrated onto me, back to him. That is not justice. I knew that sending him to jail and putting him through a trial wouldn't accomplish what I wanted, which was to have him hear what had happened to me, unmediated by the rules of evidence. To have him understand. To change him. To prevent him from hurting others. And I knew that if he had a trial and testified, he would have come to believe his own narrative because he would have been trained to do so by somebody who was doing a very

good job, reading this disclosure, and finding the soft spots in my evidence to protect him. And that might just make him harder, and more sure of his version of events. And that moment of softness where he would be willing to open himself up to admitting the truth about what happened, even if just to himself, would be gone. That opportunity, lost

I don't really have time to tell you how I got a restorative justice process, other than to say it was very different from what Jeff described happened in his case. Jeff got it for Marlee because of brave and courageous Crown. A minute of love for Cara Sweeny, please. I got it because I was a pain in the ass for the Crown.[9] I kept emailing her, much to her great consternation because I would copy defence counsel on the email – just trying to save her a disclosure issue. I ran into the defence lawyer at court, and we grabbed a colleague to be a witness, and I said, let's figure out a way to convince the Crown. The Crown said no early and often. I spoke to her boss, who I articled with. Then, when she tried to have a judicial pre-trials, a couple of the judges felt they were conflicted, so they needed an out of town judge. That judge wasn't avalaible, etcetera, etcetera. The case started getting old. I was pain in the ass. I shamelessly worked every angle that I had in the system. I was an advocate. But there is another word for that, and that word is privilege.

So I had a process similar to what Jeff described, and I did not talk about it at all until recently I read about some women Nneka was working with, who were fighting to get a restorative justice process for themselves. I read about the "no's" they were getting. And I read about some of the other things they were being told, like they should be more courageous, and that feminists had fought for years for these sexual assault laws.[10] And I realized then that I had to use my voice to tell my story, whatever that meant for me professionally and personally. I felt a responsibility to do it.

I guess I want to end by saying that I might be unusual in the criminal justice system for speaking up about having been sexually assaulted. But I am not unusual for having been. Not at all. It might be an uncomfortable truth, but you are already arguing your cases in front of judges or with lawyers who have also been sexually assaulted, or have been touched indirectly by sexual violence. It's already present here. So please do not let this change what you think of me, which was my greatest fear in speaking today. I want you to think of me not as a victim but as an advocate. Because its what I was when this happened, and it is the responsibility I now bear because of what happened to me. It wasn't something I wanted, but it is what I was given, and now it is my responsibility.

We are all justice builders, we are craftspeople. We seek out places of emptiness, places of injustice to practice our craft.25 This is one such place, and it is where our work must be done.

One thing I hope unites all of us here is something that was imperiled when I was assaulted in 2018: idealism. We are all justice builders, we are craftspeople. We seek out places of emptiness, places of injustice to practice our craft.[11] This is one such place, and it is where our work must be done.

NOTES:

[1] Nneka MacGregot is transformative justice practitioner and co-founder of WomenatthecentrE, an organization founded by and for survivors of gender-based violence. They work closely with survivors of sexual violence some who had engaged the criminal legal process and others who had decided not to. Their participatory research initiative led to the development of a new alternative framework - The Transformative Accountability & Justice Engagement (TAJE) process. Access their report here: https://www.womenatthecentre.com/declarations-of-truth/.

[2] Jeff Carolin is a lawyer, mediator and restorative justice practitioner.

[3] https://thewalrus.ca/how-one-woman-reimagined-justice-for-her-rapist/.

[4] Spanish poet Antonio Machado: "Traveler, your footprints/ Are the path and nothing more;/ Traveler, there is no path,/The path is made by walking."

[5] Walter Lindstone, from Batchewana First Nation, offered an opening prayer and drum song at the start of the conference.

[6] Jeff explained that in restorative justice portion of Marlee Liss' case, the participants sat in a circle. The circle included Ms. Liss, her mother and sister, the accused and a friend who was his support person, Cara Sweeney and Jeff. At the beginning, the facilitators asked one question, "What brings you here today?" Participants went around the circle three times answering the same question.

[7] A number of people emailed me after I gave this talk to ask me to point them to this study. Here it is: "The vast majority of incidents of violent crime did not come to the attention of police: 5% of women stated that the most serious incident of sexual assault they experienced came to the attention of police, either from themselves or otherwise." Gender-based violence and

unwanted sexual behaviour in Canada, 2018: Initial findings from the Survey of Safety in Public and Private Spaces: https://www150.statcan.gc.ca/n1/daily-quotidien/191205/dq191205b-eng.htm

[8] While I'm sure I was a pain in the ass for the Crown in my case, I feel badly that, even though it was in my speaking notes, I did not say in the short time I had when I spoke how very grateful I am to her. I believe she acted in the hightest tradition of her office when took a chance on an untested process. We had our circle at St. Stephen's House in January, 2019. As far as I am aware, this had never been done in a sexual assault case before-Marlee's case was resolved at the end of the summer of 2019.

[9] See https://www.thestar.com/news/gta/infantilized-re-traumatized-silenced-why-ontario-won-t-give-these-sex-assault-survivors-what-they/article_0507f9a0-97d8-52f7-a3b7-ec564b0eafc2.html.

[10] "I've said before that every craftsperson searches for what's not there to practice their craft. A builder looks for the rotten hole where the roof caved in. A water carrier picks the empty pot. A carpenter stops at the house with no door. Workers rush toward some hint of emptiness, which they then start to fill. Their hope, though, is for emptiness, so don't think you must avoid it. It contains what you need! " Rumi, Coleman Barks, The Essential Rumi.

AN UPDATE ON SOIRA: EXEMPTIONS, TERMINATIONS, VARIATIONS

by Emily Dyer

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On October 26, 2023, just under the wire of the October 28, 2023 deadline set by the Supreme Court in *R. v. Ndhlovu*,[26] Bill C-12 received royal assent, resulting in sweeping changes to the provisions of the *Criminal Code* dealing with SOIRA orders.

The purpose of this article is to summarize those changes, especially those which will be of practical importance to criminal defense practitioners dealing with cases involving SOIRA designated offenses.

Previous Legislation

Previously, courts were required to make an order that a person comply with the sex offender registry in all cases in which an individual was found guilty or NCR in relation to an offense under ss. 490.011(1) (a), (c), (c.1), (d), (d.1) or (e), or where the crown made an application and proved that they committed an offense under ss. 490.011(b) or (f) with intent to commit one of the previous group of offenses.

The duration of such an order was 10 years if the offense was prosecuted summarily or if the maximum term of imprisonment, prosecuted by indictment, is two or five years; 20 years if the maximum term of imprisonment is 10 or 14 years; and life if the maximum term of imprisonment is life. The duration was also life if the person was convicted of more than one designated offense, the person had a previous conviction for a designated offense, or a previous SOIRA order.

New Legislation- Mandatory SOIRA Order

The new SOIRA provisions re-categorize the offenses previously under s. 490.011(1) (a), (c), (c.1), (d), (d.1) and

(e) as "primary offenses" and those previously under (b) and (f) as "secondary offenses". In cases involving, secondary offenses, the crown must still make an application and prove that the secondary offense was committed with intent to commit a primary offense for a SOIRA order to be made.

The purpose of this article is to summarize those changes, especially those which will be of practical importance to criminal defense practitioners dealing with cases involving SOIRA designated offenses.

SOIRA orders are still mandatory when an individual is found guilty or NCR of a designated offense, prosecuted by indictment, is sentenced to two years or more imprisonment, and the victim was under 18 (ss. 490.012(1)). They are also mandatory for individuals who were previously convicted of a primary offense, previously convicted under s. 130 of the National Defense act in respect of a primary offense, or when they were previously or are currently subject to a SOIRA order (ss. 490.012(2)).

Other Cases- Mandatory Unless…

One of the major changes resulting from the new legislation is that, in all cases that do not fall in to the categories above, SOIRA orders are mandatory unless the person has established that either:

(a) there would be no connection between making the order and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under that Act; or
(b) the impact of the order on the person, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act. (ss. 490.012(3))

In determining whether to make such an order, the court shall consider

(a) the nature and seriousness of the designated offence;
(b) the victim's age and other personal characteristics;
(c) the nature and circumstances of the relationship between the person and the victim;
(d) the personal characteristics and circumstances of the person;
(e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
(f) the opinions of experts who have examined the person; and
(g) any other factors that the court considers relevant. (ss. 490.012(4))

The burden is on the defense to establish that either ss. 490.012(3)(a) or (b) applies, based on the factors in ss. 490.012(4). There is, as of writing, no reported case law that deals in depth with the application of this test and this burden in determining whether an individual will not be subject to a SOIRA order. However, expert evidence, like risk assessments, will be very beneficial for individuals wishing to avoid a SOIRA order.

Duration of SOIRA Orders

The rules to determine the duration of a SOIRA order, when it is made, generally remain the same. However, where a person is found guilty of two or more designated offenses in the same proceeding, an order is now only made for life if:

(b) the court is satisfied that those offences demonstrate, or form part of, a pattern of behavior showing that the person presents an increased risk of reoffending by committing a crime of a sexual nature (ss. 490.013(3)).

Otherwise, the duration of the order is determined based on the offense with the longest maximum sentence (i.e. if an individual was convicted of two or more offenses, and one has a 10-year maximum sentence, the duration of the SOIRA order would be 20 years).

Termination Orders

Just like under the previous provisions, a person may apply for termination of their reporting obligation under a 10-year order after five years have elapsed, under a 20-year older after 10 years have elapsed, or under a lifetime order, or when subject to multiple orders, after 20 years have elapsed. After a pardon, absolute discharge, or record suspension, a person can immediately apply for termination.

However, a test for termination has been added, which closely mirrors the test for exclusion from an order.

A court shall make a termination order if:

(a) there would be no connection between continuing an order or obligation and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under the Sex Offender Information Registration Act; or
(b) the impact on the person of continuing an order or obligation, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act (490.016(1)).

In determining whether to make the order, the court shall consider:

(a) the nature and seriousness of the offence that is the basis of an order or obligation;

(b) the victim's age and other personal characteristics;
(c) the nature and circumstances of the relationship between the person and the victim;
(d) the personal characteristics and circumstances of the person;
(e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
(f) the opinions of experts who have examined the person; and
(g) any other factors that the court considers relevant. 490.016(1.1))

As with the previous provision for termination, the burden is on the person making the termination application.

Exemption Orders

As a means of dealing with unconstitutionality of the previous SOIRA provision, provisions have been added to allow for both exemption orders and variation orders for some individuals who had SOIRA orders made between April 15, 2011 and October 26, 2023.

Exemption orders are available for anyone convicted in that period unless:

a) The person was convicted of a designated offence which was the basis of the order which was prosecuted by indictment, resulted in a sentence of two years or more and the victim was under 18,
b) Before or after the order was made, the person was convicted of a primary offence, or was convicted under s. 130 of the *NDA* in respect of a primary offence, or
c) The person is or was, as a result of a conviction, subject to another *SOIRA* order (ss. 490.04(4)).

An individual must apply to the court for the exemption. The burden is on the person applying for the exemption. The factors and test are the same as those for a termination order (and therefore, effectively the same test as that for declining to make a SOIRA order) (ss. 490.04(5-6)).

On making an exemption order, the court must also make an order for the RCMP to remove all information related to the person that was registered. Under SOIRA, a person granted an exemption order is entitled to have all information related to their order destroyed and permanently removed from the SOIRA database (ss. 490.04(8)).

These are the main changes that will impact defense lawyers in our day to day practice. There were some related changes made to the application of SOIRA to individuals convicted of designated offenses outside of Canada, which can be found in the new legislation.

Variation Orders

Anyone who is subject to a life time order under s. 490.013(2.1) as it read before October 26, 2023 may apply to vary the duration of their order under s. 490.05(1)(a). This means that they were convicted of more than one designated offense at the same time. The burden is on the person subject to the order. The court must vary the order if it is satisfied the offences which formed the basis of the order do not demonstrate, or form the part of, a pattern of behaviour showing that person presents an increased risk of reoffending by committing another sexual crime (ss. 490.05(4)).

When such an application succeeds, the revised duration of the order is determined by applying the provisions used to determine the duration when someone is convicted of one offense to the offense with the longest maximum term of imprisonment.

Conclusion

These are the main changes that will impact defense lawyers in our day to day practice. There were some related changes made to the application of SOIRA to individuals convicted of designated offenses outside of Canada, which can be found in the new legislation.

Questions have been raised as to the constitutionality of the new provisions, especially given there is still very little connection between the seriousness of an offense and the duration of registration, and given the very low bar to make a SOIRA order, which will likely require almost everyone to register. However, I will leave those to another article.

NOTES:

[1] *R. v. Ndhlovu*, 2022 CSC 38, 2022 SCC 38, 2022 CarswellAlta 3094, 2022 CarswellAlta 3093, 419 C.C.C. (3d) 285, 84 C.R. (7th) 95, 474 D.L.R. (4th) 389, [2022] 12 W.W.R. 437, 517 C.R.R. (2d) 80, [2022] S.C.J. No. 38 (S.C.C.).

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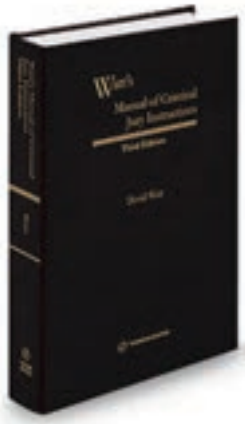

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On Writing Novels and Practicing Law

By Robert Rotenberg

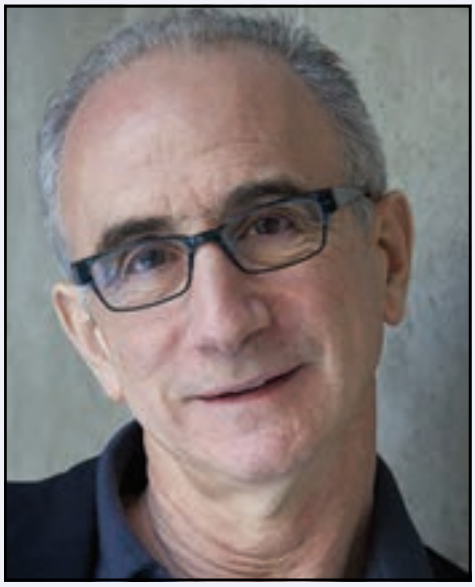

Photo courtesy of Teddy Feld.

Ever since my first novel, "Old City Hall," was published in 2009, lawyers have been taking me aside to ask the same question: "How long did it take you to write your first book?"

"Do you really want to know?" I usually ask in return.

"Uh oh," they usually say.

"Ten years to write my first novel, which never got published, ten years to write 'Old City Hall' and one year to do all the edits."

"Oh," they usually say as the penny drops. There are no shortcuts. Then, inevitably, comes the next question. "How do you practice full time and write novels at the same time?"

(Since 2019, I've written five more novels. My newest, seventh, book, "What We Buried," will be published this February.)

How did I end up having two careers? The answer, I suppose, is both simple and personal. I've been writing stories since I was a teenager, was a U. of T. English student, always thought I'd be a novelist. But after a year of trying to write with nothing to say, I ended up at law school, where the only subject that interested me was criminal law.

I graduated from Osgoode as the 'most-likely-to-never-practice-law' student in the class. For a decade I tried hard to avoid the law. After getting an LLM at the LSE, I spent a year working as an editor of an English-language magazine in Paris, ran my own city magazine, "T.O. The Magazine of Toronto," for six years, worked at CBC Radio as a producer and then, well, I had to admit to my mother that she was right: It *was* a good thing that I had my law degree "to fall back on."

But that decade of editing and writing was where I learned my craft: To tell stories. To edit, edit, edit, and edit some more. To follow my two main maxims: 'Every word matters' and 'Don't Be Boring. Those skills have been invaluable in my law practice.

I still remember my first day as a criminal lawyer. I rushed out to the old Scarborough Provincial Court, came home, and started my first novel (the still unpublished one) that very night. I've been writing ever since. For years my colleagues, and presiding judges, saw me sitting in the back of courtrooms, or waiting in set-date courts (remember those days), obsessively working on copy. Editing. (F. Scott Fitzgerald said "there are no writers, just rewriters.")

Here's the other question I often get: "What is your writing routine?" The answer: I wish I had one. I have no formula. No set hour to write. No daily word count. Most days I find an hour or two. Sometimes I hide away at a cottage for a few weeks. The day I finish a novel I make myself write the first page of the next one. The prolific novelist Michael Connelly had the best tip that I try to follow: "write every day."

How did I end up having two careers? The answer, I suppose, is both simple and personal. I've been writing stories since I was a teenager, was a U. of T. English student, always thought I'd be a novelist.

Here's a secret. Most of a writer's time is spent thinking about their story, their characters, how to fit it all together. It is the hardest part. The writer Lee Child once said a writer's job is to look out the window. My late brother David Rotenberg, brilliant author of 12 books, said to me once "if you are in the shower and not thinking through a scene or about a character, then you are not writing."

Doesn't this sound familiar to your work as an advocate?

Consider: What you do when you prepare for a trial, a motion, a discovery, a mediation, a jury address, your submission? In so many ways it's the same process: get to know your client (character), put together the chronology (plot), tell the story (narration), find key statements (dialogue), advocate in a compelling way, (Don't be boring).

But that decade of editing and writing was where I learned my craft: To tell stories. To edit, edit, edit, and edit some more. To follow my two main maxims: 'Every word matters' and 'Don't Be Boring. Those skills have been invaluable in my law practice.

Authors and advocates. We are story tellers. We share the same narrative drive. I like to say that being a lawyer has made me a better writer. What other job gives one the insights we all get into human behaviour, secrets, lies, conflict, and stories?

But the opposite is also true. Being a writer has made me a better lawyer. In the last twenty years I've resolved almost every case. How? By figuring out the plot. Getting to know my client. Understanding their case. Thinking it through. Then writing. For pre-trials I write (and rewrite) extensive and honest memos first for Crown Attorneys, then for judges. Telling the story. This almost always leads to the best resolution.

(The one real change in my law practice since the publication of "Old City Hall," is that I no longer take on murder cases, or long jury trials. When I am involved in a trial, that's when the daily writing suffers.)

I find it frustrating that at law schools, students are not taught to be better writers. When I'm hired by law firms to work with their young lawyers on their writing skills, too often I'm amazed how many lack the basic writing skills. Almost always to the frustration of the older lawyers in the firms.

Many lawyers, judges (and professors, engineers, doctors etc.) hire me to work on the first drafts of their novels. Most have a great story to tell. But now they must do the hard work of learning their craft.

(One good thing about lawyers – and it amazes my publisher and editors – is that we keep deadlines, we are organized, we know how to work hard.)

The other day I had dinner with a newly retired lawyer. Full of energy to take on the next stage of his life. Near the end of our meal, he told me he had a lot of ideas for books he wanted to write.

Ernest Hemingway once said of the ending of "A Farewell to Arms" that he rewrote it "39 times before I was satisfied". He was lying. In fact, he rewrote it 47 times. I managed to write this article in just ten versions.

He asked me: "What does it take to write a novel."

I stared straight at him and said: "Five words."

"Hit me," he said.

"Do…you…have…a…chair?"

He looked surprised for a moment. He'd been hoping that I had some magic potion. A secret elixir I could impart him with to "poof' produce a book.

Then, as had happened with so many lawyers who'd asked me this question, the light went on. He smiled. "In other words," he said, "put my ass in the chair and get to work."

I was tempted to say, "for the next twenty years," but I decided to let it go at that.

P.S. Ernest Hemingway once said of the ending of "A Farewell to Arms" that he rewrote it "39 times before I was satisfied". He was lying. In fact, he rewrote it 47 times. I managed to write this article in just ten versions. At least that's my story and I'm sticking to it.

Excerpt From Robert Rotenberg's New Novel "What We Buried"[1]

By Robert Rotenberg

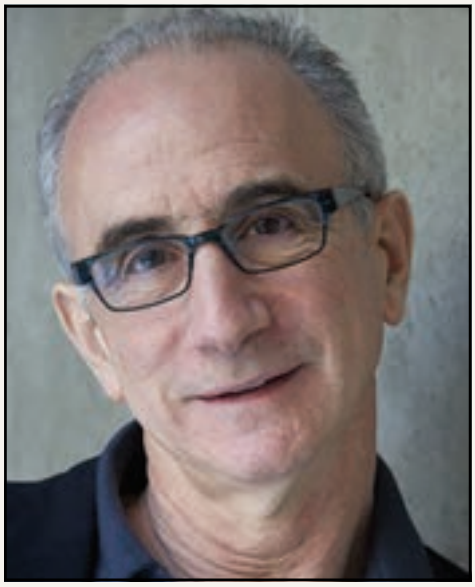

Photo courtesy of Teddy Feld.

KENNICOTT

Good and bad.

Good. There were many good things in Daniel Kennicott's life right now. He was entering his seventh year as a homicide detective and had advanced in record time to be one of the top officers on the Toronto homicide squad. After too many years of failed and near-miss relationships, he was living with a woman, Angela Breaker, who seemed to be his perfect match.

Bad. It had been ten years since his older brother, Michael, his only sibling, had been murdered. The case never solved. Twelve years since his parents had been killed in a car crash, and even though the driver had pled guilty to impaired driving causing death, Kennicott was still convinced there was more to the story.

Good. Earlier today he'd come back home from a small hill town in Italy, where he'd learned many things, including a delicious new tomato sauce recipe. This evening he was strolling through Little Italy, in his arms a brown paper shopping bag filled with groceries he was bringing home to make dinner. He'd bought his favourite Italian pasta, imported buffalo mozzarella, a big bundle of basil, a handful of cremini mushrooms, a pair of white onions, a homemade sausage, and a dozen locally grown field tomatoes. The tomatoes were in season in midsummer and would be perfect.

Bad. This uneasy feeling he'd had for the last half hour as he'd gone from shop to shop, greeting the merchants he'd gotten to know during the fifteen years he had lived in the neighbourhood. He'd been warned to be careful, so he kept checking behind him, looking for reflections in store windows, searching for something out of place. Someone watching him. Following him.

Good. College Street on a summer night. The streets of Little Italy ablaze with colourful lights, banners, umbrellas, and decorations. The bars and restaurants and stores overflowing with people, laughter, and cheer. Music blasting out on every block. A cool rain had begun to fall, making the street scene look like a misty Hollywood movie set. Even better, he wouldn't be alone tonight in his second-floor flat nearby. He was going home to Angela.

He always enjoyed the walk up from College, leaving behind the lights and traffic and streetcars and noise of the main street for the darkness and calm of Clinton, the side street where he lived. Heading home, Kennicott had convinced himself that his concerns were overblown. That there was nothing to worry about.

He always enjoyed the walk up from College, leaving behind the lights and traffic and streetcars and noise of the main street for the darkness and calm of Clinton, the side street where he lived.

Almost convinced himself.

The narrow sidewalk had turned slick from the rain. He peered down at the muddy footprints of overlapping adult shoes, dog paws, children's feet, residue from the park at the end of the street. What was it that he was looking for?

He glanced behind him back down the street. No cars coming. He looked up ahead to the top of the street. There was one set of headlights, far away. A vehicle pulled over at the end of the block, a no-parking zone. Its headlights were on, and its engine was running, spitting out vapour through its tailpipe, like a winded athlete exhaling into the cooling night air.

Six houses away from his home, he slowed his pace, watching the car. As his eyes adjusted to the dark street, he could see it wasn't an ordinary vehicle but one of those trimmed-down, sleek SUVs. Black. It still wasn't moving.

He thought about stopping, yet some instinct told him that was a bad idea. He kept walking. Five houses away now. None of these homes had side alleys he could duck into. His house did, a pathway that led to the side-door entrance to his second-floor flat. His landlords, the Federicos, had installed a motion-detector light when he told them that Angela, whom they adored, had moved in. It would click on once he got there.

Kennicott laughed to himself when he thought about Mr. Federico. Last week he had bought an expensive flexible hose and attached it to the wall at the side of the house.

"Better to water my tomato plants," he told Kennicott. "See, it bends, like rope."

"Impressive," Kennicott said.

"Please, Mr. Daniel." Federico looked around and lowered his voice to a conspiratorial level. "Not tell Rosa the price."

"I would never tell your wife. Your secret is safe with me."

The SUV at the end of the block pulled out into the street. It hadn't put its turn indicator flasher on. Why did that seem menacing?

Kennicott fixed his eyes on the car. It crept toward him, like a tiger on the prowl. Behind it, he saw another SUV pull in at the top of the street. Same shape, same black colour. It stopped in the middle of the road, cutting off any other vehicle from entering the block.

Run, a voice in his head shouted at him. *Daniel, run!* Angela was a marathon runner, and in the last few years she'd gotten Kennicott into jogging again, something he'd done in what felt as if it were a lifetime ago when he was in law school.

The sidewalk was too slick. He slipped and almost tumbled to the ground, catching himself just in time. One of the tomatoes rolled around the top of the shopping bag like a basketball circling the rim of a net and tumbled out. It nestled under the streetlight, a red dot on a sidewalk painted pale with rain, like a red bubble nose on a white clown's face.

He was steps from his door. He knew he shouldn't look back, but he couldn't help himself. The SUV climbed the curb. In the blazing light he saw that its back window was down.

He bent down to grab it, but the tomato slithered out through his fingers. He pivoted to look up the street. The SUV was charging toward him, accelerating at surprising speed.

Run, run, he shrieked to himself again. Forget the tomato.

His feet found purchase on the sidewalk, and he was off. Three houses, two houses, one. He was almost home. The SUV was racing down the empty street.

He made it to the pathway and took a sharp turn to his right. The motion-detector light clicked on. Bright, like a prison camp searchlight zeroing in on an escaping convict.

He was steps from his door. He knew he shouldn't look back, but he couldn't help himself. The SUV climbed the curb. In the blazing light he saw that its back window was down.

He saw the gun, saw it explode a split second before he heard it boom, a split second before he felt something

tear into the top of his right arm. His body slammed onto the ground. The bag of groceries flew out of his hands.

Pain hit, searing into his brain, rocketing through him. He was aware of the sound of the SUV roaring away. The groceries. What about the tomatoes? Would they be crushed by his fall and ruin the sauce he was about to cook Angela?

He heard doors opening. Footsteps. Frantic.

"Daniel. Oh my God, Daniel!"

It was a woman's voice. Who?

Angela. That's right. That was good.

I'm sorry about the tomatoes, he wanted to tell her. But he couldn't speak. That was bad.

"911!" someone was yelling. "Call 911."

He felt something touch his arm. It was a hand. Pressing down on him.

"Daniel, Daniel, can you hear me?" the woman was saying.

The woman. Yes, Angie. Angela. He'd called her Angie once and she said she hated the name. Something about how her grandmother who called her Angie wouldn't let her go out and play at night in the housing development where she grew up. Afraid of stray bullets. Bullets. Not good.

"Please, Daniel, please. Stay with me."

Stay. With Angela not Angie. At home. He was almost home. Good.

He'd been shot. Bad. Angela was here with him. Good. What else was good? He searched his brain. He wanted something else to be good.

Somewhere there was the sound of a siren. Footsteps, many footsteps. More sirens. People talking. Someone else was close now, saying something to Angie. He couldn't speak. All he could do was hold on to her arm. Try to keep her warm.

Ari Greene. Kennicott's boss. His mentor. If anyone could catch the shooter it was Greene. He'd solved every homicide case except one. That was bad.

Kennicott could feel Angela pushing hard against his skin. He had to tell her she was doing the wrong thing, tell her the right thing to do. There was no time to waste. The words wouldn't come out. All he could do was shake his head.

He closed his eyes. The rain was coming down harder now. His whole body felt cold.

"Daniel, hold on," she said.

He forced his eyes open. He could still move his left arm. He reached up and touched her. Bare skin. Angela wasn't wearing a coat. She'd be wet and cold. He wrapped his fingers around her arm. To pull her close. To tell her what she had to do to stop the bleeding. He was fading out.

Somewhere there was the sound of a siren. Footsteps, many footsteps. More sirens. People talking. Someone else was close now, saying something to Angie. He couldn't speak. All he could do was hold on to her arm. Try to keep her warm.

"Please keep your eyes open," she said to him. He rolled his head to the side. He could only open one eye. It was enough. He stared at the glimmering cement Mr. Federico watered down every night with his expensive new hose, shimmering in the motion-detector light. And the rivulets of red blood, leaching out across it, like an evil spider spreading its legs, readying to strike a final deadly blow.

NOTES:

[1] To be published in February 2024.

Search Solutions and Techno Tricks - Finding the Human Element in Lost Evidence Applications

by Wes Dutcher-Walls

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In *La* (1997), Justice Sopinka took a philosophical (and Crown-friendly) turn when he said that lost evidence is sometimes the result of the "frailties of human nature".[1] Indeed: who among us has not lost relevant evidence in a criminal prosecution now and then? Let them without sin bring the first stay application.[2] Some courts have gone as far as calling this the "human nature exception" in lost evidence applications[3] – a concept I'm sure defendants would like to expand to criminal liability generally. But what happens when there is lost evidence from errors of technology such as audio or video recording systems or digital storage? This article offers tips on how to approach lost evidence applications involving technology.

To recapitulate the *La* framework: if prosecutors or investigators lost *relevant* evidence,[4] the Crown must establish a satisfactory explanation to show there was no "unacceptable negligence" or abuse of process by the police or prosecution. The "touchstone" of the inquiry is the reasonableness of the state's conduct.[5] There is a s. 7 breach if the Crown cannot meet its burden. If the Crown discharges its burden the defence has the onus to show actual prejudice to their right of full answer and defence. In some cases a piece of lost evidence is so central to a defendant's fair trial rights that a stay is appropriate even in the absence of negligence or abusive behaviour.[6]

Claims based on technological mishaps look much like any other lost evidence application. Digital or forensic systems and other modern technology are supposed to compensate for the "frailties" of an investigator's human nature: if working properly, technology can offer a degree of consistency and infallibility no human can match. But human error inevitably impacts the

functioning of technological solutions: humans select, program, operate, and maintain technological systems.[7] Police can misplace digital devices just as easily as any other investigative materials.[8] As a result, even where a technological malfunction is the discrete cause, the lost evidence framework based on *La* inevitably directs the court and parties back to considering very human concepts: negligence, reasonableness, good or bad faith, and the right full answer and defence.

How should you approach lost evidence applications involving technology? First, keep in mind that lost evidence applications relate only to lost or inaccessible evidence that *once existed* – not to failures to create or collect evidence in the first place. Courts consistently find that lost evidence principles do not apply in the context of missed opportunities to use technology to capture evidence.[9] Courts may be wary of appearing to dictate how the state should spend its investigative resources.[10] However, there could be remedies by other means if police were acting deliberately to avoid creating evidence.[11]

Secondly, use detailed disclosure requests to explore the human element behind the lost evidence. Find out how much the police knew about the unreliability of their technologies, when they knew it, and what steps they took (if any) to avoid the loss of evidence. Sometimes you will get lucky and have the police volunteer that they lost a complainant's video statement but have since made the decision to replace the old system that was causing them so many problems. In those cases, your disclosure requests and cross-examinations write themselves: How long did the police know about the problem before replacing the system? How many other times had this happened before the fix? Why did police wait to make the change? Focus on developing evidence of the police's knowledge of and complacency about their own faulty technology. At minimum, ask for: (1) a detailed description of the functioning of the technological systems in place at the relevant times; (2) any known problems in the functioning of the technology, including the issue affecting the disclosure in your case; (3) the date of any repairs, modifications, or replacements; and (4) an anonymized or initialized list of other cases affected by similar issues.

Thirdly, alternative sources of evidence can be fatal to stay applications based on technological malfunctions.[12] Generally police can offer at least *some* evidence of a witness' prior statement or other categories of material information.[13] There will usually be other (less valuable) sources of information such as an officer's contemporaneous notes of a statement or observations of an impaired driving detainee's behaviour in the station. You will face an uphill battle if available evidence contains "essentially the same information" as the lost digital evidence.[14] Where technological malfunction causes the loss of evidence, you will need to articulate how the digital version of evidence had value that the analog version lacks. For example, it may be possible to argue that police testimony or notes are an inadequate substitute for visible or audible evidence of a witness' demeanour, affect, or tone in an audio or video recording – though courts will likely be willing to make this assessment only after hearing all the evidence and your attempt at cross-examining the witness without the benefit of the lost evidence.[15] If you are unable to establish sufficient prejudice to obtain a stay, consider case-specific remedies to compensate for the loss of the opportunity to challenge or use the lost digital evidence. Courts appear open to excising the fruits of video surveillance from judicial authorizations if the police subsequently lose the original digital files (though it is not mandatory to apply full automatic excision).[16] Similarly, courts may be willing to infer that lost evidence would have been unhelpful to the Crown.[17]

Finally, at the hearing, draw the court's attention to the proper scope of "negligence" and "human error" when investigators rely on technology. Negligence is a subcategory of human error, not coextensive but certainly overlapping, and "unacceptable" negligence is simply a further subcategory of negligence.[18] It is our job to help courts navigate the ontological distinctions that affect our client's section 7 rights. For example, some courts attempt to distinguish between unforgiveable "negligence" and forgivable "human error." Similarly, courts may conflate "human" and "technological" error.[19] In *Johnson*, the court found that Toronto police lost a complainant's video statement "by virtue of the combination of technological and understandable human error." Two police officers took a statement from a complainant in an interview room with three different systems for recording and preserving statements. At a lost evidence application the Crown offered a *different* police officer who was not present at the statement to explain the loss of the evidence.

Defence counsel will have trouble locating any "technological error" in the police's explanation in *Johnson*. First, the officer explained that the "DVAMS" recording system was "not operational" at the time of the complainant's interview. That testimony is equally consistent with police forgetting to turn the system on; the officer conspicuously *did not* testify the system was "broken" or "malfunctioning." Second, the "Jenn Tech" system recorded the statement but was set to automatically delete files after one year and one day. The system was operating just as it was supposed to and the fact the officer didn't know about the auto-deletion period is not a "technological error." Finally, there was an old-fashioned DVD burner but the statement officers "simply did not create a DVD of the video" – again, a human choice or oversight and not a technological error. And all this defer-

ence without evidence from the two officers who actually conducted the interview.[20]

Cases like *Johnson* show the importance of resisting the false dichotomy of "negligence" and "human error" by reminding the court that negligence and reasonableness fall on a sliding scale: "the more obvious the importance of the evidence, the higher will be the degree of care expected of reasonable police officers."[21] If the evidence is important enough to a fair defence, *any* human error leading to its loss is unacceptable negligence and the basis for a section 7 breach. Similarly, the defence should ensure the court is mindful of the distinction between true "technological malfunction" and human negligence *about* technology. Investigators' reliance on a system they knew or ought to have known is unreliable – or continued reliance on fallible human systems when a technological solution is readily available – is a human choice, not a technological error. Help the court find the human element in your lost evidence story.

NOTES:

[1] *R. v. La*, 1997 CarswellAlta 490, 1997 CarswellAlta 491, [1997] 2 S.C.R. 680 (S.C.C.) at para. 20 [*La*].

[2] John 8:7.

[3] *R. v. Moore*, 2023 CarswellOnt 2838, 2023 ONCJ 98 at para. 93.

[4] *R. v. Dulude*, 2004 CarswellOnt 3514, [2004] O.J. No. 3576 (Ont. C.A.) at para. 30.

[5] *R. v. Hersi*, 2019 CarswellOnt 1742, 2019 ONCA 94 at para. 30 [*R. v. Hersi*].

[6] *R. v. La, supra*, note 1, at paras. 20-25; *R. v. Bero*, 2000 CarswellOnt 4096, [2000] O.J. No. 4199 (Ont. C.A.) at para. 30.

[7] *R. v. MacDonald*, 2018 CarswellOnt 4751, 2018 ONSC 1920 (S.C.J.) at para. 40; *R. v. Thompson*, 2008 CarswellOnt 7122, 2008 ONCJ 623; *R. v. Paterson*, 2015 CarswellSask 658, 2015 SKPC 66 at para. 34.

[8] *R. v. Amdurski,* 2023 CarswellOnt 16469, 2023 ONSC 4194 (S.C.J.) at paras. 26-29.

[9] *R. v. Khan*, 2010 CarswellOnt 4769, 2010 ONSC 3818 (S.C.J.); *R. v. Deesasan*, 2018 CarswellOnt 11476, 2018 ONSC 4180 (S.C.J.); *R. v. Lee*, 2018 CarswellOnt 8078, 2018 ONSC 308 (S.C.J.); *R. v. Fitts*, 2015 CarswellOnt 6935, 2015 ONCJ 262.

[10] *R v. Fourmeaux-Clemens*, 2023 CarswellMan 270, 2023 MBPC 32 at paras. 47-48.

[11] *R. v. Azfar*, 2023 CarswellOnt 8447, 2023 ONCJ 241.

[12] *R. v. Sheng*, 2010 CarswellOnt 2421, 2010 ONCA 296 at paras. 47-53; *R. v. Girou*, 2017 CarswellAlta 2673, 2017 ABCA 426 at para. 17; *R. v. Amdurski*, 2023 CarswellOnt 16469, 2023 ONSC 4194 (S.C.J.).

[13] For a case with no alternative evidence resulting in a successful stay application, see *R. v. Natkunarajah*, 2020 CarswellOnt 6993, 2020 ONCJ 247.

[14] *R. v. Bradford*, 2001 CarswellOnt 69, [2001] O.J. No. 107 (Ont. C.A.), leave to appeal refused (June 11, 2001), Doc. 28474, [2001] S.C.C.A. No. 131 (S.C.C.).

[15] *R. v. Goro*, 2016 CarswellOnt 20390, 2016 ONSC 7956 (S.C.J.) at paras. 89-94; *R. v. Comin*, 2022 CarswellBC 1249, 2022 BCSC 808 at para. 45.

[16] *R. v. Moore*, *supra*, note 3; *R. v. Pham*, 2021 CarswellOnt 7045, 2021 ONCJ 285; *R. v. St. Clair*, 2020 CarswellOnt 5567, 2020 ONSC 2251 (S.C.J.), affirmed 2023 CarswellOnt 5446, 2023 ONCA 266.

[17] *R. v. Hersi, supra*, note 5, at para. 35; *R. v. Janeiro*, 2022 CarswellOnt 1518, 2022 ONCA 118 at para. 126.

[18] For a helpful case that equates negligence and human error based on the facts, see e.g. *R. v. Amdurski, supra*, note 12, at paras. 26-29, 31. See also R. *v. Hersi, supra*, note 5, at para. 30.

[19] *R. v. Uppal*, 2021 CarswellOnt 2113, 2021 ONCJ 99 at para. 50.

[20] *R. v. Johnson*, 2023 CarswellOnt 14475, 2023 ONSC 3516 (S.C.J.) at para. 30.

[21] *R. v. Hersi, supra*, note 5, at para. 30, citing *La*, *supra*, note 1, at para. 21.

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Wrenches for the Trenches - Difficulty is Probable Consequence: 21(2) Party Liability and Murder

By Hussein Aly

Photo courtesy of Albussein Abdelazim.

Technology continues to change the evidentiary landscape of murder cases. Murder cases being decided on the credibility and reliability of a key witness are becoming increasingly rare. The ubiquity of crystal clear surveillance and smart phone — tracking every call, text, movement, and association and saving every video, photo, and Google search, — has increased the difficulty of any murder defence to previously unseen levels. It is difficult to argue that the 4k camera and smart phone have lied or are unreliable.

The reliance on party liability has also made murder case more challenging. There has been an emergence on the reliance of s. 21(2) to establish liability for violent offence like murder.[1] In light of this reality, it is crucial that defence counsel understand the elements of the section and the evidence that can become relevant when it's engaged.

Party Liability under The Criminal Code

The *Code* outlines party liability as follows:

Parties to offence

21 (1) Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out

the common purpose is a party to that offence.

Party Liability under S.21(2) of the Code

Section 21(2) of the Code "imposes party liability for offences that are incidental to the carrying out of a common unlawful design".[2] The section "requires the Crown to prove that an accused formed an intention with others to engage in an unlawful purpose and that one or more of the others, in carrying out that unlawful purpose, committed a different offence that the accused knew or ought to have known was a probable consequence of carrying out the common unlawful purpose".[3]

The logic behind this section is that "the accused's liability in respect of the incidental offence stems from his or her decision to participate in carrying out the unlawful purpose and to contribute resources needed to achieve it".[4] What the Crown must prove can be broken down into three questions:

(1) The party's participation with the principal in the original unlawful purpose (the "agreement");
(2) The commission of the incidental crime by the principal in the course of carrying out the common unlawful purpose (the "offence"); and,
(3) The required degree of foresight of the likelihood that the incidental crime would be committed ("knowledge")

This being the case, when s. 21(2) is relied upon to establish liability for murder it "requires the Crown to prove that the party in fact foresaw that murder was a probable consequence of carrying out the original unlawful purpose".[5] The probable consequence "analysis hinges on an exploration into whether the secondary offence was within the realm of contemplation of the parties to the joint endeavour." Moreover, "a party need not foresee the precise circumstances which lead to the offence actually committed".[6]

When it comes to an allegation of murder that arises during the commission of other offences, "there must be a sufficient evidentiary basis -- something beyond mere participation in the underlying agreement and offence".[7] For example, "there may be evidence that the accused knew that his colleague had been told or instructed to intimidate, if not harm the victim".[8] In the end, "each case will ultimately turn on its facts, but the overarching question remains whether murder was known to be a probable, or likely, consequence of the joint endeavor -- and, by extension, whether the murder was entirely unanticipated or instead emerged from the circumstances of the plan itself".[9] Situations may arise where there is direct evidence —such as intercepts, texts, or witnesses — that can establish that the accused knew that murder was a probable consequence. That said, courts have concluded that despite no direct evidence on the probability of murder, "the circumstances of the underlying offence coupled with knowledge of the co-accused's possession of a loaded handgun was sufficient."[10]

The realities of s. 21(2) mandate the consideration of several strategic consideration for defence counsel.

First, if the defence will be that the accused was party to some offence other than murder — a robbery, kidnapping, home invasion, or an assault for example — the door will likely be open to prejudicial evidence being introduced regarding the accused and his co-conspirators' propensity of violence. Defence counsel will have to thoroughly canvass what potential evidence the Crown has access to that could demonstrate that the accused knew murder was a probable consequence. In the digital era, where cell phone extractions provide endless insight into the accused, this will include:

- discussions regarding violence captured on intercepts, chats, voice notes;
- publicly available expressions of violence in music video or social media; and
- prior knowledge or participation in other violent criminal offences that suggest that murder was a probable consequence.

All of these sources of information can be informative if it has been established that an accused knew murder was a probable consequence. In short, any information that can be argued to inform an accused's state of mind on this issue could be fair game.

Secondly, defence counsel will have to decide how to approach situations where these realties could play out. If the Crown raises the issue in pretrial motions in hopes of introducing certain evidence to establish liability under s. 21(2), clarity as to what evidence will be admissible will be provided. However, situations may arise where the Crown seeks to lead this type of evidence in response to defence led evidence. In these situations, defence counsel should consider asking for rulings in advance regarding what doors will be open if certain defences are advanced. If disadvantageous to seek rulings in advance, an accused should be prepared for cross-examination on potential bad character evidence in the event the Crown brings an application during the accused cross-examination.

Final Thoughts

The challenges faced defending murders in the digital era are endless. The likelihood that a murder investigation will uncover evidence that could strengthen an argument that an accused knew murder was a probable consequence is high. This being the case, some difficult strategies might have to be considered to counter the argument such as evidence that the accused had previously committed

the same offence and no murder/violence occurred. Relatedly, evidence may have to be led regarding the accused having knowledge of the same crime occurring where no violence occurred. Despite appearing counterproductive on the surface, these steps may have to be taken to advance a rigorous defence.

NOTES:

[1] See *R. v. Wu*, 2024 CarswellOnt 73, 2024 ONSC 45, [2024] O.J. No. 32 (S.C.J.); *R. v. Jama*, 2023 CarswellOnt 5759, 2023 ONSC 2375, [2023] O.J. No. 1721 (S.C.J.); *R. v. Douse*, 2022 CarswellOnt 7646, 2022 ONSC 3228, [2022] O.J. No. 2517 (S.C.J.); R. v. Kawal, 2018 CarswellOnt 12527, 2018 ONSC 4560, [2018] O.J. No. 4087 (S.C.J.).

[2] *R. v. Wu*, 2024 CarswellOnt 73, 2024 ONSC 45, [2024] O.J. No. 32 (S.C.J.) at para. 27.

[3] *Ibid*.

[4] *Wu, supra,* note 2, at para. 28.

[5] *Ibid*., at para. 29.

[6] *Ibid*., at para. 32.

[7] *Ibid*., at para. 46.

[8] *Ibid*.

[9] *Ibid*., at para. 47.

[10] *Ibid*., at para. 46.

THE DOCKET

by Lauren Wilhelm

Murder – elements of the offence – intention – role of mental health evidence

Appellant convicted of first degree murder – there were two issues at trial: ID and intention – there was a significant body of evidence regarding the appellant's mental health leading up to the offence – this included his 12 year history of psychiatric care, a suicide attempt five weeks before the offence, the appellant's fragile mental state in that time frame, utterances of wanting to harm others, and a meeting the day of the offence with a mental health support worker wherein the appellant told her he was feeling suicidal followed by an attendance at the ER at 2:15 am where he reported having overdosed on his medications.

In instructing the jury on the element of intent, the trial judge made reference to the consumption of alcohol and drugs and "the rest of the evidence that sheds light on his state of mind" – however he made no reference to any of the extensive evidence in relation to the appellant's state of mind - the failure to relate this evidence to the element of intent was an error that left the jury unable to properly consider the element of intention and whether it was sufficient for murder.

The court emphasized the importance of being aware of mental health evidence and its relevance to issues of criminal responsibility particularly when instructing jurors on the proper use thereof.

R. v. Lawlor, **2023 CarswellOnt 19823, 2023 CarswellOnt 19824, 2023 SCC 34; O'Bonsawin J. (Rowe, Martin and Moreau JJ. concurring; Kasirer J. dissenting**

Traffic stop – consequential breaches – 24(2) – Grant analysis

Appellant convicted of possession of 100+ pounds of marihuana located in duffel bags in the bed of this truck under a tonneau cover – discovery of the marihuana was the culmination of a series of searches that began with a traffic stop – observations at the stop led to an investigative detention, which lead to the attendance of a sniffer dog, which lead to a search of the truck and duffel bags .

Court found that the arrests and searches incident thereto following the sniffer dog search and investigative detention were breaches of the appellant's ss. 8 and 9 rights but ultimately held that the evidence should not be excluded – police cannot rely on evidence unlawfully obtained in one search to justify subsequent arrests and searches – courts must excise evidence obtained from an unlawful act from consideration of the constitutionality of the subsequent acts.

Where a subsequent arrest or search is unlawful only by virtue of the initial breach as opposed to additional or independent state misconduct, it is a consequential breach – consequential breaches are relevant to the first and second stages of the *Grant* analysis – on the first factor, the gravity of the state conduct is unlikely to be rendered more serious by virtue of consequential breaches – where police were acting in good faith, consequential breaches should be situated on the less serious end of the scale of culpability - consequential breaches will be most relevant on the second *Grant* factor – breaches of additional rights will necessarily create a more significant impact on *Charter*-protected interests.

R. v. Zacharias, **2023 CarswellAlta 2950, 2023 CarswellAlta 2951, 2023 SCC 30; Rowe & O'Bonsawin JJ.; Côté J. concurring in the result; Martin & Kasirer JJ. dissenting**

Rules of evidence – lay opinion evidence – intention for murder

Appellant convicted of second-degree murder – he had admitted to causing the victim's death in the course of a physical attack in which he levelled several kicks and blows – the issue was whether he had the requisite intention for murder – two civilian witnesses to the attack gave evidence to the effect that they believed the force they witnessed was likely to cause death – the evidence was admitted as opinion evidence without an admissibility *voir dire*.

The court held that although evidence about the "bodily plight" of another person is admissible as lay opinion, the evidence of the civilians was not evidence of the victim's "bodily plight" – the evidence was not a summary of observations but drew an inference about the type of force likely to cause death – it should have been subject to an admissibility hearing focusing on whether the witnesses had the knowledge and experience to give the opinion – the trial judge should also have assessed whether the fact that the witnesses gave this evidence with knowledge that the victim

had died created a risk of cognitive distortion – the evidence in this case went to the ultimate issue of whether the appellant intended to kill the victim, although not a bar to admissibility, it required that the evidence be treated with caution .

R. v. Moreira, **2023 CarswellOnt 18902, 2023 ONCA 807; Thorburn J.A. (Zarnett & George JJ. concurring)**

Constructive possession – control over vehicle – opportunity of others – reasonable inferences – third party suspect application

Appellant convicted of a number of offences pertaining to the location of a loaded handgun and ammunition under the front seat of a car he'd been seen driving – the appellant lead evidence that others had access and control of the car and had driven it prior to the seizure of the gun – the trial judge treated this evidence as requiring analysis through the law of third party suspects – amongst other things, the court found it was an error to do so.

The law relating to third party suspects is meant to ensure that evidence about a third party's role is relevant to a material issue – where the Crown relies on evidence of control by the accused to establish constructive possession, evidence that others had control over the subject place is inherently relevant to that issue – an accused need not raise the issue by satisfying the sufficient connection test.

Where the sufficient connection test *is* applicable, it is a threshold admissibility test that proceeds on the premise that the subject evidence is true without close examination of its ultimate probative value – if the low threshold is met, the evidence is admissible and must be considered alongside everything else in assessing whether the Crown has met its burden.

R. v. Rudder, **2023 CarswellOnt 20455, 2023 ONCA 864; Paciocco J.A. (Miller & Nordheimer JJ. concurring)**

Sexual assault – text messages – prior consistent statements – post-offence conduct

The appellant was convicted by a jury of sexual assault of a previous intimate partner – the morning after the alleged sexual assault the appellant messaged the complainant asking her if she wanted to have breakfast, she responded with '"I didn't want to have sex with you last night, that's why I kept saying no" - he did not reply.

In closing submissions the Crown referred to the messages as "the most illustrative piece of evidence at this trial" and went on to refer to its consistency with her evidence – he also asked the jury to find that the appellant's failure to respond was an implicit acceptance of the truth of her message – the Crown made no application to the court to admit the prior consistent statement or regarding its use or that of the post-offence conduct and the trial judge gave no instruction as to the use the jury could make of it.

A prior consistent statement cannot corroborate in-court testimony – it is not independent proof as it comes from the same source of the testimony – lies can be repeated as easily as truth – even when admissible subject to an exception, prior consistent statements must "almost always" be the subject of a limiting instruction.

Evidence of after-the-fact conduct is only admissible if it is logically relevant to a live, material issue and its probative value exceeds its prejudicial effects – even if the appellant's lack of response could have been used as after-the-fact evidence, the jury was not instructed that it could only use it for this purpose and not as corroboration of the complainant's testimony.

R. v. S.C., **2023 CarswellOnt 19896, 2023 ONCA 832; Paciocco, George & Dawe JJ.**


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MEMBER PROFILE

Photo courtesy of Geoff Lister.

Hillson Tse

by Craig Bottomley

City/Town: Toronto

Year of Call: 2015

I genuinely like Hillson. Every once in a while, I would get a chance to chat with him while standing around in Court. He's funny. I'm funny. He's nice. I'm nice. So, I am hard-pressed to explain why he sniped me with such effectiveness in his answer to one of the questions!! I spit out my coffee!!

ON TO THE QUESTIONS!!

Questions

Finish the Sentence…

1. If I never went to law school, I would have become…a reporter. *A mild mannered one, surely.*
2. If I could change careers tomorrow, I would become...a surgeon, got to keep the parents proud. *I'm sure they're proud. (You see?? You see how nice I am??)*
3. If I win 10 million dollars, I will…take a lot of time to travel the world and eat tasty food. *I just want two hours in the market in Crazy Rich Asians.*
4. If I could appoint the next Chief Justice of Canada it would be… Grover from Sesame Street. *Rendering judgements on the difference between near and far.*
5. Jimmy O Yang…will play me in the movie based on my life. *Correct.*
6. Ana de Armas...will play my love interest in the movie.
7. Prime Minister Trudeau is…one of our Prime Ministers. *Hillson Tse, Master of Sophistry.*
8. Canada's next Prime Minister is…going to have a fun time fixing the economy.
9. If I could pick one injustice to undo it would be...intolerance and the increase in extremism across our society. *I swear it's a mental health issue.*
10. If I could solve one issue it would be…fixing the Tim Horton lids so they stop leaking. *Finally, a hero emerges.*
11. If I could represent/defend a historical figure it would be…Alan Turing. *I would like to help.*
12. If I was to be executed, my last meal would be…instant noodles and a fried egg. *And now your parents are disappointed.*
13. My greatest regret in life is… not travelling more when I was younger.
14. Boy I really screwed up when…I ordered the cheesy fries at a New Delhi Burger King. *I suspect subsequent toilet screw ups exist.*
15. My hero is …Thor Heyerdahl (sailed across the Pacific in a hand built boat).
16. My favourite sections of the *Criminal Code* are…s. 276 and s. 278.92 because of all the billings. *Getting paid is the hardest part.*
17. If I could legalize an activity it would be…drinking in public spaces and parks. *Now my parents are proud of you.*
18. If I could criminalize an activity it would be…slow walking on a busy sidewalk. *Straight to the gallows!*
19. Most people don't know that I… was trained in outdoor survival and have spent many weeks out in the Alberta bush. *Yeah, I didn't see that coming!*
20. The strangest thing I have eaten is…a toss up between chicken sashimi or goat testicles. *Strangely, I'd rather have the goat nuts. They're cooked, right? Right?*
21. I really embarrassed myself when I…wore bright blue pants with my robes into assignment court.

22. My pet peeve is…things in the home not being well organized.
23. The toughest challenge in my life has been…staying in touch with all the people I have met in the past
24. If I could be reincarnated, I would come back as…an alpaca. *Llama think about this for a while.*
25. I am afraid of…any chair with an armrest while I am robed. *I find flipping the chair makes for dramatic objections.*
26. I believe in…making an effort to understand problems from all sides and perspectives.
27. In high school I was an…expert in finding ways to schedule free blocks so I could nap. *I have dreams about taking naps.*
28. In undergrad I was an...expert in finding good places on campus to nap.
29. In law school I was a…student that was too busy with school to nap. *Say it ain't so!*
30. If my dog could speak s/he would say...cats are so much better and you should trade me in for one.
31. Legal Aid Ontario…wants you to change your password again.

Choices

1. Beer or Wine? Beer, wheats or sours, death to IPA's. *Well, now we can't be friends.*
2. Grilled Rib Eye or Grilled Tofu? Rib Eye. *Let's never fight again.*
3. Alfa Romeo or Mercedes Benz? Alfa Romeo because my mechanic has 5 kids to feed.
4. Romantic or Hunter/Provider? Hunter/Eater
5. Out late and sleep in or in bed by 10 and up at 6? Sleep in always
6. Armani or Old Navy? Arm@ni from the Scarborough Flea Market. *Keeping the scar in the borough!!*
7. James Bond or Lara Croft? James Bond
8. Hockey or Soccer? Hockey
9. Classical music or classic rock? Classic rock
10. Superman or Wonder Woman? Obviously, Batman. *You make a valid argument.*
11. Blended or Single Malt? Single, Japanese
12. Manolo or Crocs? Manolo (had to Google what those were). *You can get M@nolo at the flea market.*
13. Mac or PC? PC
14. *Globe and Mail* or *The National Post*? Neither, *Toronto Star*
15. Starbucks or Tim Horton's? Tim Horton's, steeped tea is discount milk bubble tea
16. Yoga or Treadmill? Treadmill
17. 30 days jail or two-year conditional sentence? 30 days jail, free food and I get to skip work.
18. Dog or Cat? Cat.
19. Canoe or Speedboat? I dragon-boat so I guess that is just a big canoe?
20. Muskoka cottage or condo in Florida? Muskoka cottage, now I can be the friend with the cottage.
21. Star Wars or Star Trek? Star Trek, Janeway. *You are making some real controversial choices here!*
22. Prime Minister Doug Ford or 5 years of recession? This is a chicken or egg situation here.
23. Cash paying drunk driving case or legal aid murder? Homicides are more interesting.
24. Flowers or chocolate? Chocolate, cookies and crème.
25. Pinot Noir or Chardonnay? Pinot Noir.
26. Android or iPhone? Android, green bubble gang. *For life!*
27. Drunk or stoned? Ganbei. *Cheers!*
28. Naughty or nice? Of course I'm nice =)

Favourites:

1. Guitarist: Tim Henson
2. Poet: John McCrae
3. Author (Fiction): Stieg Larsson
4. Author (Non-Fiction): Friedrich Nietzsche
5. Prime Minister: Paul Martin
6. City: Bern, drink a beer and watch some bears
7. Lawyer: Graham Zoppi has put no pressure on me to choose Graham Zoppi. *Best not to upset him. He's very strong.*
8. Judge: Crosbie and Fillier
9. Journalist: Bob Woodward
10. Chef/Restaurant: Alo in Toronto tied with Shinsen Haten in Singapore
11. Hotel: Viroth's Hotel in Siem Reap.
12. Theme park: Playland at the PNE
13. Park: Jiuzhaigou in China
14. Canadian: Keanu Reeves
15. Sports team: Raptors
16. Travel destination: Singapore for the eats
17. Thrill seeking activity: Go karts
18. Police force: Team America World Police
19. Movie: Mad Max Fury Road
20. Actor: Ryan Gosling, his SNL sketches are gold
21. Band: Polyphia, prog-rock band
22. Song: Fluffy by CHON
23. Intoxicant: Hibiki whiskey
24. Supreme Court of Canada decision: Manitoba (AG) v Manitoba Egg and Poultry Association, egg wars baby
25. Hobby: Model kit building
26. Political party: None
27. Ontario Premier: I moved here seven years ago so I am stuck with Wynne or Ford…
28. Historical figure: Craig Bottomley. *YOU SON OF A ……!*
29. Attorney General: Lametti
30. Crown Attorney: If I name someone from Brampton, will they start giving me better positions? *No.*